The Case Against EFCA Lite

The debate about the proposed Employee Free Choice Act continues. Because of its anti-democratic "card check" provision, which would effectively eliminate secret ballot elections in union representation elections, EFCA has stalled in the Senate. All Republican Senators and Senator Specter, who recently switched from the Republican party to the Democratic party, would vote against cloture, ensuring that a filibuster against EFCA would succeed. An increasing number of Democratic Senators also have expressed their unwillingness to fully support EFCA, primarily due to its "card check" provision.

For EFCA opponents, these developments were only an initial and, perhaps, temporary victory. Derailing EFCA's "card check" provision would not completely defeat EFCA. If the labor unions cannot obtain the necessary 60 votes in the Senate for EFCA's "card check" provision, then the labor unions may seek a compromise that would not include "card check." For example, SEIU President Andy Stern recently suggested the possibility of legislative reforms, other than "card check," that would "change the election process:" "fast elections, eliminating employer behavior," and penalties for employer violations. Republican Senator John Ensign (R-Nev) also noted the possibility of compromise when he stated about EFCA's loss of support that there is a "caveat:" they "say they can't support the bill 'as it stands now.' I get nervous when I hear that saying."

Employers should also get nervous when they hear that caveat. That is why the real challenge for the business community will be whether there will be a potential compromise version of EFCA – EFCA Lite - that would not contain the politically toxic "card check" provision. An EFCA Lite compromise would likely make it almost as easy for unions to organize new members as EFCA's "card check" provision would make it.

Eliminating "card check" and preserving secret ballot elections would mean that EFCA Lite could be presented as a labor law "reform." Opponents – Republicans and businesses – would then not be protecting secret ballot elections by opposing the anti-democratic "card check" procedure, but instead would be opposing proposed labor law "reforms" that could potentially attract the support of moderate Republican and Democratic Senators. Protecting secret ballot elections provided a principled basis for opposing EFCA, while opposing labor law "reforms" and advocating a continuation of the current system for union organizing and representation elections may characterized by labor unions and their political allies and perceived by the public as obstructionism.

One suggested alternative to mandatory "card check" recognition, for example, would be the use of expedited or "quickie" elections that would likely occur within five to twenty-one days after the filing of an election petition. The political appeal of a "quickie" election is that it would allow Senators to oppose the anti-democratic "card check" procedure, but to support a "reform" that preserves the secret ballot election.

For employers, however, a "quickie" election would be almost as bad as "card check" recognition. Unions would have substantial advantages in "quickie" elections and, consequently, would likely win a very high percentage of those elections. The use of a "quickie" election would permit a union to organize employees secretly for weeks or months before filing an election petition. During that period, the union would be the employees' sole source of information about what unionization would mean. The union would be free to

make promises, misleading or untrue statements, or both without any rebuttal by the employer. Also, the union would not educate the employees about the negative aspects of unionization, such as, for example, union dues and possible strikes. In addition, the union will have warned the employees that the employer will not tell them the truth and that employees should not listen to the employer.

In a "quickie" election system, once the union finally decides to file its election petition, which would occur at the peak of its employee support, an employer would have only a short period of time – probably, at most, twenty-one days, which is half the current forty-two day period - to campaign against unionization, to educate the employees about unions, and to clarify or correct any union misstatements or misrepresentations. A short campaign period would be a major disadvantage for an employer.

A "quickie" election process, by compressing the pre-election campaign period and reducing an employer's ability to educate its employees, would make it far easier for unions to win secret ballot elections and to organize employees. As a result, the enactment of EFCA Lite with "quickie" elections would expose employers to a much greater risk of unionization that would be very similar to the risk posed by mandatory "card check" recognition.

Recently, Benjamin Sachs, an Assistant Professor of Law at Harvard Law School, suggested two alternatives to "card check." The first alternative would be the use of "early voting," as is used in some American political elections. Under this proposal, employees, at any time during a union organizing drive, could submit their vote, by a "confidential mail-in procedure" to the National Labor Relations Board. The second alternative, which is derived from the method used in union elections under the Railroad Labor Act for airline and railroad employees, would assign to employees who are eligible to vote "a confidential voter identification number," so that the employees could then "vote in their homes by either phone or the Internet." Under both alternatives, the NLRB would maintain a "running tally," and if more than 50% of the employees voted for the union, the NLRB would notify the union of its entitlement to "demand recognition from the employer."

From an employer's perspective, however, either of these two alternatives would result in a union encouraging employees to vote as quickly as possible before an employer had an opportunity to educate its employees and to respond to the union's promises and misstatements. The election process would be transformed into a race for the union to get over 50% of the employees to vote for the union as soon as possible. The adoption of either of these two alternatives would help unions organize new members more much easily than under the current system.

Another potential EFCA Lite component would be to grant labor unions a new right: union access to an employer's workplace in order to campaign among the employees. Senator Specter, for example, supports granting unions "equal time under identical circumstances" to meet with employees on company property, if the employer uses "captive audience" meetings. However, he also suggests eliminating home visits by a union without an employee's prior consent. (Under NLRB case law, employers are already prohibited from home visits due to their coercive effect). Democratic Representative Sestak has introduced a bill – the "National Labor Relations Modernization Act" - that excludes mandatory "card check" recognition, but provides for "equal" union access to an employer's workplace to campaign among employees. Similarly, the proposed

principles suggested by three major employers – Starbucks, Costco, and Whole Foods – include "equal access to employees for campaign purposes" by creating a "level playing field for unions and management to access employees during non-working hours during the campaign period…"

Granting a union access to an employer's facility, including potentially the employer's e-mail system, would not create a "level playing field," but one heavily tilted in favor of unions, unless unions and employers also have "equal access" to employees away from the workplace. Especially if combined with a "quickie" election process, "equal access" would make it much easier for unions to win secret ballot elections and to organize employees.

Under EFCA, as proposed, if a union and a company cannot agree to a first contract within the first 90 days after the start of the bargaining, then a federal government mediator can be asked to mediate for thirty days. If there is still no contract after thirty days of mediation, then the federal government will appoint an arbitration panel that will decide what the terms of the contract, including wages, benefits, and contract language, will be for a two-year period. In the long-term, EFCA's revolutionary mandatory arbitration provision could be even more damaging to employers than its "card check" provision.

Potential EFCA Lite options regarding the negotiation of a first contract, however, may be equally unacceptable to the business community.

Senator Specter, for example, has suggested requiring the start of negotiations for a first contract within twenty-one days after the union is certified and permitting the use of a federal mediator after one hundred and twenty days of from the start of the negotiations.

Another possibility would merely extend EFCA's one hundred and twenty day period before mandatory arbitration, but would retain the use of mandatory arbitration that would result in an arbitrator-imposed contract. Representative Sestak's proposal, for example, would provide for one hundred and twenty days of "mediation and conciliation" before the start of mandatory arbitration.

The third major part of EFCA consists of increasing the penalties against employers that engage in illegal conduct while employees are organizing a union or while the company and the union are negotiating a first contract: triple back pay in a discharge situation, civil fines of up to $20,000, and mandatory injunctions.

An EFCA Lite compromise would likely retain EFCA's proposed enhanced penalties against employers. Senator Specter, for example, has suggested those kinds of enhanced penalties. Representative Sestak's proposal also retains EFCA's enhanced penalties.

For employers, the enactment of EFCA would be an unmitigated disaster, but the enactment of an EFCA Lite compromise could be nearly as disastrous. An EFCA Lite compromise in the name of labor law "reform" would represent a major victory for labor unions and a major defeat for employers. While EFCA, with its "card check" provision, may not be enacted, the potential for an EFCA Lite compromise exists and, due to Senator Specter's change from Republican to Democrat, may have increased.