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EMPLOYEE FREE CHOICE ACT IN THE 111TH CONGRESS: THE BATTLE BEGINS

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(Editors Note: This is the second in a series of articles published by Jones Walker's Labor and Employment Practice Group on the proposed Employee Free Choice Act. The first article in the series, authored by Sidney Lewis and Mark Adams, may be viewed by clicking on the following link http://www.joneswalker.com/assets/attachments/1336.pdf).

The grossly misnamed and highly controversial Employee Free Choice Act ("EFCA") was introduced by Senators Ted Kennedy (D-MA) and Tom Harkin (D-IA), and Representative George Miller (D-CA) in the 111th Congress on March 10, 2009 (H.R. 1409, S. 560). The legislative fight over EFCA is a battle royale between business and organized labor and is a defining moment in the history of labor relations in the United States. The President of the U. S. Chamber of Commerce, Tom Donahue, in a major address in Washington last week, called this legislation "Armageddon" and a "game changer." EFCA is clearly the most ambitious and transformative piece of labor legislation to come before Congress since the 1935 enactment of the National Labor Relations Act ("NLRA") and would radically alter the balance of power between management and labor.

Seldom in our history has a bill so alarmed the entire business community that virtually all employers, representing large business, small business, and every major trade association and state and local chamber of commerce in the nation, have united in an effort to defeat this legislation. Over 500 of these chambers, trade associations, and business groups, led by the United States Chamber of Commerce and the National Association of Manufacturers, have formed the Coalition for a Democratic Workplace ("CDW") in an effort to defeat EFCA. Jim Funk, President of the Louisiana Restaurant Association, is the Louisiana State Coordinator for CDW, and Steve Ridley, a labor lawyer in our New Orleans and Capitol Hill offices, is working with Mr. Funk as well as the Louisiana Association of Business & Industry ("LABI") as Co-coordinator of CDW. The real fight on this bill will be in the Senate, where Senate Republicans and moderate Democrats from some right-to-work states in the South will filibuster the bill and attempt to hold on to 41 Senators to prevent "cloture," which requires 60 votes to cut off debate and thereby kill the filibuster and move the bill to final passage by a majority of senators. The fight on EFCA will probably be in the summer, but could be brought to the floor at any time. Organized labor will likely not push the bill to the Senate floor until after the challenge over the second senator from Minnesota is resolved by seating either Coleman (R-MN) or Franken (D-MN).

In the meantime, employers should become familiar with the requirements and ramifications of the new law or any of the compromise bills pending. They may also wish to contact their representatives in Congress to express their views against EFCA and cloture and begin taking lawful steps to prevent unionization, which steps will help regardless of whether EFCA becomes law.

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I. What the So-Called "Employee Free Choice Act" Does

A. Card Check Recognition – End of the Secret Ballot

EFCA would amend the National Labor Relations Act ("NLRA") in three significant respects. The one receiving the most media attention is the abolition of the right to a "secret ballot" election process by which employees decide whether to be represented by a union – the so-called "card check" provision. Currently, the NLRA does not require an employer to recognize a union unless the union receives majority support from employees in a secret ballot election. This election is conducted by the National Labor Relations Board ("NLRB"), usually following a 42-day campaign period. The campaign period is commenced after a petition by the union and notification to the employer of the union's attempt to organize. During the campaign period, both the union and the employer can attempt to persuade employees of their positions on unionization. When the election occurs, it is conducted and closely supervised by the NLRB in "laboratory conditions" to ensure that it is fair and that all employees have the opportunity to exercise their true free choice by casting a secret ballot.

The EFCA bill, in its current form, would change this procedure by eliminating an employer's right to demand a secret ballot election before requiring the employer to bargain with the union. The EFCA would require employers to recognize a union upon being presented with "authorization" cards signed by a majority of its employees, presumably indicating that they desire union representation.

The bill's elimination of an employer's right to a secret ballot election is a major challenge for several reasons:

- An employer may be unaware of off-premises organizing activity, thereby eliminating its ability to educate employees about the pros and cons of unionization and the economic impact of unions, and to present its side of the story and respond to union arguments and misrepresentations;
- Employees will lose the ability to hear both sides of the argument before being pressured into signing a union authorization card by heavy-handed union organizers using high pressure sales techniques; and
- Employees lose their ability to vote anonymously in a secret ballot election, creating a likelihood of coercion and retaliation when union organizers know precisely which employees are supporting the union and which are not.

Under current law, a union can petition the NLRB for an election with only 30 percent of bargaining unit employees' signatures. As a matter of practice, however, virtually all major unions choose to petition the NLRB for an election only after they have collected signatures of over 50 percent of the bargaining unit. Statistics maintained by the NLRB prove that unions today are winning about 50 percent of all representation elections, the same percentage they've been winning for at least the last 30 years. So the unions' argument that it's become too hard for employees to unionize is false advertising. As a practical matter, EFCA would wholly displace secret ballot union elections with the new "card check" procedure. No union will petition for an election with only 30 percent, or anything less than 50 percent, of cards signed. Moreover, EFCA would prohibit a secret ballot election whenever the signed union cards exceed 50 percent of an appropriate bargaining unit, and there is no procedure in the bill for checking cards to ensure they were freely signed without union threats and coercion. Indeed, there is no mechanism in EFCA to ensure employee free choice.

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B. Mandatory "Interest" Arbitration of the Initial Contract

The second, and possibly even more objectionable, feature of EFCA is the amendment to the NLRA that would revolutionize and alter any genuine collective bargaining for the all-important first contract after employees first unionize. EFCA's imposition of compulsory interest arbitration of a first contract of two years duration, in effect, is not collective bargaining at all, and instead lets a third party panel of arbitrators dictate an agreement without the need of obtaining the assent of either party. In addition, unlike under current law, employees will not have a right to ratify this arbitral contract before having it imposed on them by fiat for two years.

The current EFCA bill allows either party to request mediation if agreement on an initial collective bargaining agreement is not reached within 90 days and mandates binding arbitration if an agreement is not reached within 30 days of that request. An arbitration board's decision would be binding on the parties for two years unless they mutually agreed to an amendment. This change to the law would severely limit employers' bargaining strategies and freedom to negotiate. The provision might lead unions to inflate their demands, knowing that an arbitration board might well split the difference between the employer's and the union's positions.

The two central pillars of the original NLRA, which form the basis upon which the U.S. Supreme Court has upheld the Act's constitutionality, are: (1) union democracy whereby unions can become the "exclusive bargaining" representative of employees only through a secret ballot election; and (2) the absence of anything in the Act that would compel either party to make an agreement or to permit government supervision of its terms. This second pillar of free negotiations was clearly and painstakingly reinforced by the legislative history of the NLRA as follows: "… [the] committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement because the essence of collective bargaining is that either party is free to decide whether proposals made to it or satisfactory." [S. rep. No. 573, 74th Cong. 1st Sess. (1935), reprinted in 2 Legislative history of the National Labor Relations Act of 1935, at 2312 (1935)]. EFCA rejects entirely both of these fundamental premises of the NLRA.

C. Increased Damages and Penalties for Unfair Labor Practices

Finally, EFCA substantially increases penalties imposed on employers for violations of section 8(a)(3) of the NLRA, which prohibits discrimination against employees for their union activities. This section also mandates the NLRB to give priority to unfair labor practice charges that arise during an organizational campaign; a backstop provision to maintain the advantages organized labor expects to receive from the card check provisions in the bill. These penalties would apply during any period when unions are attempting to organize and during negotiations of a first contract. In addition, the current bill would:

- Increase the penalty for discharging or discriminating against an employee during the relevant period to provide for back pay plus two times that amount as liquidated damages (i.e., treble back pay damages);
- Impose civil penalties of up to $20,000 for each violation where an employer is found to willfully or repeatedly violate employee rights during this period; and

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- Mandate that the NLRB seek a federal court injunction whenever it believes an employer has committed an unfair labor practice during this period, something that has previously been left to the NLRB's discretion.

However, the bill would not impose similar penalties for union unfair labor practices including threatening and coercing employees to obtain their signatures on union cards. Thus, contrary to its name, EFCA would further erode the true free choice employees enjoy under current law.

D. The True Economic Impact of EFCA

In short, EFCA would streamline the process of union organizing and tilt the process much more heavily in favor of unions in a bold and unprecedented fashion. Conversely, it would make it extremely difficult for employers to fight union organizing efforts and severely limit the bargaining power of all employers, especially small businesses. Small business as a group is by far the largest source of new jobs in the country, and they will find themselves besieged with increasing demands for unionization, for which they are ill-equipped to cope given their limited budgets. In this period of record unemployment and the worst financial crisis in 40 years, this is no time to divert the attention of small business entrepreneurs from their essential tasks of production, marketing, and sales upon which their business success depends. In a major study of the effects of EFCA on the economy by Richard A. Epstein for The University of Chicago Law School, (John M. Olin Law & Economics Working Paper No. 452, 2nd Series, January 2009 at page 10), Professor Epstein noted: "The likely consequence of EFCA will be to retard the formation of small businesses, as fledgling entrepreneurs will reassess their prospects of success to take into account the danger of derailment at an early stage in the process. In the long-term the EFCA will reduce the rate of firm formation, and thus deprive the economy of a central driver of new job creation and technology growth."

II. Further Information

To review the text of the bill, visit http://thomas.loc.gov and search by bill number H.R.1409, S. 560.

III. Developing a Plan of Action Now

Notwithstanding the uncertainty over EFCA's ultimate form and fate, union-free employers should review actions that can be taken now to keep their operations union-free. EFCA, in some form, is still very likely to be passed into law. Possible steps employers should take now include:

A. Company's Position Statement on Unions and Employee Relations

Communicate your stand on the issue of unions to your employees clearly, so they will know your philosophy before any card signing activity gets underway. Prepare an orientation program for all new employees which explains your company's union-free status and provides further education through the use of videos or DVDs explaining the dangers of unionization and the economic and job security advantages of remaining union-free.

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B. Employee Issue and Satisfaction Audit

Dissatisfied employees and festering employment issues are fertile ground for union organizers. Reasonable preventive action in some cases may include conducting an objective audit of the workplace for the presence of such issues. It is also important to analyze the competitiveness of wages and benefits and any expression of employee health and safety concerns in the workplace.

C. Keep Communication Lines Open and Be Responsive to Employee Issues

Two-way communications and rapid responsiveness to employee concerns are essential to prevent employees from viewing a union as necessary. Feedback from employees is important to keep management from being isolated or insulated from workplace problems. Employees' perceptions as to the fairness of resolutions to their problems have a significant impact on how employees respond to union organizing. Provide positive employee relations training to all management and supervisory personnel. Poor supervision is often a primary reason that employees seek out or join a union, so supervisory training should minimize these risks. The primary objectives of such training are to: (1) educate supervisors on the impact unionization would have on your company and their jobs as supervisors; (2) familiarize supervisors with the factors that contribute to unionization and actions to minimize the risks; and (3) help managers and supervisors recognize and understand the early warning signs and language of union organizing. It's also critical that you maintain constant vigilance and respond immediately to the first hint that a union is pressuring your employees to sign cards.

D. Review Employment Policies and Practices

Certain policies, enacted before union organizing occurs, can be effective preventive measures or provide useful tools in the event organizing begins. Because implementing a policy in response to organizing is likely to be construed as an unfair labor practice, it is important to review, amend, or implement new preventive policies prior to the onset of any organizational activity. Management should consider:

- A "no-solicitations" policy to keep unwanted visitors, including union organizers, out of the workplace altogether and limit employee-to-employee solicitations to non-work areas during non-work time.
- A similar policy that limits the distribution of literature by employees to non-work areas during non-work times.
- An open door policy that encourages employees to bring concerns directly to their supervisors.
- A policy covering personal use of business e-mail, internet access, and other electronic technology including business telephones.

E. Conclusion

Regardless of the form EFCA finally takes, if any version of the bill is enacted, it will dramatically alter the balance of power in favor of unions and their ability to organize your employees. Accordingly, you must adapt your workplace strategies and practices now to meet this new and serious threat to your union-free status. It is perilous to await the final

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outcome of the EFCA fight when the unions are already engaging in card signing activity in anticipation of EFCA's passage. Contact your labor attorney now to begin the development of a strategy to combat the certain union onslaught that will be forthcoming if EFCA survives in any form.

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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