THE EMPLOYEE FREE CHOICE ACT

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Professionals In Human Resources Association

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The Employee Free Choice Act

Big Labor's Top Priority for the New Administration

If you haven't heard of the EFCA, it's definitely time to get up to speed on its implications and begin to develop and implement a response.

Big Labor spent an estimated $450 million to help elect Barack Obama, and now they see it as pay-back time.

Obama has already publicly expressed support for the EFCA. He has appointed a new Labor Secretary who, prior to her appointment, co-authored the EFCA (along with Obama and Biden) and called it "vital legislation."

The EFCA is the highest priority of the unions for the new administration.

What's it all about? Making unionization far easier.

Background

Reports of an exit poll conducted by Guy Molyneux, a survey expert with Peter D. Hart Research, show that 67% of union members – and 69% in swing states – supported Obama.

Richard Trumka, the AFL-CIO Secretary Treasurer, repeatedly told union members in key states "there's not a single good reason for any worker – especially a union worker – to vote against Barack Obama."

According to the United States Bureau of Labor Statistics, unions in 2006 represented only 12.1% of all American employees. In the private sector, fewer than 1 in 10 private sector employees belonged to a union. This is a dramatic decline from their membership a generation ago; in 1983, 20.1% of workers were union

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members. In 2007, the U.S. House of Representatives approved the Free Choice Act by a 241 to 185 vote. Fifty out of 51 Democratic senators and one Republican voted “yes,” but the Republicans successfully filibustered the measure. Even had it passed the Senate, President Bush had pledged to veto it.

The Republicans barely succeeded in denying the Democrats a filibuster-proof majority as the result of the 2008 elections, thus ensuring that the matter will remain a hotly contested piece of legislation.

In a December 2009 poll of influential political bloggers, the National Journal found that 32 leading Democratic pundits were evenly split on whether Obama should push for EFCA passage in his first year in office, with skeptics arguing that the economy and health care should be higher priorities.

Recent statements from spokespersons for the IBT and SEIU have suggested that the climate may not be as conducive to quick passage of the proposed bill as they had originally hoped, but organized labor across the board has continued to describe the bill as critical.

Current Law

The current National Labor Relations Act

- gives employers the right to insist on a secret ballot election among their employees on the issue of unionization, organized and supervised by the National Labor Relations Board. Although there is the possibility that an employer would voluntarily recognize a union on the basis of evidence of employee support, very few do so

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- requires the parties to bargain in good faith, but does not require that they reach agreement

- provides remedies for violations, including reinstatement and backpay

In fiscal 2008, the NLRB found that 1,771 employees were fired "in violation of their organizational rights" and it got employers to offer to rehire them; more than $124 million in back pay was awarded.

Statistics on NLRB Activities

No. of Representation cases filed:

FY 2008: 3,400

FY 2007: 3,324

No. of initial representation elections conducted:

FY 2008: 2,085

FY 2007: 2,080

% of elections won by union (first half of each year):

FY 2008: 67%

FY 2007: 59%

No. of ULPs filed:

FY 2008: 22,501

FY 2007: 22,147 (of these, approximately 6,000 were against unions)

No. of ULP complaints issued:

FY 2008: 1,149

FY 2007: 1,182

% of ULPs where formal proceedings were warranted:

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FY 2008: 36.1%
FY 2007: 36.6%

Monetary recovery:
FY 2008: $70,001,594
FY 2007: 110,388,806

No. of employees offered reinstatement:
FY 2008: 1,564
FY 2007: 2,456

Key Features of Anticipated Legislation

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Card-Checks, Not Secret Ballot Elections

Under a card-check system, an employer must recognize and bargain with the union if the union presents cards signed by a majority of employees in a bargaining unit.

Unions argue that employers have used the time period between a representation petition and the secret ballot to intimidate and coerce employees into voting against the union.

In almost any election, there is the belief by the employer, based on employee reports, that the union engages in coercive tactics to get employees to vote for the union. Commonly reported types of union coercion include repeated telephone calls to employee homes, visits (often in groups) to the employee homes, ostracizing non-supportive employees, and surrounding non-supportive employees after work. In some cases, it is reported that union supporters have sabotaged equipment, supplies, or personal effects of non-supportive employees.

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Employers point to the secret ballot procedure (as well as the union's ability to file unfair labor practices) as the best way to ensure that an employee can vote the way the employee wants to, free from the fear that either side will know how the employee voted. Thus, to avoid peer pressure from either side, an employee can say whatever he or she wants to prior to the election, and then vote in secret in the secret ballot election.

This employee protection would be taken away under a card-check system.

Mediation and Interest Arbitration, Not Good Faith Bargaining with the Right to Say "No"

Under the current law, both the employer and the employee must negotiate in good faith to reach a collective bargaining agreement. If the union believes that the employer is not negotiating in good faith, the union can file an unfair labor practice charge.

The employer currently retains the ability to say "no" to a union's negotiating demands. If the parties are ultimately unable to reach agreement, "impasse" is reached. The employer can then decide whether to continue its current terms and conditions of employment or implement its "last, best offer." The union retains the right to strike.

Under the EFCA, if the employer and union cannot agree on a collective bargaining agreement within 90 days, either party can request federal mediation. This in turn could lead to binding interest arbitration if an agreement is not reached after 30 days of mediation.

The arbitrator would be provided by the Federal

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Mediation and Conciliation Service.

Thus, the EFCA would give the union the chance to have an outside third party ultimately set the wages, benefits, and working conditions of the employees. This could occur at a very early stage. Either party could call for a government-appointed mediator after 90 days. Either party could unilaterally have the matter submitted to arbitration after 30 days of mediation, and the results of the arbitration would be binding on both parties for two years. Many of the details about how the arbitration process would work are not included in the legislation which has been proposed to date.

Many public sector employers are governed by interest arbitration. Thus, there are models and experience with interest arbitration that can be considered.

In October 2007, the Employer Center for New York State Policy issued a special report entitled "Taylor Made – the Cost and Consequences of New York's Public-Sector Labor Laws." Among other issues, it reviewed the state's experience with its interest arbitration law. The report observed that public sector employees under the compulsory interest arbitration procedure had garnered "considerably higher" salaries, "without even factoring in costly added benefits."

While some of the driving forces behind this result are unique to the public sector (e.g., elected officials who did not want to take a stand and thus decided to "let the arbitrator decide" so as to more easily pacify voters), it noted that in many cases employers settled on terms they would otherwise find unacceptable out of fear that an arbitrator would award an even worse result.

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Furthermore, because the arbitrators tended to look to precedent in deciding compensation issues, an upward spiral effect took place. It also noted that arbitrators had not been generally inclined to address creative means of financing pay increases through concessions in other areas, such as employee health insurance contributions.

The New York special report made the following recommendations with respect to interest arbitration: (1) make arbitrators consider affordability and ability to pay; (2) move from the current issue-by-issue interest arbitration format to a last-best offer system under which an arbitration could choose between the complete "final offers" of the employer and the union so as to avoid the "splitting the baby" approach so prevalent under the current structure.

It should be noted that many of the public sector jurisdictions that provide for interest arbitration preclude the covered employees from striking – something that has not been included as feature of the EFCA.

The New York special report thus highlights some of the major issues that private sector employers would face under the proposed provision.

A 2007 study done by the Mackinac Center for Public Policy reviewed experience under the Michigan state model. Under this model, the process of arbitration is supposed to go quickly. Assembling the arbitration panel should take less than three weeks. Once the panel is named, the first hearing should be held within 15 days, and hearings are supposed to be wrapped up 30 days after they commence. In reality, the study concluded that the process takes much longer. It

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stated that in the early 1990's, only one out of every six arbitration cases was resolved within 300 days of a petition being filed. A review of 29 arbitration cases resolved in 2005 and 2006 showed that only seven were resolved within 300 days, and that on average, arbitration took almost 15 months from the date that a request is filed to the date that a decision is reached. This delay ties up resources because arbitrators' awards are retroactive, meaning that pay raises awarded by arbitration often involve back pay that the employer must prepare for in advance and with a great deal of uncertainty.

There are several different ways that an arbitration procedure can be structured.

One way is on an issue-by-issue basis. Under this structure, the arbitration can pick among various proposals on all matters not resolved, and could potentially allow the arbitration to design his/her own compromises on an issue-by-issue basis.

Another way is for the parties to submit their best and final offers along with previously-agreed upon language. The arbitrator then selects one of the proposals; the arbitrator cannot create a compromise. This is sometimes referred to as "baseball" or "winner takes all" arbitration.

There are many other variations on the structure. Each type of structure has advantages and disadvantages, and the selection of a particular type will undoubtedly influence the negotiations.

One thing that employers should be prepared to do in any mediation and arbitration is present not only their own internal considerations (e.g., total compensation and benefits, ability to pay)

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but also "comparators," i.e., contracts that are "first contracts" negotiated by companies of similar size in the same region and industry, and same "maturity" as the company in question (i.e., start-up vs. well-established). Whenever possible, the company's position should be described in a way that emphasizes that it benefits both the company and the employees. Proposals that are more mainstream often fare better than those that are creative but unusual.

Arbitration also makes the negotiating history and mediation more important, since it is likely that a position taken in arbitration that appears to be different than that taken in prior proceedings will be used to impeach credibility.

The EFCA presents another problem in this regard – it is practically unheard of for a first contract to be completely negotiated within the period provided by the EFCA for reaching agreement without the ability of one of the parties to call for mediation and/or interest arbitration. This fact is not necessarily due to an obstructive employer; the union has to put together a negotiating committee and formulate initial demands – a process which itself often takes several weeks. The union negotiators have to be available to meet promptly. Furthermore, since nearly all terms and conditions of employment are mandatory topics of bargaining, there are usually a minimum of 20 pages of contractual language that have to be reviewed, considered, and negotiated.

The arbitrator's decision would bind both parties for two years unless they mutually agreed to an amendment.

Thus, it is abundantly clear from the experience of other employers under interest arbitration proceedings, as well as the author of this docu-

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ment, that the prospect of arbitration presents employers with an expensive and risky gamble.

Increased Penalties

The EFCA would increase penalties against employers who violate the law – while leaving unchanged the penalties against unions for similar violations.

Liquidated damages – would be imposed against employers who unlawfully terminate pro-union employees during any period when unions are attempting to organize and during negotiations of a first contract. These would be assessed in addition to reinstatement and back pay, by providing for back pay plus two times that amount as liquidated dates!

Civil penalties – would be assessed in amounts up to $20,000 against an employer who willfully or repetitively violated employees' rights during the above period of time.

Injunctive relief – the NLRB would be required to seek injunctive relief whenever it believed that an employer had committed an unfair labor practice during this period, a possibility that has previously been left to the NLRB's discretion.

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The Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers Act ("RESPECT")

Under current law, supervisors are agents of, and owe a duty of loyalty to, their employer with respect to labor-management activities. As the result, they are excluded from a voting for, or being included in, a union-represented bargaining unit.

Currently, the test for supervisory status focuses on supervisory authority and does not require any threshold percentage of time.

Many elections involve disputes about who is or is not a supervisor.

Under the proposed RESPECT Act, the current list of duties that qualify an individual as a supervisor would be reduced, and no individual could be classified as a "supervisor" unless that person engages in managerial duties "for a majority of the worktime."

Thus, the number of union-eligible employees would increase, it can make it more difficult for an employer to respond to organizing efforts, and individuals with managerial duties would become part of the bargaining unit thus potentially affecting their loyalty to the company.

10 Steps to Take NOW

1. Let your legislators know your position on these proposed laws.

2. Ensure that communication lines are open and that employees feel free to express their concerns and questions to management.

3. Be sure that managers are responsive to employee issues.

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4. Consider conducting employee issue and satisfaction audits – but also be prepared to act promptly in response.

5. Make sure that your company's wages and benefits are competitive and comply with applicable laws.

6. Be sure that there is a dispute resolution procedure, that it works, and that employees know about it and know that it works.

7. Review and revise employment policies, and be sure that there is a policy on visitors in the workplace that can be used to keep unwanted visitors (including union organizers) out of the workplace and that there is a no-solicitation policy in place and enforced.

8. Train managers and supervisors on the importance of being aware of potential unionization "flags," and how to respond to initial employee questions.

9. Review job descriptions from a labor law perspective with a view toward who might be included in a bargaining unit, and defending the company's position that certain individuals are supervisors or managers.

10. Educate your employees on the effect of signing a union card and their rights as to whether to sign it or not, as well as the company's position that a union is not necessary and can have an adverse effect on employees.

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A frequent author and lecturer, Ms. Tracy has been quoted as an expert source in numerous publications, including Workforce Management, *California Executive*, *Employment 360*, *Bloomberg News*, *Los Angeles Business Journal*, and *FinancialWeek*, among others.

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