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Employee Free Choice Act

Legal Strategies for Employers Facing Broader Unionizing Rights

A Live 90-Minute Audio Conference with Interactive Q&A

Today's panel features:

Teresa R. Tracy, Principal, **Berger Kahn**, Los Angeles

Andrew J. Rolfes, Member, **Cozen O'Connor**, Philadelphia

Steven M. Swirsky, Member, **Epstein Becker & Green**, New York

Wednesday, April 15, 2009

The conference begins at:

1 pm Eastern
12 pm Central
11 am Mountain
10 am Pacific

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EMPLOYEE FREE CHOICE ACT

Certification of Union Without Secret Ballot

Sponsored by the Legal Publishing Group of Strafford Publications

April 15, 2009

Teresa R. Tracy, Esq.
Berger Kahn, A Law Corporation
4551 Glencoe Avenue, Ste. 300
Marina del Rey, CA 90292
(310) 821-9000, x717
ttracy@bergerkahn.com

UNION CERTIFICATION

1. Recent Statistics

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%

2. Overview of Current Procedures

Under current law, a petition may be filed by a union alleging that a substantial number of employees want to be represented for purposes of collectively bargaining and that it desires to be certified as their representation. This petition is commonly referred to as an "RC – Certification of Representative" petition, or simply an "RC."

Although the RC petition form has a space for the date on which the petitioner requested recognition from the employer, it is not a condition precedent to the filing of the petition that a demand for recognition be made.

The union must allege and be able to submit proof that the petition is supported by 30% or more of the employees in the proposed unit. This proof is presented when the petition is filed within 48 hours thereafter.

After the petition is filed, the regional director of the NLRB investigates to determine if there is any question about (a) whether the employer is engaged in or has a business that affects interstate commerce and is thus under the jurisdiction of the NLRB,[1] (b) whether a written collective bargaining agreement is in effect that

[1] Almost all employers are large enough to be under NLRB jurisdiction. Some of the factors are: gross annual revenue from sales of goods or services of $500,000 or more; annual purchases of goods, supplies, commodities or services purchased directly from other firms located outside the state of $50,000 or more; annual purchases of goods,

bars the filing of the petition, or (c) whether the showing of representation among the employees is insufficient (i.e., less than 30%).

At this point, the regional director also investigates whether the union's proposed bargaining unit is appropriate. This is usually an issue that is contentious between the employer and the union, with each jockeying for a bargaining unit that, in the view of that party, is most desirable. This discussion can involve the status of one or more people as supervisors,[2] independent contractors, guards, professionals, agricultural laborers, domestic servants, individuals employed by a apparent or spouse, and anyone employed by an employer subject to the Railway Labor Act or by an employer who does no fall within the coverage of the Act (and therefore excluded from the bargaining unit or, in the case of professionals, requires a majority vote of the professional employees to be included) and the community of interest[3] between the positions that the union is proposing to be included in the unit. It is not uncommon for the employer to take the position that a larger unit is appropriate or that a smaller unit would be more appropriate. However, the unit does not have to be the "most" appropriate bargaining unit; it only needs to be "an" appropriate unit.

If the regional director finds a problem with the petition, the regional director can request the union to withdraw its petition; if the union refuses to do so, the regional

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supplies, commodities, or services purchased from firms located inside the state, but which originated outside the state of $50,000 or more; annual revenue from the sales of goods, products, or commodities delivered directly to points outside the state or from services to firms located outside the state of $50,000 or more; annual revenue from sales of goods, products, or commodities delivered to, or from services performed for, firms located within the state, which firms, in turn, made sales to customers located outside the state of $50,000 or more.

[2] Supervisory status is probably the most litigated job classification. The current definition of supervisor is "any individual having authority, in the interest of the employer, to hire, fire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

[3] Factors considered in determining community of interest include same hours of work, job duties, tools, equipment, skills, compensation, benefits, production methods, transfers between departments or location, same overall supervision and management policies, and integration of work flow.

director can dismiss the petition subject to the union's right to appeal that decision to Washington.

However, the most usual outcome is that the petition is processed.

The regional director notifies the employer that the petition has been filed, requests a list of names and job classifications of employees in the proposed unit, and schedules a conference.

It is common at this point for counsel to become involved.

There are several different possibilities from this point.

The employer may decide not to submit a list of employees. Some employers are reluctant to submit this list because it may become accessible to the union; furthermore the list may unwittingly commit the employer to a position on the appropriate bargaining unit by including or excluding a name/job classification. However, if the union has grossly understated the number of employees in the unit, and the employer believes that the union does not have the required 30% showing of interest, it may be advisable to submit a list and request dismissal.

The employer may decide not to submit a response to the commerce questionnaire (or stipulate to NLRB jurisdiction). In the absence of a response from the employer, the NLRB may rely on other evidence to determine jurisdiction.

One of the topics that is addressed at the conference is the parties' positions concerning the appropriate unit, the eligibility of individuals to vote. The NLRB exerts significant pressure on the two sides to reach agreement on a consent agreement. Due to this pressure, many employers do sign an agreement, particularly if they can get concessions on issues that they perceive as advantageous, such as the date and time of the election itself.

There are two types of consent agreements. One is referred to as an "Agreement for Consent Election." This type of agreement provides that the rulings of the regional director are final and binding on all questions relating to the election (e.g., voter eligibility, challenges to ballots, objections to the conduct of the election or other conduct that affects the outcome of the election).

The second type of agreement is a "Stipulation for Certification Upon Consent Election."

The difference between the two types of agreements is that the stipulated agreement allows for either party to appeal to the Board in Washington for the

final determination of any disputed matters following the election. This is a strategic decision for the employer, but most employers want to reserve the right to appeal.

The signing of the agreement assumes that there is agreement on the bargaining unit. When the two sides cannot resolve their differences at the conference, a hearing will be required to settle this issue.

Thus, an employer should only sign an agreement if it is satisfied with the bargaining unit, the specific employees eligible to vote, and the election date.

Setting the election date is often just as strategic as the composition of the bargaining unit. Various factors that come into play in this decision are (a) giving the employees sufficient time to hear from the employer and discuss among themselves the potential consequences of being represented by a union, (b) selecting a date that is likely to result in the highest voter turnout – usually a payday.

In a Board-directed election, the full 30 days after the Board's Direction of Election is normally taken. When the Regional Director directs an election, the election normally should not be scheduled prior to the 25th day thereafter, unless the right to file a request for review has been waived, not later than the 30th day thereafter. If the 25th day is not a workday suitable for an election, then the election should be set for a later, not an earlier, day.

If the two sides reach agreement, the regional director will issue a Notice of Election.

The employer does not have to agree to an election; it can insist on a formal hearing. In this case, the regional director will issue a Notice of Representation Hearing. On the date of the hearing, the hearing officer will again try to get the parties to reach agreement before starting the hearing. Among the issues on which testimony will be elicited (or a stipulation entered) are (a) whether there is another union that claims an interest in the proceeding or wishes to intervene; (b) whether there is jurisdiction; (c) whether the union is a *bona fide* labor organization; (d) evidence regarding what the bargaining unit should be, including the status of one or more positions as excluded from the unit due to status.

After the testimony is presented, the parties are given an opportunity for oral argument. The hearing officer asks if either side wants to file a brief. If so, briefs are due within seven days. Because the court reporter often takes some time to transcribe the testimony, it is almost always necessary to request an extension to file briefs, which can be granted for a maximum of 14 days.

After the hearing is closed and the briefs filed, the hearing officer will analyze the evidence but makes no recommendation about resolution of the issues. The regional director makes the decision. The regional director will issue a Decision and Direction of Election.

After the election is directed, a field examiner discusses with the parties the arrangements for the election, including dates, times, and locations.

Within 7 days after a decision by the regional director, or approval of the consent agreement, the employer must send a list of the names and addresses of all employees in the bargaining unit to the regional director. The regional director then sends a copy of this list to the union.

The union is given a minimum of 10 days to use the list, so the regional director will not set the election date earlier than 10 days after the union receives the list. Thus, the election date is not normally set earlier than 17 days from the date of the regional director's decision or approval of a consent agreement.

Preceding and continuing on through this process, the employer and union can be expected to provide employees with information about the upcoming union, and about the pros and cons of being represented by a union. There are a number of restrictions on what an employer can do; it is important that an employer consult with knowledgeable counsel about these restrictions. For example, no supervisor, manager, or other employer representative can Threaten, Interrogate, Promise, or Spy ("TIPS") on employees in the bargaining unit.

The election is held on the date, time, and location that have been directed.

There are pre-election procedures designed to ensure that employees are aware of the election and that it is conducted in a fair manner. A critical element in this regard is the fact that the election is by secret ballot under the supervision of one or more NLRB agents. The NLRB agents set up the voting booth and handle other details associated with the election. The agents also maintain a neutral stance. Each party is allowed one or more observers, who can check off voters as they enter. However, there should not be any conversation, and certainly no electioneering in or near the voting area, and both management and union representatives (other than the observers) should stay away from any location where they can be seen or heard by voters while entering or leaving the voting area. Typically, the voting area is at a place that is at least semi-private to reduce allegations that one or the other party is spying on what is going on.

Only one occupant is allowed per enclosed voting booth, and there cannot be conversation between the occupants of the booth. Each voter marks a ballot "yes" or "no", indicating a desire to be represented by the union or a desire to not be represented by the union. After voting, the voter will leave the voting booth, deposit the folded ballot into the ballot box, and leave the voting area.

At the end of the voting time, the ballot box is sealed, and should only be handled by the Board agent.

Challenges to the ability of an individual to vote can be made by either of the observers, or by one of the parties as the ballots are opened and counted. If the number of challenged ballots is insufficient to affect the election outcome, the challenged votes are effectively disregarded.

The ballot count is done soon after the close of the voting period at the polling place. Board agents, observers, and other outside observers (e.g., supervisors, attorneys, and union representatives) can be present. The Board agents are the only ones who can handle marked ballots. Sometimes there are issues regarding the intent of a voter; these have to be resolved or the ballot is treated as a challenged ballot.

The Board agent will count out the ballots cast for "yes" and "no" verbally.

The union must get a majority of the valid ballots case in order to win. Thus, a majority of the unit employees do not have to vote for it to be determinative. If the count of valid votes cast results in a tie, the union loses.

Following the election, there are two types of post-election objections. One kind of objection relates to the manner in which the election itself was conducted. The second relates to conduct that affected the results of the election.

Objections based on either of the above must be filed by the close of business on the 7th day after the tally of ballots. The objections must be accompanied by a short but specific statement of the underlying reason for the objection, and within 7 days the objecting party must furnish evidence in support of the objections. This triggers an investigation and additional related procedures.

A certification of representative identifies the union's status as exclusive bargaining representative for one year after the date of certification, and indefinitely thereafter until such status is shown to have ceased. Thus, absent very unusual circumstances, the union will be the exclusive bargaining representative during the first year even if it loses support from a majority of employees, even if a

majority of employees say they no longer wish to be represented by the union, and even if a competing union wishes the represent the employees.

3. Key Features of Anticipated Legislation 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.

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.

Teresa R. Tracy is chair of Berger Kahn's Labor & Employment Group. She has practiced exclusively in labor and employment law for 28 years and has extensive experience representing employers in wrongful termination, discrimination, harassment, wage and hour matters, class actions and traditional labor law. She also advises clients on compliance with the myriad of state and federal regulations governing employers. Ms. Tracy is the author of numerous articles. She has been selected six times by her peers as a Southern California Super Lawyer in the area of Labor and Employment. In 2005, she was named one of the "Top 75 Women Litigators" by the *Los Angeles Daily Journal*.

J.D., Loyola University School of Law

(310) 821-9000, x717
ttracy@bergerkahn.com

EMPLOYEE FREE CHOICE ACT

Preparing for the Act

Sponsored by the Legal Publishing Group of Strafford Publications

April 15, 2009

Teresa R. Tracy, Esq.
Berger Kahn, A Law Corporation
4551 Glencoe Avenue, Ste. 300
Marina del Rey, CA 90292
(310) 821-9000, x717
ttracy@bergerkahn.com

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.

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 sued 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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ttracy@bergerkahn.com

The Employee Free Choice Act

Alternatives to EFCA – Compromise Proposals From Congress And Business Groups

Andrew J. Rolfes
Cozen O'Connor

The Employee Free Choice Act was introduced in both the House of Representatives (H.R. 1409) and the Senate (S. 560) on March 10, 2009. Since that time, a number of Senators (Arlen Specter, R-PA; Dianne Feinstein, D-CA; and Blanche Lincoln, D-AR) have publicly announced their intention not to support EFCA in its present form. Even before these announcements, which make it highly unlikely that EFCA will be enacted this year as currently drafted, alternatives to EFCA began to surface. Proponents of these alternatives pitch them as reasonable compromises to EFCA, but to date, no "compromise" legislation has garnered much support. The following is a summary of the key elements of the more significant "compromise" proposals made to date:

1. The National Labor Relations Modernization Act

On March 5, 2009, Rep. Joe Sestak, D-PA, introduced the National Labor Relations Modernization Act (H.R. 1355) as an alternative to EFCA. A copy of the bill is attached. The key features of Rep. Sestak's bill (which has no co-sponsors), are:

- Preservation of the secret ballot for union elections;
- Interest arbitration, but after a longer period for negotiations than provided under EFCA – 120 days for negotiations, followed by 120 days for mediation, followed by arbitration with a decision due in 30 days that would be binding for 18 months;
- Increased penalties similar to EFCA – treble damages (backpay plus double the amount of backpay as liquidated damages); civil penalties of $20,000;
- Equal access to employer property for union organizing activities.

2. The Committee for a Level Playing Field

On March 22, 2009, representatives of three companies – Starbucks Coffee Corp., Costco Wholesale Corp. and Whole Foods Markets, Inc. – announced an ad hoc "Committee for a Level Playing Field for Union Elections," whose mission is to offer a "third way" approach to reforming labor law. Rather than specific proposals, these companies offered a platform statement of principles to reform the union election process. Those principles include:

- Guarantee the right to a secret ballot for union elections;
- Treat certification and decertification equally by allowing management to initiate a decertification campaign;
- Guarantee a fixed time period for conducting secret ballot elections;

- Provide equal access to employees by unions and management for campaign presentations during non-working hours;

- Provide for expedited enforcement and stricter penalties for unfair labor practices;

- Preserve private collective bargaining with no mandatory interest arbitration, but provide stricter penalties and expedited enforcement for violations of the duty to bargain in good faith.

3. Arlen Specter's "Suggested Revisions To The National Labor Relations Act"

In his remarks delivered March 24, 2009, Sen. Specter emphasized the difficulty of his decision to oppose EFCA, but noted that he had been subject to unprecedented lobbying from both sides of the issue. A copy of those remarks is attached. Sen. Specter also noted the "particularly bad" timing of introducing EFCA during a severe recession. Nonetheless, he made clear his opposition to the elimination of the secret ballot and the imposition of contract terms through mandatory arbitration. He also offered a series of "suggested revisions" to the NLRA which he would recommend, including:

- Establish an expedited timetable for elections, including resolution of challenges (hearing on unit issues within 14 days after petition; election 7 days thereafter; challenges filed within 5 days; Board ruling on challenges within 15 days);

- Create additional unfair labor practices, including the denial of equal access for unions to respond to captive audience speeches;

- Enhanced penalties similar to EFCA (treble back pay and civil penalties);

- Require bargaining within 21 days after union certification with mediation 120 days after bargaining begins, but no interest arbitration;

- Allow an order establishing a bargaining schedule upon a finding that a party is not negotiating in good faith;

- Provide that ALJ and Regional Director decisions become final if not reviewed by the Board within 180 days.

4. Miscellaneous proposals

There have been other alternatives to EFCA reported recently, some attributable to anonymous congressional aides, including variations on the card-check theme, such as allowing for certification of a union only for a super-majority of authorization cards in a proposed unit (such as 60% or higher), or an authorization card offering employees the option of authorizing representation or requesting a secret ballot election. None of these have been included as part of a more formal proposal such as those discussed above. Undoubtedly, more alternatives will surface in the coming weeks if support for EFCA continues to erode.

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111TH CONGRESS
1ST SESSION

H. R. 1355

To amend the National Labor Relations Act to require employers to provide labor organizations with equal access to employees prior to an election regarding representation, to prevent delays in initial collective bargaining, and to strengthen enforcement against intimidation of employees by employers.

IN THE HOUSE OF REPRESENTATIVES

MARCH 5, 2009

Mr. SESTAK introduced the following bill; which was referred to the Committee on Education and Labor

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A BILL

To amend the National Labor Relations Act to require employers to provide labor organizations with equal access to employees prior to an election regarding representation, to prevent delays in initial collective bargaining, and to strengthen enforcement against intimidation of employees by employers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "National Labor Relations Modernization Act".

SEC. 2. PREVENTING EXCESSIVE DELAYS IN INITIAL COLLECTIVE BARGAINING AGREEMENTS.

Section 8 of the National Labor Relations Act (29 U.S.C. 158) is amended by adding at the end the following:

"(h) Whenever collective bargaining is for the purpose of establishing an initial agreement following certification or recognition, the provisions of subsection (d) shall be modified as follows with respect to any employer having 20 or more employees:

"(1) Not later than 10 days after receiving a written request for collective bargaining from an individual or labor organization that has been newly organized or certified as a representative as defined in section 9(a), or within such further period as the parties agree upon, the parties shall meet and commence to bargain collectively and shall make every reasonable effort to conclude and sign a collective bargaining agreement.

"(2) If after the expiration of the 120-day period beginning on the date on which bargaining is commenced, or such other period as the parties may agree upon, the parties have failed to reach an agreement, either party may notify the Federal Mediation and Conciliation Service of the existence of a dispute and request the appointment of an arbitra-

tion panel. Whenever such a request is received, the Service shall promptly appoint an arbitration panel which will use its best efforts, by mediation and conciliation, to bring the parties to agreement.

"(3) If after the expiration of the 120-day period beginning on the date on which the request for mediation is made under paragraph (2), or such other period as the parties may agree upon, the arbitration panel appointed under paragraph (2) is not able to bring the parties to agreement by mediation and conciliation, the such panel shall then begin to arbitrate the dispute in accordance with such regulations as may be prescribed by the Service. Such panel shall render a decision settling the dispute not later than 30 days after commencing arbitration and such decision shall be binding upon the parties for a period of 18 months, unless amended during such period by written consent of the parties.".

SEC. 3. STRENGTHENING ENFORCEMENT AGAINST INTIMIDATION OF WORKERS.

(a) INJUNCTIONS AGAINST UNFAIR LABOR PRACTICES DURING ORGANIZING DRIVES.—

(1) IN GENERAL.—Section 10(l) of the National Labor Relations Act (29 U.S.C. 160(l)) is amended—

(A) in the second sentence, by striking "If, after such" and inserting the following:

"(2) If, after such"; and

(B) by striking the first sentence and inserting the following:

"(1) Whenever it is charged—

"(A) that any employer—

"(i) discharged or otherwise discriminated against an employee in violation of subsection (a)(3) of section 8;

"(ii) threatened to discharge or to otherwise discriminate against an employee in violation of subsection (a)(1) of section 8; or

"(iii) engaged in any other unfair labor practice within the meaning of subsection (a)(1) that significantly interferes with, restrains, or coerces employees in the exercise of the rights guaranteed in section 7;

while employees of that employer were seeking representation by a labor organization or during the period after a labor organization was recognized as a representative defined in section 9(a) until the first collective bargaining contract is entered into between the employer and the representative; or

"(B) that any person has engaged in an unfair labor practice within the meaning of subparagraph (A), (B) or (C) of section 8(b)(4), section 8(e), or section 8(b)(7);

the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred.".

(2) CONFORMING AMENDMENT.—Section 10(m) of the National Labor Relations Act (29 U.S.C. 160(m)) is amended by inserting "under circumstances not subject to section 10(l)" after "section 8".

(b) REMEDIES FOR VIOLATIONS.—

(1) BACKPAY.—Section 10(c) of the National Labor Relations Act (29 U.S.C. 160(c)) is amended by striking "*And provided further,*" and inserting "*Provided further,* That if the Board finds that an employer has discriminated against an employee in violation of subsection (a)(3) of section 8 while employees of the employer were seeking representation by a labor organization, or during the period after a labor organization was recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract was entered into

between the employer and the representative, the Board in such order shall award the employee back pay and, in addition, 2 times that amount as liquidated damages: *Provided further,*".

(2) CIVIL PENALTIES.—Section 12 of the National Labor Relations Act (29 U.S.C. 162) is amended—

(A) by striking "Any" and inserting "(a) Any"; and

(B) by adding at the end the following:

"(b) Any employer who willfully or repeatedly commits any unfair labor practice within the meaning of subsections (a)(1) or (a)(3) of section 8 while employees of the employer are seeking representation by a labor organization or during the period after a labor organization has been recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract is entered into between the employer and the representative shall, in addition to any make-whole remedy ordered, be subject to a civil penalty of not to exceed $20,000 for each violation. In determining the amount of any penalty under this section, the Board shall consider the gravity of the unfair labor practice and the impact of the unfair labor practice on the charging party, on other

persons seeking to exercise rights guaranteed by this Act, or on the public interest.''.

SEC. 4. EQUAL ACCESS TO LABOR ORGANIZATIONS PRIOR TO ELECTIONS.

(a) EQUAL ACCESS.—Section 9 of the National Labor Relations Act (29 U.S.C. 159) is amended by adding at the end the following new subsection:

''(f)(1) Not later than 30 days after the Board shall have directed an election, the employer shall notify the representative designated by the employees under subsection (a) of any activities the employer intends to engage in to campaign in opposition to recognition of the representative, including any meetings with individual employees or groups of employees, any announcements to employees, any signs to be displayed at the place of employment, and any literature to be distributed to employees, and shall provide the representative with equal access to the place of employment to campaign in favor of recognition of the representative, including the opportunity to hold an equal number of meetings with individual employees or groups of employees, and an opportunity to make announcements, display signs, and distribute literature, under the same terms and conditions that the employer engages in such activities.

"(2) As used in this subsection, the term 'campaign' means any activity undertaken to persuade employees to vote for or against representation in an election directed by the Board, but shall not include any interference with, restraint or coercion of, or discrimination against employees in violation of paragraphs (1) through (3) of section 8(a).".

(b) UNFAIR LABOR PRACTICE.—Section 8(a) of the National Labor Relations Act (29 U.S.C. 158(a)) is amended—

(1) in paragraph (5), by striking the period and inserting "; or"; and

(2) by adding at the end the following:

"(6) to fail to provide the notification and equal access to a representative as required by section 9(f).".

○

Senator Specter Speaks on Employee Free Choice Act/Card Check

Washington D.C.
Tuesday, March 24, 2009 -

Watch Video Clip

U.S. Senator Arlen Specter (R-Pa.) today spoke on the Senate floor concerning the Employee Free Choice Act/Card Check.

Senator Specter's full floor statement, including the appendix, follows:

I have sought recognition to state my position on a bill known as the Employee Free Choice Act, also known as card check. My vote on this bill is very difficult for many reasons. First, on the merits, it is a close call and has been the most heavily lobbied issue I can recall. Second, it is a very emotional issue with Labor looking to this legislation to reverse the steep decline in union membership and business expressing great concern about added costs which would drive more companies out of business or overseas. Perhaps, most of all, it is very hard to disappoint many friends who have supported me over the years, on either side, who are urging me to vote their way.

In voting for cloture - that, is to cut off debate - in June 2007, I emphasized in my floor statement and in a law review article that I was not supporting the bill on the merits, but only to take up the issue of labor law reform. Hearings had shown that the NLRB was dysfunctional and badly politicized. When Republicans controlled the Board, the decisions were for business. With Democrats in control, the decisions were for labor. Some cases took as long as eleven years to decide. The remedies were ineffective.

Regrettably, there has been widespread intimidation on both sides. Testimony shows union officials visit workers' homes with strong-arm tactics and refuse to leave until cards are signed. Similarly, employees have complained about being captives in employers' meetings with threats of being fired and other strong-arm tactics.

On the merits, the issue which has emerged at the top of the list for me is the elimination of the secret ballot which is the cornerstone of how contests are decided in a democratic society. The bill's requirement for compulsory arbitration if an agreement is not reached within 120 days may subject the employer to a deal he or she cannot live with. Such arbitration runs contrary to the basic tenet of the Wagner Act for collective bargaining which makes the employer liable only for a deal he or she agrees to. The arbitration provision could be substantially improved by the last best offer procedure which would limit the arbitrator's discretion and prompt the parties to move to more reasonable positions.

In seeking more union membership and negotiating leverage, Labor has a valid point that they have suffered greatly from outsourcing of jobs to foreign countries and losses in pension and health benefits. President Obama has pressed Labor's argument that the middle class needs to be strengthened through more power to unions in their negotiations with business. The better way to expand labor's clout in collective bargaining is through amendments to the NLRA rather than on eliminating the secret ballot and mandatory arbitration. Some of the possible provisions for such remedial legislation are set forth in an appendix to this statement.

In June 2007, the vote on the Employee Free Choice was virtually monolithic: 50 Senators, Democrats, voted for cloture and 48 Republicans against. I was the only Republican to vote for cloture. The prospects for the next cloture vote are virtually the same. No Democratic Senator has spoken out against cloture. Republican Senators are outspoken in favor of a filibuster. With the prospects of a Democratic win in Minnesota, yet uncertain, it appears that 59 Democrats will vote to proceed with 40 Republicans in opposition. If so, the decisive vote would be mine. In a highly polarized Senate, many decisive votes are left to a small group who are willing to listen, reject ideological dogmatism, disagree with the party line and make an independent judgment. It is an anguishing position, but we play the cards we are dealt.

The emphasis on bipartisanship is, I think, misplaced. There is no special virtue in having some Republicans and some Democrats take similar positions. The desired value, really, is independent thought and an objective judgment. It obviously can't be that all Democrats come to one conclusion and all Republicans come to the opposite conclusion by expressing their individual objective judgments. Senators' sentiments expressed in the cloakroom frequently differ dramatically from their votes in the well of the Senate. The nation would be better served, in my opinion, with public policy determined by independent, objective legislators' judgments.

The problems of the recession make this a particularly bad time to enact Employees Free Choice legislation. Employers understandably

complain that adding a burden would result in further job losses. If efforts are unsuccessful to give Labor sufficient bargaining power through amendments to the NLRA, then I would be willing to reconsider Employees' Free Choice legislation when the economy returns to normalcy.

I am announcing my decision now because I have consulted with a very large number of interested parties on both sides and I have made up my mind. Knowing that I will not support cloture on this bill, Senators may choose to move on and amend the NRLA as I have suggested or otherwise. This announcement should end the rumor mill that I have made some deal for my political advantage. I have not traded my vote in the past and I would not do so now.

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Appendix
SOME SUGGESTED REVISIONS TO THE NATIONAL LABOR RELATIONS ACT

(1) Establishing a timetable:
(a) Require that an election must be held within 10 days of a filing of a joint petition from the employer and the union
(b) In the absence of a joint petition, require the NLRB to resolve issues on the bargaining unit and eligibility to vote within 14 days from the filing of the petition and the election 7 days thereafter. The Board may extend the time for the election to 14 additional days if the Board sets forth specifics on factual or legal issues of exceptional complexity justifying the extension.
(c) Challenges to the voting would have to be filed within 5 days with the Board having 15 days to resolve any disputes with an additional 10 days if they find issues of exceptional complexity.

(2) Adding unfair labor practices:
(a) an employer or union official visits to an employee at his/her home without prior consent for any purpose related to a representation campaign;
(b) an employer holds employees in a "captive audience" speech unless the union has equal time under identical circumstances;
(c) an employer or union engages in campaign related activities aimed at employees within 24 hours prior to an election.

(3) Authorizing the NLRB to impose treble back pay without reduction for mitigation when an employee is unlawfully fired

(4) Authorizing civil penalties up to $20,000 per violation on an NLRB finding of willful and repeated violations of employees' statutory rights by an employer or union during an election campaign

(5) Require the parties to begin negotiations within 21 days after a union is certified. If there is no agreement after 120 days from the first meeting, either party may call for mediation by the Federal Mediation and Conciliation Service

(6) On a finding that a party is not negotiating in good faith, an order may be issued establishing a schedule for negotiation and imposing costs and attorney fees.

(7) Broaden the provisions for injunctive relief with reasonable attorneys' fees on a finding that either party is not acting in good faith

(8) Require a dissent by a member of the Board to be completed 45 days after the majority opinion is filed;

(9) Establish a certiorari-type process where the Board would exercise discretion on reviewing challenges from decisions by an administrative law judge or regional director.

(10) If the Board does not grant review or fails to issue a decision within 180 days after receiving the record, the decision of the administrative judge or regional director would be final.

(11) Authorizing the award of reasonable attorneys' fees on a finding of harassment, causing unnecessary delay or bad faith

(12) Modify the NLRA to give the court broader discretion to impose a Gissel order on a finding that the environment has deteriorated to the extent that a fair election is not possible.

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The Employee Free Choice Act

How EFCA Changes The First Contract Bargaining Process

Andrew J. Rolfes
Cozen O'Connor

I. The Current Statutory Obligation

A. Section 8(d) of the NLRA (29 U.S.C. § 158(d)):

> "For purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to ***meet at reasonable times*** and ***confer in good faith*** with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, ***but such obligation does not compel either party to agree to a proposal or require the making of a concession*** …" (emphasis added)

B. The failure to bargain in good faith is already an unfair labor practice. It is unlawful to engage in "surface bargaining," which may be evidenced by delaying tactics, arbitrary scheduling of meetings, unreasonable bargaining demands, unilateral changes, efforts to bypass the union, failure to designate a bargaining representative with appropriate bargaining authority, or regressive bargaining.

C. However, a bedrock principle of the current statutory scheme is that the NLRB polices only the process of bargaining, and does not dictate results. So long as a party acts in good faith, it remains free to adhere to a bargaining position and is under no compulsion to make concessions or to agree to any proposal.

II. How EFCA Changes The Process For First Contracts

A. EFCA adds a new Section 8(h) to the NLRA. There are three primary elements to Section 8(h) under EFCA.

1. Bargaining to commence within 10 days after union demand;

2. After 90 days of bargaining, either party can request mediation by FMCS;

3. FMCS is required to refer the dispute to interest arbitration 30 days after the request for mediation. The arbitration award is binding for two years.

B. EFCA contains no guidance on how interest arbitration will work. Instead, EFCA requires FMCS to develop regulations governing the interest arbitration process.

COZEN O'CONNOR

DO'S AND DON'TS FOR SUPERVISORS

I. **What you may do to legally bring the facts to your employees.**

A. What you may do.

You may communicate with your employees. You can use every available means of getting your side of the story over to your employees so that they will have all of the facts and not just union promises and propaganda. Above all, it is important that you talk to your employees.

You may freely give the employees your views and opinions so long as you do not threaten them or promise them anything on account of the union.

You may continue to run your operations as in the past, assign employees to jobs, discipline, layoff, discharge, etc., so long as you can justify your action according to past practice, economic need, or some other objective reason which has nothing to do with the union. You cannot discriminate against employees in any way because of the union.

It is illegal to go around questioning employees about the union. It is against the law to spy on union meetings or union members to determine the extent of their union activities or to get some employee to do this for you. However, you may listen to any information which is voluntarily offered.

It is always good management-labor relations to encourage employees to advise management of their problems, gripes, etc., and to establish a channel of communications with management. This continues to be true during union organizational efforts. It is good business and good management to find out what the gripes are. However, this should not be tied in with the union. For example you should not ask: "Why do you want a union?"

Except in very unusual circumstances, you have the absolute right to deny outside (non-employee) union organizers the privilege of coming on your property to campaign for the union. You may also forbid employees to campaign or solicit for or against a union during working time — work time is for work. Except in unusual circumstances, you may not forbid employees to campaign or solicit for or against a union during their non-working time, such as before or after hours, and during lunchtime and coffee breaks. You may prohibit the distribution of campaign literature by employees in working areas, and also, in special circumstances, in

non-working areas if the distribution in such non-working areas creates a serious health or safety hazard.

B. What you may legally say to your employees.

1. You may tell your employees that in your opinion the union is not good for them because --

   a. The union is like any other business and is after their money. They may be compelled to pay the union initiation fees, dues, and assessments. This comes out of their paychecks. If the union calls a strike anywhere, the union may ask your employees to pay extra money for strike assessments for those employees, even though it means nothing to your employees.

   b. The union can call on your employees to strike. Employees who go out on strike lose their wages. If the employees go out on an economic strike, the Company can hire someone else in their place and they will no longer have a job to come back to. (Do not tell any employee that he/she will be fired for going on strike.) Further, employees who go on strike are generally not entitled to unemployment compensation while they are on strike. You certainly can tell employees about strikes in general, and about strikes by this Union in particular.

   c. Employees enjoy many benefits that haven't cost them a cent in union dues, fees, fines, or assessments. (Discuss specific benefits.)

   d. You may point out to employees that there is nothing the union can get for them they could not get on their own.

2. You can tell your employees that even if a union is voted in, that doesn't mean that the employees will necessarily benefit by having the union. The union doesn't pay any wages to the employees — it simply collects dues. All the union can do is talk to the Company and ask the Company. As long as the Company bargains in good faith, the Company has the right to refuse to give what the union asks or to refuse to give any more than sound business practice allows. All the union can do then is call the employees out on strike with all the disadvantages set out above — the employees lose wages — they can be replaced and then have no job — they get no unemployment compensation while out on strike. Meanwhile, the union organizers continue to draw their salaries and pay while the employees are out on strike and drawing no pay.

You may tell your employees that if they have signed cards for the union or joined the union, that is not binding on them. They are entirely free to resign from the union, and they can still vote against the union in any election that may be held. If there is an election, it will be held by a government agency. There will be closed-in voting booths. The ballot will be entirely secret. Each employee is free to vote against the union. The union will not know how the employee voted. (However, do not directly ask any employee to resign from the union by telling then what to say, where to send their resignation, or in any other way.)

3. You may legally tell your employees that these are some of the things that may happen to them if they vote a union into the Company:

   a. They may be called upon to quit work even though they don't want to;

   b. They may be called upon to go on strike and lose their pay for something they really don't care about;

   c. They may be called upon to go on strike in sympathy with workers employed by other companies, here or in some other city. They may not want to, but the union can put pressure on them to strike and lose their pay for other workers they don't even know;

   d. They may be called upon to march in a picket line without any pay when they would rather be at work, getting paid;

   e. They will be only one of a little group in a big union. They may be lost in the crowd and no longer treated as individuals;

   f. If the union calls a strike, the law provides the strikers' jobs may be given to someone else in order that the Company may continue to operate;

   g. Their chance to get ahead and make more money will become a matter for the union to argue about and will not necessarily depend on their own ability and skill;

   h. They will no longer be considered as an individual, but will be dealt with by the union as one among many of its members — efficient or inefficient — ambitious or lazy.

4. You can post current news stories or magazine stories with respect to union activities on the bulletin board or call them to employees'

attention. (But you should not attribute the unsavory activities of one union to another union.)

5. You may argue that organizers are outsiders who have come in to spread disruption, to upset the working relationships in the Company, to cause dissatisfaction. Tell employees sincerely that both you and they benefit most when dealing with one another directly without interference from outsiders.

6. You may point out that, once unionized, your employees will be discouraged by the union from discussing gripes and troubles directly with you. They may be forced to rely on a union official, such as a shop steward, to talk for them.

7. You may remind employees that now they may always discuss matters with you or any other members of management.

8. You may expose the union's strike history. Union organizers will try to play down the strike issue — with good reason. Workers don't like strikes. Unions will probably claim they seldom strike. But show when and where they've had strikes or walkouts, how many persons were affected, how long they lasted, and how much was lost in wages.

9. You may give your personal opinion of the union and its leaders and organizers. Your opinion can be uncomplimentary. But, of course, you can't libel or slander.

10. You may tell employees that it's the Company that provides the jobs, not the union — and the union cannot prevent layoffs if they become necessary.

11. You may point out to employees that they aren't obligated to talk to union organizers if they don't care to.

12. You may explain that most unions push hard for a form of compulsory unionism in which those who don't want to belong to the union or pay dues to it can lose their jobs.

II. **<u>Areas in which you should be careful</u>.**

1. You should not threaten your employees with reprisal or take action of reprisal against them which has any connection with union activity or employee group activity concerning wages, hours, or working conditions. You have the right to continue to run the Company and mete out discipline in accordance with your usual business practices, but it is a good idea to

exercise more care in these areas during a union campaign and, where possible, try to document the non-discriminatory, normal, and necessary character of your action. This is necessary to avoid even the appearance of discriminatory action. (The union may not legally threaten or coerce employees either.)

2. You should not promise your employees benefits or grant benefits to them in order to discourage union activities or group activities concerned with wages, hours, and working conditions. However, if you have regularly granted employees increased benefits at regular times or for good business reason, these practices can be continued even though a union campaign is going on at the same time. Of course, the benefit cannot be connected with the union campaign.

3. You should not question employees about their union activities or the activities of others. In some cases, this may be illegal. In many cases, in response to a direct question about union activities, the employee will give the answer he thinks management would like to hear, and not necessarily the truth. However, there is no reason why management should avoid conversations with employees about the union, where threats and promises are avoided. Where employees have questions, or want to discuss union problems, management should provide the employees with facts, information, and opinions which will help balance the one-sided picture which they have received from the union. Management should not spy on employees' union activities, hire others to do so, or engage in any conduct which creates the impression of surveillance.

4. The National Labor Relations Board has certain specific rules with respect to employer conduct during an election which must be followed to avoid the possibility that the Labor Board may set the election aside if the union loses. The more important rules are the following:

   a. After a petition for an election has been filed with the Labor Board, the employer may not bring employees into the employer's private office to discuss the union. However, the employer may talk to employees about the union individually or in groups in all normal production or working areas.

   b. The employer may not give a speech to groups of employees on Company time and property within 24 hours prior to the election. However, the employer may talk to employees on an individual basis in their normal working area during the 24-hour period, and written material discussing union issues may be distributed to employees during that period.

   c. The employer is forbidden to visit employees at their homes during a union campaign to discuss union issues with them, although

union representatives are free to do so. Presumably, however, if members of management are accustomed to meeting socially with certain employees at their homes, they can continue to do so and are not required to avoid talk about the union. Any such activities occurring after an election petition has been filed may be grounds for setting the election aside if the union loses.

d. The Labor Board has forbidden both unions and employers to distribute sample ballots which are facsimiles of the ballot used by the Labor Board. However, "sample ballots" which contain only the question to be voted on and boxes for the choices available can be distributed.

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