Will There Be A Compromise On The Employee Free Choice Act?

The Employee Free Choice Act is an extremely important legislative priority for labor unions because, as proposed, it would make it much easier for unions to organize new members. EFCA, if enacted, would expose employers to an increased risk of unionization because it would be much easier for labor unions to organize employees. The goal of EFCA is to substantially increase the number of union members and the unionization rate in the private sector.

As proposed, EFCA has three parts:

- Mandatory recognition of a union if more than 50% of the employees sign union cards. This is the "card check" provision, which the labor unions refer to as "majority sign up."

- Mandatory arbitration of a first collective bargaining agreement if there is no contract after 120 days from when bargaining starts. A federally-appointed arbitrator would impose a contract that would be in effect for 2 years.

- Increased penalties on employers that commit unfair labor practices during a union organizing campaign or during the negotiation of a first collective bargaining agreement. The increased penalties would include triple back pay for an illegally discharged employees and fines of up to $20,000.00 per violation for employers that have committed "willful and repeated" violations.

The Employee Free Choice Act has been stalled in the Senate due to the opposition of moderate Democratic Senators to mandatory card check recognition, mandatory arbitration of a first contract, or both. Senators have been attempting to develop an EFCA compromise that would attract the support of moderate Democrats, would obtain 60 votes, and would defeat a Republican filibuster.

An EFCA compromise may be imminent. The terms of this compromise reportedly include:

– Abandonment of mandatory card check recognition if a union obtains signed union cards from a majority of employees.

– Expedited representation elections within 5 to 10 days (currently the NLRB schedules elections within 42 days)

Other potential components of an EFCA Lite compromise may include:

– Union access to employer property during an organizing campaign

– Prohibiting employers from requiring employees to attend "captive audience" meetings

Another controversial EFCA proposal -- mandatory arbitration of a first collective bargaining agreement after 120 days after bargaining starts – reportedly remains part of the proposed EFCA Lite compromise.

The EFCA proposal for increased penalties on employers for unfair labor practices during either an organizing campaign or the negotiations for a first contract also reportedly is part of the EFCA Lite compromise.

The reported EFCA Lite compromise has not yet been publicly announced by any of the Democratic Senators who have been privately working on an EFCA compromise. There may be several reasons why there has not been any public announcement yet:

- The details of the compromise have not been agreed to and finalized by the Democratic Senators working on it.

- Democratic Senators or labor unions may have released information about the potential compromise to the news media in an effort to gauge the reaction of other Senators, especially moderate Democrats who have not yet supported EFCA, the business community, and the general public.

- Labor unions may have released information about a possible agreement to abandon mandatory "card check" recognition of a union in order to obtain a compromise that would contain mandatory arbitration of a first collective bargaining agreement, expedited elections, union access to employer property, ending employer "captive audience" speeches, and increased "unfair labor practice" penalties on employers. An EFCA Lite compromise with those features would be a major victory for unions and a major defeat for employers. Even an EFCA Lite compromise without mandatory "card check" recognition and mandatory arbitration, but with expedited elections, no employer "captive audience" meetings, and union access to employer property during a campaign would make it much easier for unions to organize new members and much more difficult for employers to defeat union organizing campaigns.

- Labor unions may have released information about a potential EFCA compromise as a means of reviving interest in EFCA, which has been stalled for several months.

Whether an EFCA compromise will be reached and what the terms of any EFCA Lite compromise will be remain uncertain. And, it is still not clear whether any potential EFCA compromise would attract 60 votes in the Senate by obtaining the support of moderate Democrats who have not yet supported EFCA. To enact an EFCA Lite compromise, all of those moderate Democrats – up to 10 Senators – would have to vote for it.

Additional compromises – perhaps eliminating or diluting the mandatory arbitration provision or lengthening the campaign period before an expedited election - may be needed to attract 60 votes in the Senate.

But for employers, the reported EFCA Lite compromise, if enacted, would be almost as bad as the original EFCA Lite proposal.

Expedited elections would be very advantageous to unions and very disadvantageous to employers: unions could be expected to win an extremely high percentage of expedited elections. The use of expedited elections would permit the 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.

Once the union finally decides to file its election petition, which would occur at the peak of its employee support, the employer would have only a short period of time to present its position on the issue of unionization and what unionization would entail for the employees and the company. The employer would have little opportunity to educate the employees about unions and to clarify or correct any union misstatements or misrepresentations. Also, because union organizing campaigns occur when employees are dissatisfied with the employer and how management is treating the employees, employees often do not listen to or pay serious attention to what an employer says about unions during the first 2 to 3 weeks of an election campaign now under the current system when there are up to 42 days from when the union files an election petition until the election date. For an employer, it would be extremely difficult to successfully educate its employees and to win an election with only a 5 to 10 day campaign period, and employers could be expected to lose an extremely high percentage of expedited elections.

To succeed in an expedited election, an employer, as part of its strategic union avoidance program, would need to educate employees about unions and about why the employer opposes unionization before any union organizing even begins and before there is an expedited election with only a 5 to 10 day campaign period.

Granting a union access to employees on the employer's premises and prohibiting employers from holding "captive audience" meetings with employees to educate them about unions would also help unions organize employees and handicap employers in their efforts to successfully oppose union organizing campaigns. Currently, unions can hold meetings with employees away from work, can send mailings to their homes, can call them at home, and can even visit them at home, but unions have no right to campaign among employees on company property. To grant unions the right to campaign on company property and to prohibit employers from holding "captive audience" meetings would create an advantage for unions and, by prohibiting "captive audience" meetings, which are an effective campaign tactic, would partially prevent employers from educating employees and expressing the company's views on unionization. These changes would make it easier for unions to win elections and harder for employers to successfully defeat a union organizing campaign.

Mandatory arbitration of a first collective bargaining agreement would revolutionize the collective bargaining process and would result in the imposition of first contracts by government-appointed arbitrators. A union would have little or no incentive to compromise in collective bargaining negotiations with an employer if a federally-appointed arbitrator might impose a more favorable contract than the union could negotiate with the employer.

Mandatory arbitration of a first contract would result in federally-appointed arbitrators dictating to employers and unions the terms of the contract, including how much employees are paid, what their employee benefits are, what rights belong to the company to operate the business, and what rights belong to the union and to the employees. It would amount to government intrusion into and potentially control over the collective bargaining process for a first contract. One commentator has referred to mandatory arbitration of a first contract as "federal pay determination." An arbitrator-imposed first contract may determine whether an employer can operate its business successfully and profitably.

The existence of mandatory arbitration of a first collective bargaining agreement also would be a strong selling point for a union when it seeks to organize new members: under federal law, a federally-appointed arbitrator will award the employees a good contract with higher pay, better benefits, and more rights with the risk that the employees would have to go on strike in order to force the employer to grant their demands.

In the long-term, a mandatory arbitration provision could be even more damaging to employers than another other EFCA or EFCA Lite provision because it could expose employers to arbitrator-imposed contracts that are unacceptable or potentially unaffordable. The Chamber of Commerce has called it "economic poison."

Enhanced unfair labor practice penalties on employers – for example, triple back pay and fines of up to $20,000 per violation – may cause employers to be inhibited in their response to union organizing campaigns to the extent of observing a self-imposed neutrality.

Labor unions want the enactment of EFCA or, at worst, an EFCA Lite compromise that favors labor unions. It is still not clear whether labor unions will succeed in enacting either EFCA or EFCA Lite. The business community and Senate Republicans have opposed EFCA and, to date, any EFCA compromises. But it is clear that labor unions and their political allies are continuing their efforts to develop an EFCA Lite compromise that may attract 60 votes in the Senate. EFCA may have been stalled in the Senate for the past several months, but the possible enactment of an EFCA Lite compromise remains a serious threat to employers. EFCA or an EFCA compromise, in brief, has not yet been defeated.

With or without the enactment of EFCA or EFCA Lite, remaining union-free in the future will require employers to focus on preventing the causes of unionization from existing in their workplaces and, before any union organizing activity occurs, educating their employees about unions and why unionization would not be in the company's or the employees' best interest.

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