Legal Alert: WHAT'S UP WITH THE EMPLOYEE FREE CHOICE ACT? Reports of its Death Have Been Greatly Exaggerated

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With the election last November of a President and Congress more sympathetic to the interests of organized labor, union leaders looked to 2009 as the year they would finally secure passage of the controversial Employee Free Choice Act (EFCA). Congressional leaders from the House and Senate jointly introduced the proposed legislation in the current Congress in March 2009.

In recent weeks, however, a number of key Senators have either withdrawn their support for the Bill in its current form or indicated they would not vote to end a filibuster in opposition. As a result, it now is questionable whether big labor will be able to achieve its "top legislative priority," even though labor unions spent tens of millions of dollars to elect pro-union candidates and on lobbying efforts to build support for the EFCA. In light of the declining public support for the Bill, some have declared the ultimate demise of the EFCA – perhaps prematurely.

Despite the apparent wavering support, the EFCA is far from dead. In a recent Washington Post interview, Andy Stern, President of the 1.9 million-member Service Employees International Union, indicated that organized labor would consider various compromises in order to achieve passage of a modified version of the EFCA that still provides some measure of reform to union certification procedures.[1] The Washington Post article also claims that other labor leaders have "put on a brave face" saying that they have the votes necessary to pass the EFCA and that "it is premature to start talking about alternatives to the bill."[2]

PROVISIONS OF THE EFCA AS PROPOSED

As currently proposed, the EFCA calls for sweeping amendments to the National Labor Relations Act (NLRA) designed to make it significantly easier for labor unions to organize union-free employers as well as the non-union employees of unionized companies. Also known as "Card Check," the central provision of the EFCA would enable unions to organize a group of employees merely by obtaining signed "union authorization cards" from a simple majority (50% plus 1) of the employees. Under the EFCA, once the union obtained cards from a simple majority of employees, the employer would then be required to recognize and bargain with the union – effectively eliminating the secret-ballot election provided under the NLRA as the means to determine

whether employees want union representation. Other provisions of the proposed legislation would allow for significant penalties against employers and impose a mandatory arbitration scheme for first contracts that would completely undermine employer rights at the bargaining table and allow federal arbitrators to impose contract terms on employers and employees.

POTENTIAL FOR COMPROMISE?

Thus far, the focal point of the EFCA debate has centered primarily on the proposed elimination of the secret ballot election in favor of union certification through card check. Despite labor's contention that the existing system unfairly favors employers, many see the elimination of the secret ballot as a blatant assault on workplace democracy. In fact, recent public opinion polls by both Gallup and Rasmussen indicate that – regardless of whether they support unionization – Americans overwhelmingly are opposed to eliminating the secret ballot election to determine unionization.

As a result, since the re-introduction of the EFCA in March, a number of key Senators who previously supported the Bill have reversed their position. For example, Senators Arlen Specter (D-PA)[3] and Blanche Lincoln (D-AR) announced that they would not support the EFCA even though they were co-sponsors of the Bill in years past. Moreover, an "Updated Head Count on EFCA" published on campaigndiaries.com[4] states that 46 Senators currently support the bill, 36 Senators oppose the bill, 5 Senators oppose the current version of the bill, but have indicated they might support compromise legislation, and 12 Senators are "undecided" or "uncommitted."

Thus, in order to secure passage of the EFCA, big labor may need to allow a compromise version of the Bill – one that does not eliminate the secret ballot election that most Americans view as a fundamental tenet of workplace democracy. To regain the support of those concerned about the loss of the secret ballot, the most commonly discussed alternative involves replacing the "card check" provisions of the EFCA with "expedited elections." Under this approach, the National Labor Relations Board would conduct a secret ballot election within days of the filing of an election petition by a union – likely between 5 and 21 days after the petition.

Although expedited elections would allow EFCA supporters to claim the Bill continues to preserve the secret ballot, the "quickie election" scheme nevertheless would undermine the integrity and purpose of the secret ballot. Secret ballot elections exist to protect the voters' right to make an informed and private decision, free of intimidation and coercion after having the opportunity to thoroughly consider all sides of the issues prior to voting. A "quickie" election may preserve the façade of a secret ballot – but it effectively would deprive employees of the right to make a reasoned and informed decision about unionization after hearing the employer's position on the issue. In fact, since unions control the timing of the filing of any petition, employees likely would hear only the union side prior to filing and very little if anything from the employer due to the compressed timeframe. Bottom line: the shorter the period for an expedited election, the less opportunity there is for employers to communicate important facts about the disadvantages and potential risks of unionization to employees before they vote.

Another potential "compromise" purportedly needed to "level the playing field" between unions and employers would be to allow the unions access to the employer's premises during the workday to meet with the employees to

discuss unionization. Unions claim access rights are necessary to offset the employer's "unfair advantage" of being able to hold meetings with employees during the workday to discuss the employer's position regarding unions. However, the "access argument" advanced by pro-labor groups completely ignores the fact that unions already possess significant communication rights that employers do not have – therefore there is no need to "level the playing" field as the unions claim. Whereas employers can only meet with employees during their workday, unions can and often do hold off-site meetings with employees, repeatedly visit employees at their homes, and make repeated after-hours phone calls to employees' homes to solicit signatures on union cards. Moreover, it is not unlawful for unions to make promises to employees in exchange for their signatures – even if there is no way for the union to guarantee the outcome of collective bargaining.

By contrast, employers cannot meet with employees at their homes or make home phone calls to discuss the union. Furthermore, an employer may not make promises to influence employees as such promises are considered coercive under the NLRA. Thus, despite the compromise rhetoric regarding the need for union "access," unions already have a number of ways to communicate their message to employees.

Whether EFCA contains "card check" recognition as currently proposed or is subsequently modified to provide for "expedited elections" and/or union access to employees during the workday, there remains a very strong possibility that some version of the EFCA will become law this year. Moreover, if mandatory government arbitration of first contracts remains part of the EFCA, it not only will eliminate employer leverage at the bargaining table, it also would provide a powerful organizing message point for union agents during the campaign.

Employers can expect virtually every union to aggressively recruit new dues-paying members in 2009 and beyond. Therefore, whether union organizing depends on majority card check or an expedited election scheme, employers subject to the NLRA should institute proactive measures to reduce potential vulnerability to union organizing. For example, employers should focus on identifying and responding to employee issues and concerns well before there is any hint of potential union organizing. Moreover, employers should implement comprehensive training of all management team members and evaluate the need to educate frontline employees regarding the potential consequences of signing union cards.

For more information concerning the EFCA, including obtaining a free copy of the Ford & Harrison "Critical Analysis of the EFCA" which contains a Strategic Action Plan for employers to reduce their vulnerability to union organizing, please see the special EFCA page on our website located at http://www.fordharrison.com/efca.aspx, or contact the Ford & Harrison attorney with whom you usually work.

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[1] See Stern Considers Alternatives to the EFCA, April 20, 2009, located at http://voices.washingtonpost.com/44/2009/04/20/stern_considers_alternatives_t.html?wprss=44

[2] Id.

[3] Earlier last week, Republican Senator Specter switched parties, announcing that he would run for re-election in 2010 as a Democrat rather than as a Republican. Senator Specter's announcement fueled debate on what his defection from the Republican Party would mean for the EFCA. In that regard, Senator Specter indicated that he still would not support the EFCA as written and that he would not be an "automatic 60th vote" for cloture on a filibuster in opposition to the EFCA.

[4] See "Updated Head Count on EFCA; Udall and Warner Will Vote For Cloture, Bennet Bashes Measure" April 8, 2009, at http://campaigndiaries.com/2009/04/08/updated-head-count-efca/.