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Employee Free Choice Act: Dream or Disaster?

Proposed labor law comes with many unanswered questions

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Within the next few months, Congress is set to take up the Employee Free Choice Act (EFCA). If enacted, this legislation would be the first substantive change in more than 60 years to the National Labor Relations Act (NLRA), the statute governing virtually all aspects of private sector labor-management relations in America. Not surprisingly, labor and management have diametrically opposed views of the proposed legislation.

The statute would make three major changes. (1) Unions could achieve representation status by obtaining authorization cards from a majority of the workers in an appropriate bargaining unit, without a secret ballot election as required by existing law. (2) If negotiations did not produce agreement on an initial contract covering a newly certified bargaining unit within 120 days, the terms of the contract would be decided by binding interest arbitration. (3) Employers accused of unfair labor practices during the period when a bargaining unit is being formed or an initial contract is being negotiated would face dramatically enhanced penalties.

These changes go far beyond any proposal advanced by either labor or management over the last half century. Proposed amendments to the NLRA introduced from time to time have been dropped, in part because the proponents did not want to give the other side an opportunity to advance their own agenda in the give-and-take of the legislative process. Given the make-up of the current Congress, however, that concern is dramatically diminished. The EFCA has passed the House easily in the last two sessions, and while the climate may have changed somewhat, the primary uncertainty is whether it will garner enough support in the Senate to cut off debate. Both sides are lobbying with unprecedented intensity.


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Devil In Details

Unions attribute their loss of membership (down from 35 percent of the private sector workforce in the 1930s to under 10 percent today) to increasingly sophisticated and aggressive opposition from employers, and lack of timely and effective action by the National Labor Relations Board (NLRB). They say legislation is needed to offset the effects of employee intimidation and employer intransigence. Employers respond that unions have declined in strength because they are ineffective and increasingly irrelevant in light of the market forces that drive the global economy. They argue that the EFCA effectively takes away the right of employees to choose their representatives by secret ballot election, and leaves employers (and many employees) with virtually no say in the establishment of conditions of employment that determine labor costs.

Observers in both camps, however, acknowledge that the proposed legislation leaves many unanswered questions. While the headlines have been about the basic changes the EFCA would bring, the devil is in the details, and the actual impact of the new law would depend in part on how those details are resolved.

For example, the statute says the NLRB must certify a union as bargaining agent for employees in an appropriate unit if it finds that a majority of the employees have signed "valid authorizations" designating the union to represent them. However, it leaves to the NLRB the determination of what constitutes a valid authorization. It also provides no answer to a number of other questions. For how long is a signed authorization effective? As of what date is majority status determined? Can employees revoke their authorizations, and if so how? If a request for certification is dismissed, for example because it is determined some of the authorizations are not "valid," how long must a union wait before submitting a new request?

Even more important questions remain unanswered with regard to the provision mandating binding arbitration of initial contracts. It is clear that negotiations must

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begin within 10 days after certification of a union as collective bargaining agent, and if no agreement is reached within 90 days, another 30 days is provided for mediation, after which arbitration is imposed. However, while the law makes the Federal Mediation and Conciliation Service is responsible for appointing an arbitrator, it provides no substantive or procedural guidelines for the arbitrator to follow.

Connecticut, for example, mandates binding arbitration of public sector employee contracts, in lieu of the right to strike. However, there are statutory criteria on which the arbitrator must base his or her decision. Under the EFCA, it is not clear whether factors such as labor market comparisons or the employer's ability to pay are even relevant. Also, under Connecticut's laws the arbitrator must select the "last best offer" of either labor or management on each of the issues in dispute. The absence of this feature in the EFCA would seem to encourage each party to take extreme positions, in the hope the arbitrator will award some of what they ask. Regardless of the positions of either party, however, the statute apparently permits the arbitrator to create out of whole cloth whatever contract he or she thinks is appropriate. The resulting contract remains in effect for two years.

Enhanced Penalties

By contrast, the EFCA is extremely clear about enhanced penalties. In addition to requiring the NLRB to give priority to investigating cases of the type that arise during union organizing campaigns, it mandates that any union supporter who is discriminatorily discharged must be awarded not only back pay, but twice that amount as liquidated damages. This applies during the period when the employer's employees are "seeking representation by a labor organization," apparently regardless of whether or not management is aware of that fact, and thereafter until an initial contract is finalized. During the same period, an employer who "willfully or repeatedly commits" unfair labor practices "shall" have a civil penalty of $20,000 imposed for each offense.

There is no question the EFCA would make the formation of new bargaining units and the resolution of initial contracts easier and quicker, but at what price? The current secret ballot election process assures that every employee has a vote, has an opportunity to weigh the arguments of both sides, and cannot be coerced into voting one way or the other. Contracts that result from negotiations and even strikes may take time, but are at least the result of voluntary agreement between labor and management. And draconian penalties that apply only to employers will inevitably deter them from taking normal disciplinary action because they cannot afford the consequences of a successful challenge. Even some moderate labor supporters are having second thoughts about the EFCA, and are suggesting consideration of less radical means of updating the NLRA to meet the needs of today's workforce. ■