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Pending “EFCA” Labor Legislation Would Bring Sweeping Change to American Labor Laws

With the election of Barack Obama and increased Democratic majorities in the United States Senate and House of Representatives, the likelihood of the Employee Free Choice Act (“EFCA”) becoming law this year has increased significantly. While last year the House passed EFCA by a 241-185 margin, it was filibustered in the Senate and faced a certain veto by President Bush.

EFCA would represent the most sweeping change of American labor law in the last half century, and is likely to promote private sector unionization, which is now less than 8%. EFCA’s most publicized impact would be to curtail the use of secret ballot representation elections conducted by the National Labor Relations Board (“NLRB”). Two other lesser-known provisions of the proposed law, as presently drafted and described below, would have equally far-ranging effects — mandatory arbitration when parties are unable to negotiate a first collective bargaining agreement within 120 days of NLRB certification of a union representative, and new employer fines, penalties and injunctions when employers engage in unfair labor practices during union organizing campaigns.

The Demise of Secret Ballot NLRB Elections

Under existing labor law, when unions obtain authorization cards from 30% of employees in an “appropriate” bargaining unit in support of union representation for that bargaining unit, the union may petition the NLRB to represent those employees. However, under existing labor law, the employer in such event may insist upon an NLRB-sponsored secret ballot election. The purpose of the secret ballot, of course, is to permit employees to vote their representational preference in private without pressure or other interference from the employer, the union, or other employees.

EFCA would enable unions to obtain NLRB certification without the test of a secret ballot. If a *majority* of employees in a bargaining unit sign cards authorizing the union to represent them, the secret ballot election would be waived and the union immediately would be certified by the NLRB as the exclusive bargaining representative for that employee unit.

The practical consequence is that union organizers and supporters could exert pressure on individual workers, no longer protected by voting booth anonymity, to obtain such authorization cards. Card-signing “parties” and after-hours home visits by union organizers could become routine union organizing tactics. There would be no employer right, as there is now, to require an NLRB election before which employers may lawfully campaign against unionization.

EFCA, if enacted, is likely to increase both unionization and the speed with which it can occur — perhaps even before an employer knows organizing has begun and before the employer has an effective opportunity to respond.

A dramatic increase in union organizing success has the potential to add significantly to employer costs. The ability of unions to impose certification by “ambush” on unsuspecting employers can impede efforts to restructure or sell businesses. Under existing law, the cost of owning a unionized business, or one that is susceptible to union organizing efforts, can be assessed by potential purchasers, lenders and investors, who can factor these considerations into their transactional decisions. In the absence of NLRB elections, unionization can occur before or after such transactions take place, without warning, and perhaps prompted by announced plans for restructuring the business. As a result, important operational changes can be delayed or even derailed by bargaining requirements and union-filed unfair labor practice charges.

Mandatory Arbitration of First-Contract Collective Bargaining Agreements

Under current law, collective bargaining is the process through which contractual terms and conditions of employment, including wages, benefits and work rules, are determined after a union has been certified or voluntarily recognized. Bargaining must be conducted in "good faith" by private parties (employer and union) familiar with industry and local work-site needs and conditions.

EFCA would fundamentally alter this framework of private negotiation by requiring mandatory arbitration of the "first contract" if the employer and union do not reach an agreement within 120 days after NLRB certification. Under EFCA, when first-contract bargaining disputes proceed to mandatory arbitration, employment terms would be imposed by government-appointed arbitrators. Thus, employers would no longer be permitted to bargain lawfully to "impasse" and then unilaterally implement their last offers. Instead, after 120 days, bargaining disputes would be presented to a panel of arbitrators for resolution. When unions believe they would fare better in arbitration than in negotiations, they would have the incentive to await imposition of terms in mandatory arbitration. Similarly, employers would be unlikely to advance their best contract offers to unions, knowing they could become the "floor" for arbitrators. With mandatory arbitration as the default process, good-faith "collective bargaining" as contemplated by the National Labor Relations Act could become a relic for first contracts.

Moreover, the EFCA bill imposes no standards for determinations by these arbitrators. They will have a free hand to set terms even though they are less familiar than the parties with local facility and market conditions impacting the business.

For employers, as well as prospective buyers and investors in American business, mandatory first-contract labor arbitration could significantly complicate efforts to restructure a business, impede acquisitions and investments, and make it particularly difficult to make accurate budget predictions. Critical operational plans and changes may be delayed, or worse, made impossible or even unlawful.

Increased Penalties For Unfair Labor Practices

Finally, EFCA imposes substantial new penalties for employer unfair labor practices while employees are seeking union representation and during first-contract negotiations, including NLRB-imposed treble damages (e.g., tripling of "back pay" awards required by NLRB-ordered make-whole remedies), new NLRB-imposed civil penalties of up to $20,000 for each violation, and mandatory injunctions. Presently, the NLRB has no statutory authority to issue punitive economic sanctions.

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