

Choose Carefully: The Employee Free Choice Act



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In 2007, Representative George Miller (D-CA) and Senator Edward Kennedy (D-MA) introduced legislation that would fundamentally modify the National Labor Relations Act. Dubbed “The Employee Free Choice Act of 2007” (H.R. 800/S. 1041), the new law proposes an expedited process for employees to form a union, and creates new procedures for a union to reach a first collective bargaining agreement. The EFCA also mandates federal court injunctions for certain unfair labor practices during union organizing drives, and substantially increases the penalties for violations of employee rights.

The EFCA proposes to amend the National Labor Relations Act in three key areas, the first of which is related to forming a new union. Under current law, if an employer declines recognition to a union claiming to represent a majority of its employees, then the National Labor Relations Board must conduct and supervise a secret ballot election before it can certify a union. Generally, unless an employer consents to a “card-check” by a neutral third party, a union is entitled to certification only if it

obtains a majority of the votes cast by employees in a NLRB election. The EFCA would require the NLRB to certify a union as the bargaining representative of a group of employees through a “card-check” process, without an election. Under the proposed law, if the NLRB finds that a majority of employees in an appropriate unit have signed valid authorization cards designating a union as their bargaining representative, then the NLRB must certify the union as the employees’ representative. The new process totally eliminates the need for either employer consent or an employee vote.

The second key provision of the EFCA proposes a new procedure for a union and an employer to reach a first collective bargaining agreement. Currently, employers have a duty to bargain in good faith, but are under no obligation to reach an agreement and there is no fixed timetable for the bargaining process. The amendments proposed by the EFCA require that the parties begin bargaining within ten days of a union demand for negotiations. If an employer and the union are unable to reach an agreement for a first contract within ninety days, then either party may seek mediation through the Federal Mediation and Conciliation Service. If no contract is reached within thirty days after a request for mediation, then the contract dispute is referred to mandatory interest arbitration. The results of the interest arbitration are binding on the parties for a period of two years.

The third key provision of the EFCA proposes stronger remedies and penalties against employers for violations occurring while employees are attempting to organize or obtain a first contract. Under current law, remedies are generally limited solely to “make whole” remedies such as back pay and reinstatement. In cases of egregious violations by an employer, the NLRB may order the employer to negotiate with a union without an election. Under the EFCA, the NLRB must seek a federal court injunction against an employer whenever it finds “reasonable cause” to believe that the employer has threatened or actually discharged or discriminated against employees, or engaged in other conduct significantly interfering with employee rights, while employees are organizing or attempting to reach a first contract. The EFCA also increases the penalties for discharging or discriminating against an employee during an organizing campaign or first contract drive. Under the EFCA, an employee subjected to unlawful discharge or discrimination is entitled to three times his or her back pay. In addition, an employer may also incur civil penalties of up to \$20,000 per violation if the employer is found to have willfully or repeatedly violated employee rights during an organizing campaign or first contract drive.

The House of Representatives passed the EFCA on March 1, 2007, and on the same day the EFCA was placed on the Senate Legislative Calendar. The EFCA was subsequently referred to committee when, by a vote of 51 to 48, its supporters failed to obtain the 60 votes necessary to end debate on the bill and call for a vote. Barack Obama co-sponsored the EFCA in the Senate, and John McCain opposed its passage.

Both supporters and opponents of the EFCA are closely watching the outcome of the November elections, and expect that a Democratic win will ultimately result in passage of the EFCA or some other proposal to amend the National Labor Relations Act. ★

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The Rochester Business Alliance will be hosting a trip to China in March 2009 with three departure dates: March 17, 18, and 19. The nine-day trip visits Beijing, Suzhou, Hangzhou and Shanghai with an optional side trip to Xi-an.

Details coming soon on our web site