The Employee Free Choice Act – Redux

by Donald F. Burke
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On the morning of Thursday, March 10, 2009, for the third time in as many years, a pair of companion bills was placed in the Congressional hopper. Together they are designated as H.R. 1409 and S. 560. The bills constitute an amendment to the National Labor Relations Act designated the Employee Free Choice Act of 2009 ("EFCA").[1] These will be two of the most closely watched bills pending in the 111th Congress because there has been a change this year in the political landscape.

In summary, the EFCA "streamlines" procedures for employees to decide on union representation and bargain a first contract. Under the EFCA, as presently drafted, a union would be automatically recognized in a workplace when a majority of employees sign cards stating that they want to be represented by that union. Under current labor law, the National Labor Relations Board will certify a union as the exclusive representative of bargaining unit employees by secret ballot election, which is held if more than 30% of the employees in a bargaining unit sign cards asking for representation by a union. Pursuant to the EFCA, a union can demand that an employer begin bargaining within ten days of certification of the union as the exclusive bargaining representative for an appropriate unit of employees as a result of the majority card check provision. A majority is 50% of the employees plus one is euphemistically styled "majority sign-up." In the event that the union and employer cannot agree upon the terms of a first collective bargaining contract either the union or management can request the assistance of the Federal Mediation and Conciliation Service ("FMCS"). If the FMCS mediator is unable to reach a "deal" within an additional thirty (30) days, the dispute will go to binding interest arbitration and the results of the arbitration will be imposed on the parties for two years.

Additionally, the EFCA imposes much stiffer penalties against employers – not against unions - for discrimination in their anti-organizing efforts. These sanctions include increased civil penalties, injunctive relief, and up to three (3) times the back pay if an employee is discharged or discriminated against during an organizing campaign. Finally, the bill provides for civil penalties of up to $20,000.00 per violation against employers who are found to have willfully or repeatedly violated employees' rights during an organizing campaign or first contract drive.

President Obama has signaled his intention to sign the EFCA into law once it reaches his desk. However, in 2007, the Democrats lacked the majority in the Senate to avoid filibuster to and ensure its passage. Democrats also lacked the majority in the Senate in 2008. Of course, as mentioned above, the political landscape, particularly in the Senate, changed after the 2008 election and the inauguration of President Obama. This means that the EFCA has a good chance of becoming law. The question remains: How will the final bill shape up and will there be compromise on some of the more radical provisions of the EFCA? What is undeniable is that this bill has polarized labor and management more than any other piece of legislation since the original National Labor Relations Act ("NLRA") to which this is an amendment was enacted into law in 1935 as an integral part of President Roosevelt's new deal legislation. It is both helpful and insightful to visit the National Labor Relations Board's (NLRB) website to read that, "Congress enacted the National Labor Relations Act in 1935 to protect the rights of employees and employers, to encourage collective bargaining and to curtail private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy."[2]

Because the EFCA legislation would materially change the NLRA, it has engendered much controversy and debate from both sides of the labor bar. Organized labor posits two primary arguments in support of the EFCA. First, unions assert that the NLRB representational procedures are broken; and therefore, are easily abused by employers seeking to delay and frustrate employee rights. Unions argue that the penalties for committing unfair labor practices during the course of an election, including promises of benefits, and threats of reprisals or discharge, are small compared to the overall effect such actions have on election results. Second, unions argue that current NLRB law is ineffective to redress break-downs in negotiations given the heavy burden of proof on unions to establish bargaining violations in initial contract cases and the lack of effective remedies. The unions argue that these inadequacies continue to be exploited by employers to avoid reaching agreement before the expiration of the certification year and to eventually encourage already frustrated employees to vote in favor of decertification in some instances.

Organized labor has made the EFCA its top legislative priority. One need only look at the Service Employees International Union ("SEIU") website[3] to readily observe the priority given to the passage of the EFCA by this strong union. The website states: "One million strong for Employee Free Choice Act." It also states

> A robust middle-class. Economic Growth and Shared Prosperity. The American Dream. None are possible unless workers have the free choice to bargain for a better life - in their workplaces and in our nation. That's why SEIU members need the Employee Free Choice Act - critical legislation that would restore workers' freedom to form unions and bargain for better wages, health care, and working conditions – and have a voice in our economy. We're going to show the new president and Congress that there are one million people who want to give hard working families a chance to get ahead. Can you be one of the first?

Another web page on the SEIU site shows a management financed and produced "movie" on YouTube where the union focuses on a recent management statement that "our country is on the verge of 'armageddon,' 'nuclear war,' and 'the demise of civilization.'" The SEIU website further states that "According to CEOs and their front groups, the fabric of our nation may well fall apart, all because of the Employee Free Choice Act. Its opponents no longer debate the merits of the bill, and instead resort to hyperbolic vitriol intended to inflame the public and press. In reality, the Employee Free Choice Act is a bipartisan, common sense economic recovery for working families that will pump billions into our nation's economy."

In an article by Isaiah J. Poole,[4] published shortly after the EFCA passed in the House of Representatives in 2007, he wrote, "The report (a Canadian report comparing secret ballot elections to majority-sign-up election systems in several provinces) estimates that if EFCA became law, union membership would increase by about 10% - thus increasing the pool of workers who are more likely to get access to employee-paid health insurance and retirement benefits that are substantially more prevalent among unionized workers than they are among non-unionized workers." He also quotes Senator Tom Harkin, Democrat from Iowa, who says, "By passing the Employee Free Choice Act and giving workers a seat at the table, we can start to reverse these negative trends (declining union membership). Union participation in the workplace means everybody wins. When employees have voice - when they can ask for better wages and benefits and make suggestions about how to do things better - employers benefit too."

Finally, the SEIU website cites from a recent address by the President to the AFL-CIO on March 3, 2009, in which the President states: "I have every confidence that if we are willing to do the difficult work that must be done, we will emerge from these trials stronger and more prosperous than we were before. And as we confront this crisis and work to provide health care

to every American, rebuild our nation's infrastructure, move toward a clean energy economy, and pass the Employee Free Choice Act, I want you to know that you will always have a seat at the table."

The management oriented members of the bar have expressed serious concerns over the EFCA, and in particular, its vaguely defined parameters. In management's view, EFCA will not give effect to true employee choice but actually eradicate that choice, which is embodied in the secret ballot election. Management describes the Employee Free Choice Act as intentionally "misnamed." In a report published by the Heritage Foundation,[5] James Sherk and Paul Kersey write

> The Act would replace the current system of secret-ballot organizing elections with card checks, in which workers publicly sign union cards to organize and join a union…under the EFCA, once organizers collect signed cards from a majority of the company's employees, all of the company's workers would be forced to join the union without a vote. This strips workers of both their fundamental right to vote and their privacy. Both union and the employer would know exactly which workers want to join the union, leaving workers vulnerable to threats and intimidation…when workers decline to sign the union card on the spot, union organizers return again and again to pressure these holdouts to change their minds.

Under the card check system, instead of holding the traditional secret ballot election, which has stood the test of time for over seventy (70) years, a company's employees can become unionized if just 50% plus one (1) of the employees in an appropriate unit signs union pledge cards. If passed, the NLRB will draft model pledge card language and procedures to to establish the validity of signed cards. Many employers have publically stated their objection to this provision of the proposed Act. In fact, during the week of March 8, 2009, industrialist/investor Warren Buffet, an early Obama supporter, stated in a CNBC interview that "I prefer to retain the right to vote in privacy."

Another major flaw noted by management with the EFCA concerns the mandatory arbitration provisions. Critics have noted that binding arbitration is at odds with long-standing principals of self-determination that are the underpinnings of capitalism in the private sector. Unlike the public sector, private sector employers and employees have at their disposal economic weapons, such as the lock-out and strike, to achieve their respective bargaining objectives. What becomes of these rights should the parties be forced into binding arbitration? Further, the same critics object to the lack of any defined standards the arbitrator must apply in making its determination at arbitration. The question remains open if the arbitrator will defer to standards that exist in the public sector (which are not necessarily appropriate for the private sector) or whether these "standards" will be amorphous, leading to inconsistent rulings and decisions – thus making the entire venture an even bigger gamble for management. The Heritage Foundation noted in its report that in states like Michigan that do use binding arbitration, it takes an average of fifteen months for arbitrators to make a ruling. Moreover, an arbitrator's ruling would be final. Workers could not appeal a decision that gave them too little pay and the employer could not appeal a decision that would bankrupt the company. Also, naturally employers decry the bill's provision which ignores union abuses during organizational campaigns but rather increases penalties on employers alone despite the fact that unions have been charged with making threats, violence, coercion, and intimidation thousands of times since 2000.

It is a safe bet to conclude that some version of the EFCA will pass either this year or within the next three years. It is also worthy of note that irrespective of the EFCA, in the last three years in contested union elections, unions have won a majority of those elections for the first time since 1978. It seems that the fortunes of the unions are on an upswing, even without the EFCA. Finally, it is entirely conceivable that there may be compromises for the sake of

political expediency if the EFCA is to become law. This is mainly due to an odd consortium of several Republicans and certain "Blue Dog Democrats," such as Pennsylvania's Republican Senator Arlen Specter, who often vote with the Republicans on conservative matters especially in the U.S. Senate. These so called Blue Dog Democrats are mainly from southern states which, for example, have given huge subsidies to non-union foreign auto production plants and other non-union facilities. Therefore, even with the significantly changed political landscape in Washington, there still may not be enough Senate votes to force cloture and thereby enact a compromise bill even during an activist Obama administration. What will a compromise, if any, look like? Will it substitute a three quarters vote for 51 percent of the vote? Will it soften employer only penalties? Will it amend or lesson the impact of binding arbitration? Only time will tell.

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[1] Interestingly, there were 40 Senate co-sponsors and 223 House co-sponsors for the companion bills. In 2007, the measure had 46 co-sponsors in the Senate and 230 co-sponsors in the House.
[2] See National Labor Relations Board (last visited March 16, 2009) <http://www.nlrb.gov/about_us/overrun/national_labor_relations_act>.
[3] See Service Employees International Union (last visited March 16, 2009) <http://www.seiu.org>.
[4] Isaiah J. Poole, Campaign for America's Future: How Free Choice Act Aids Workers (last modified May 1, 2007) <http://www.ourfuture.org/blog-entry/how-free-choice-act-aids-workers>.
[5] James Sherk and Paul Kersey, How the Employee Free Choice Act Takes Away Workers' Rights, The Heritage Foundation, June 20, 2007.