

An Update:

Employee Free Choice Act: The Need to Remain Vigilant in Opposition

By Gregory B. Robertson

The new and "improved" version of the Employee Free Choice Act (EFCA) remains the most radical transformation of American labor law since the New Deal. EFCA has undergone a slight political compromise in order to make it seem more palatable to those politicians who expressed lingering concern over maintaining some semblance of democracy in the workplace. Gone, for the moment anyway, is mandated recognition based solely on signed authorization cards. It is replaced by an election to be scheduled at the union's request within five (5) to ten (10) days after the union announces that it is ready for the vote to occur. The mandatory contract arbitration provisions remain as do the escalated penalties against employers for violations. The "compromise" also bans mandatory captive audience meetings and allows union organizers access to the company's employees on the employer's premises and on company time. For those who have opposed EFCA, this "compromise" does not even begin to solve the fundamental problems with this proposed legislation. However, without continued opposition by the business community and others, the legislator who has paid only passing attention to EFCA may mistakenly conclude that the issues with the statute have been resolved by the reinstatement of the secret ballot election.

Proponents justify EFCA's radical reach beginning with the unproven assumption that union representation is a good thing. Millions of working men and women in this country don't agree and have expressed that opinion either in voting against unions in NLRB elections, in decertification votes or in their total lack of interest in card signing drives. For the last 20 years or more, less than 10% of employees in the private sector have chosen union representation and that number has never been above 35% even in the 1950's which were the best of times for unions. Union representation is a choice which should be protected but it is by no means a foregone conclusion to be virtually guaranteed by federal legislation.

As now proposed, EFCA continues the secretive card signing process but requires an election to occur with five (5) to ten (10) days after the union files its petition with the NLRB signifying

that it has enough signed cards AND that it is politically ready for the election. Smart unions will file these petitions late on a Friday which in turn will effectively cut down the pre-election period to two or three days. The proposed law does not require that the employer be notified of any card signing activity and good organizers almost always tell employees to keep the organizing efforts a secret from their employer. Thus, the first opportunity the company may have to tell its employees its position on the subject matter, on the particular union involved or on the pros and cons of unionization may well be during the several days after the petition is filed. That is hardly enough time to gather the employees for a single meeting much less to gather and distribute information about the union, the process and what it may mean to the employees, their families and the company they work for to have a union. Of course, by banning meetings on the subject where employee attendance is mandatory and allowing access/rebuttal by union organizers on company property, the new EFCA dilutes the employer's one and probably only opportunity to convey its message to its employees before the election. An election five (5) days after the petition is almost like not having an election at all. Democracy requires the opportunity for meaningful communication not a shortcut for the sake of appearances and gaining congressional support.

The proposed bill still restricts the ability of employers and unions to bargain freely. Under EFCA, if an employer and a union bargaining for their first contract cannot reach agreement within 90 days plus a brief mediation period, they must submit the agreement to binding arbitration. A federal arbitrator then gets to impose the terms under which the employer must conduct its business for at least two years. The employer has no power to reject these terms. Traditionally, arbitration is a process where a neutral arbiter interprets agreements that the parties reached voluntarily. EFCA overturns this concept, allowing the federal arbitrator to impose the terms of the contract, bind the employer, and thus dictate the conditions governing the workplace.

EFCA also threatens employers with large costs and new burdens. It allows the government to impose fines up to \$20,000 per violation against employers who willfully violate its ambiguous limits, increases the amount employers must pay when an employee is discharged or discriminated during an organizing campaign, and requires the Board to seek mandatory injunctions for violations

of obligations that may not be well-defined. In practice, these provisions would force even scrupulous employers, weary of the potential litigation exposure, to either refrain from communicating with employees or face large legal costs and risks.

The future of EFCA is uncertain at this point. Certainly labor can pull enough Congressional support to get significant "reform" legislation passed albeit perhaps not as radical as the original draft of EFCA. Likewise, the President will support most anything that Congress passes in this regard. Health care, the economy and other factors present timing issues for pressing the case for any version of EFCA. However, labor has vowed to continue the fight for EFCA as originally drafted. As the debate continues, however, other events are transpiring.

The President's nominees for the NLRB will likely be confirmed and will create the most pro-labor Board since the Fanning Board of the 1970's. Even without EFCA, the new NLRB will be able to change many of the rules including shortening the election period, fashioning tougher penalties, allowing union access and curtailing the employer's right to campaign.

In addition, organized labor is behind the Shareholders Bill of Rights Act which would allow any shareholder of as little as 1% of a company's stock to propose and run competing slates of Board members against incumbents. The company would be required to foot the bill for the associated expenses. This would allow, for example, unions waging corporate campaigns the ability to abuse the electoral process to further its campaign ends which often run counter to the best interests of the company involved and its shareholders.

It is critical that business remain active in the debate over these and other pieces of proposed legislation. Recognizing that the timing issues presented by the recession and other legislative priorities will not be an impediment for activity on the labor/employment legislative front for much longer, companies would be prudent to look carefully at all aspects of their human and labor relations programs and undertake whatever training and other initiatives are necessary to be prepared when the onslaught of legislation arrives.