A Timely Analysis of Legal Developments

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The Employee Free Choice Act was formally introduced in the 111th Congress, much to the delight of labor and dread of business. Although the bill is believed to be identical to that introduced in 2007, whether the 2009 version of this sweeping legislation will meet the same fate as it did two years ago given the current economic and political climate is far from certain.

The Battle is Joined: The Employee Free Choice Act Re-Introduced in the 111th Congress

By James M. L. Ferber, John M. Skonberg, Jay Sumner and C. Scott Williams

On March 10, 2009, Senators Tom Harkin (D-IA) and Ted Kennedy (D-MA) and Representative George Miller (D-CA) formally introduced the Employee Free Choice Act (EFCA) in the 111th Congress (H.R. 1409, S. 560). There were 40 Senate co-sponsors and 223 House co-sponsors for the companion bills. Referring to the current economic crisis, Senator Kennedy said, "The Employee Free Choice Act will give these hardworking men and women a greater voice in the decisions that affect their families and their futures. It's a critical step toward getting our economy back on track and I hope we can act quickly to send it to the President's desk." Senator Harkin said, "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." Representative Miller, echoing Senator Kennedy's sentiments said, "If we want a fair and sustainable recovery from this economic crisis, we must give workers the ability to stand up for themselves and once again share in the prosperity they help to create." The introduction of the EFCA is just the opening move in the high-stakes battle between organized labor and the business community over the measure. As evidenced by the comments made by its primary sponsors, the EFCA's supporters are attempting to shift the debate on the EFCA toward an economic case for its passage, and away from the troubling labor policy aspects of the measure that have caused support to wane recently.

Although the text of the bill is not yet publicly available from the Library of Congress (www.thomas.gov), according to the websites of the House Education and Labor Committee and the Senate Health, Education, Labor, and Pensions Committee, the bill is substantively the same as what was introduced in 2007. The EFCA will give unions the ability to force representation through a card check process, euphemistically styled "majority sign-up," in an attempt by labor to blunt the heated criticism the term "card check" has received. The EFCA would allow a union to demand that the employer begin bargaining with the union on as little as ten days' notice. Either party can request the assistance of a government contract mediator in bargaining for a first contract, and, if there is no agreement after 30 days of mediation, the EFCA would require the parties to

submit to binding interest arbitration. Finally, the bill would stiffen penalties against employers, but not unions, who commit unfair labor practices during a union organizing campaign or negotiations for a first contract. These stiffer penalties include requiring employers to pay up to triple back pay to discriminatees and civil penalties. The EFCA, if enacted, would result in the most sweeping changes to national labor policy since the original Wagner Act was passed in 1935.

Questionable Economic Justifications for the EFCA

Several themes emerged during the consideration of the EFCA in the 110th Congress, most notably its supporters' belief that increased unionization is essential to sustaining and growing the middle class, which will lead to a robust U.S. economy. The House Education and Labor Committee's Report on the bill made clear that the Democratic members of the Committee believed that the EFCA is critical to the survival of the "American Dream." Few would disagree that a strong middle class is an important indicator for our economy's long-term stability and our country's prosperity. More recently, a group of over 40 economists, including two Nobel laureates, made similar claims in a February 25, 2009 advertisement in the *Washington Post*. According to the Economic Policy Institute, a think tank funded in part by labor unions and the sponsor of the advertisement, the EFCA "would restore some balance to our labor markets. As economists, we believe this is a critically important step in rebuilding our economy and strengthening our democracy by enhancing the voice of working people in the workplace."

The economic basis for the argument that increased unionization as a result of the passage of the EFCA will prompt economic recovery is suspect and likely will be challenged. On March 5, 2009, the non-partisan consulting firm LECG Consulting released a study that examined the impact that legislation in Canada similar to the EFCA had on businesses in that country. Among other troubling findings, the study concluded that a three percent rise in union membership would lead to a one percent increase in the nation's unemployment rate. According to the study, "while card checks could be expected to increase union membership as hoped by EFCA proponents, the EFCA is unlikely to achieve its main goal of improving social welfare." The study concluded that passage of the EFCA would likely increase the unemployment rate and decrease job creation substantially: "Any potential increase in some union-represented employee wages and benefits would be offset by other likely effects, including a reduction in jobs overall and an increase in the unemployment rate. These latter two impacts affect the economy as a whole and thus would overwhelm any anticipated wage and benefit increases among the subset of workers that gain union status." An increase in the unemployment rate and reduced labor supply are not likely to bolster an already weak economy and run contrary to the economic claims being used to justify and promote passage of the EFCA.

Although economists disagree about the impact of the EFCA, it is clear that the bill's supporters are pulling out all the stops to pass the bill. Rolling out a suspect economic rationale for supporting the EFCA in the current economic climate is opportunistic and distracts from the real debate. Because support for the EFCA has slipped recently, supporters are taking advantage of the tough economic times in an attempt to shift the conversation from the labor policy debate raging in the halls of Congress and the business community to one focused on a claim that there is an economic necessity for passage of the EFCA to create middle class jobs and pull our economy out of recession. This new approach will likely allow the EFCA's supporters to tie the bill to the Obama Administration's broader efforts to stimulate job and economic growth during a weak economy. A similar strategy employed by organized labor in 1933 during President Roosevelt's first term in the midst of the Great Depression led to the passage of the National Labor Relations Act two years later in 1935.

Senate Support for the EFCA May Be Wavering

As noted above, the EFCA was introduced with numerous co-sponsors. The overall number of co-sponsors, however, fell from the number supporting the measure when it was introduced in the 110th Congress in February 2007. In 2007, the measure had 46 co-sponsors in the Senate and 230 co-sponsors in the House. Thus, even with an overall net gain in the number of Democratic seats in both the House and the Senate resulting from the November 2008 elections, the co-sponsor support for the EFCA did not keep up with those gains.

Between senators who are facing re-election battles in which support of the EFCA may be an issue and those who are being heavily lobbied by business interests in their districts, there is some indication that support among Democratic and Republican senators who supported the bill in 2007 may be wavering. Running the numbers in the Senate, the Democrats alone currently do not have enough support to invoke cloture, end debate on the EFCA, and proceed to a vote on the merits of the bill. Whether or not Democratic supporters can garner enough Republicans to invoke cloture will be the closely watched question.

Major EFCA Provisions

One of the centerpieces of the National Labor Relations Act is its secret ballot election process. For nearly 75 years, the NLRB and the federal courts have developed an elaborate process, overseen by the NLRB, in which employees have the opportunity to cast an informed vote in a secret ballot election that determines a union's representation status. The process begins with the filing of a petition with the local NLRB regional office. During the period between the filing of the petition and the election, both the employer and the union have an opportunity to present their views to the voters, much like a political campaign. Certain conduct by an employer during the campaign is prohibited, such as making promises of benefits or threats of harm; implying that the selection of the union in the election would be futile; surveilling organizing activity or creating the impression of such surveillance; conducting campaign meetings within 24 hours of the election; and campaigning in the polling area. The election itself is supervised by an NLRB agent. In order to prevail in the election, a union must receive a majority of the votes cast.

The EFCA would materially change the NLRA by requiring the NLRB to certify a union upon a finding that a majority of employees have signed authorization cards designating the union as their bargaining representative, thus effectively eliminating secret ballot elections. Card-check certification would hinder, not promote, employee free choice by depriving employees of their long-established right to a secret ballot election. In many cases, it would also deprive an employer of an opportunity to present its view to its employees on whether unionization is appropriate for that workplace.

Another centerpiece of the NLRA is that it is neutral concerning the content of collective bargaining agreements. It merely requires that the parties engage in good faith bargaining in an effort to reach agreement on a contract, and it leaves it up to the participants to craft their own agreements. The EFCA would considerably change this process by forcing the parties to expedite the bargaining over an initial contract and, if an agreement cannot be reached, a government-appointed arbitration board would determine the terms under which the business will operate. Thus, the EFCA would: (1) require an employer and the newly certified or recognized union to commence bargaining within ten days of the employer's receipt of a written request for bargaining from the union; (2) give either party the right, 90 days after bargaining commences, to engage the Federal Mediation & Conciliation Service (FMCS); (3) require FMCS to refer the dispute to an arbitration board, if it is unable to bring the parties to agreement within 30 days; and (4) require the arbitration board to render a decision settling the dispute that is binding upon the parties for a period of two years. Such a mandatory, first contract interest arbitration provision would undermine, not promote, collective bargaining by taking out of the parties' hands, and giving to government-appointed arbitrators, the power to dictate both the economic and non-economic terms and conditions of employment.

For a more detailed analysis of the EFCA, please see the *Littler Report The Employee Free Choice Act: A Critical Analysis.*

Possible Compromise Legislation – The National Labor Relations Modernization Act

In a preview of compromise legislation that may be on the horizon, the National Labor Relations Modernization Act (NLRMA) (H.R. 1355), introduced on March 5, 2009 by Representative Joe Sestak (D-PA), would amend the NLRA to require employers to provide unions with equal access to employees prior to a representation election, increase employer penalties for unfair labor practices and expedite the collective bargaining process. This bill resembles the EFCA in many ways, but it omits the controversial "card check" provision that obviates a secret ballot election. While the supporters and opponents of the EFCA continue to express stiff resistance to any change in their relative positions – either the EFCA as written or not at all – the NLRMA may be the first attempt at a compromise.

Certain provisions of the NLRMA are lifted verbatim from the EFCA. Under both the EFCA and the NLRMA, fo example, employers who commit unfair labor practices during the organizing period are required to award employees back pay in addition to twice that amount as liquidated damages. Moreover, an employer who willfully or repeatedly violates the NLRA is subject to a $20,000 per violation penalty. The NLRMA also parallels the interest arbitration section of the EFCA, laying out a strict timeline for bargaining the initial labor agreement with provisions for mediation and mandatory, binding arbitration; however, this bill is slightly less stringent in that it extends the bargaining and mediation timelines before arbitration is required to give the parties almost twice the amount of time contained in the EFCA to reach agreement before interest arbitration is invoked.

A section in the NLRMA that does not appear in the EFCA is "Equal Access to Labor Organizations Prior to Elections." This section requires an employer – after an election date has been set – to notify the union of any campaign activity it intends to undertake and allow the union equal access to the employer's premises to present its side directly to the employees in the same manner as the employer. This new provision addresses one of the main complaints of organized labor about the current union election process: that the employer has direct access to all employees and thus possesses an unfair advantage over the union. The equal access provision addresses those concerns. If compromise legislation eventually removes the card check provisions from the EFCA, business can expect that there will be a strong movement to include access provisions in any bill that is brought to the floor of either chamber for a vote.

Given the intense focus on the EFCA, the NLRMA will not likely receive serious consideration until after the debate on the EFCA has run its course. However, if a movement emerges in Congress for compromise on the EFCA, the NLRMA, or something similar, could be a more palatable bill for those in the Senate who are currently against the EFCA.

The Time for Action is Now

Under the EFCA, an employer could end up with a union before it becomes aware that a union campaign has even started and before it has had any opportunity to present the other side of the picture to employees. Consequently, employers must work immediately to develop a proactive, long-term strategy to be prepared for the potential passage of the EFCA in its current form, or in any version that lessens or eliminates the employer's ability to effectively respond to a union organizing campaign.

Our recommended plan of action involves three steps:

1. *Auditing* – Conducting a comprehensive human resources audit is the only effective methodology for assessing an employer's vulnerability to unionization. In this context, auditing involves a detailed review of the circumstances that create employee frustration and related union interest. Evaluating communication systems, employee morale, supervisory competence, policies and procedures, compensation and benefit structures, working conditions, respect for leadership, and union activity in the geographic area and the industry are just some of the necessary components of an audit geared to assessing an employer's potential exposure to unionization.

2. *Planning* – Once the audit is complete, an organization's next step is to analyze the results, identify opportunities for improvement, and formulate changes to the organization that should minimize the risk of unionization, without unduly burdening operations. This is the planning stage of the proactive strategy. Such planning generally involves identifying, and then making, necessary changes to communication systems, policies and procedures, pay and benefits, and leadership methodologies, among other areas

3. *Training* – The final step of the proactive strategy is to provide positive employee relations training to all leaders and supervisory personnel. Experience shows that because poor supervision is often the primary reason that employees choose a union, management training is one of the most effective methods to minimize the risks. The primary objective of this critical training is: (1) to educate supervisors on the impact unionization would have on your organization, factors that contribute to unionization and actions that will minimize the risks; and (2) to help managers understand the signs of unionization.

The introduction of the EFCA also provides employers with the opportunity for legislative advocacy. We recommend the following:

1. Encourage trade associations and other organizations to engage in lobbying and education efforts regarding the EFCA. Many organizations such as the U.S. Chamber of Commerce and the Coalition for a Democratic Workplace have campaigns well underway to defeat or modify the EFCA and have posted information about these campaigns on their websites.
2. Let your representatives and senators know that you oppose the bill. Employers should describe the type of work they perform, the number of employees they employ, and, if possible, describe how the EFCA would impact their operations and their ability to grow their business. Congressional opponents of the EFCA need anecdotal evidence from their corporate constituents, in addition to empirical evidence from labor economists, to counter the argument that the EFCA would lead to job creation and economic stability.
3. Draft letters to the editors of local newspapers and find other opportunities to promote public awareness of the impact of the EFCA on employers' operations and ability to grow their business and create jobs.

James M. L. Ferber is a Shareholder in Littler Mendelson's Columbus office, John M. Skonberg is a Shareholder in Littler Mendelson's San Francisco office, Jay Sumner is a Shareholder in Littler Mendelson's Washington, DC office, and C. Scott Williams is an Associate in Littler Mendelson's Atlanta office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Ferber at jferber@littler.com, Mr. Skonberg at jskonberg@littler.com, Mr. Sumner at jsumner@littler.com, or Mr. Williams at scwilliams@littler.com.