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# Labor Law Bulletin

## THE EMPLOYEE FREE CHOICE ACT—A POST-INAUGURATION UPDATE

### Introduction

Much has been written recently about the Employee Free Choice Act ("EFCA"). Indeed, if passed, it would be the most significant change in labor relations law in decades. The advent of the Obama administration and a clear Democratic majority in both houses of Congress have many employers focusing on changes that the new year will potentially bring. With the economic recession and the apparent lack of a filibuster-proof Democratic majority in the Senate, there is discussion that there will have to be compromises for EFCA to pass both houses of Congress. But organized labor is still pushing Congress and the new Administration to pass the bill unchanged, either as part of a broader economic bill, or later in 2009, after other priorities work through Congress.

As originally proposed, and passed by the U.S. House of Representatives in 2007, EFCA had three primary components: (1) card check recognition, requiring unions to present only a simple majority of authorization cards in order to represent a targeted bargaining unit; (2) interest arbitration if a first contract is not reached after 120 days of bargaining and mediation; and (3) enhanced penalties for unfair labor practices committed during organizing campaigns and first-contract bargaining. With the new Congress about to begin its session, the business community eagerly awaits the floor debates over EFCA to see the bill that will finally emerge.

### What Might a Compromise Bill Look Like?

The aspect of EFCA most frequently discussed is the provision allowing a union to be certified on the basis of authorization cards. As might be expected, employers have raised a number of objections to this proposal, which would deprive employees of a democratic voice in a secret ballot election.

Some commentators posit that EFCA's card check recognition provision will be changed to a "fast election" provision, with a period as short as one week between the filing of a representation petition and the election. This would preserve the right to a secret ballot election, a part of the National Labor Relations Act since its enactment in 1935. To the extent that card check recognition does survive, a compromise bill might require a supermajority of perhaps 60 or 70 percent, or be used only if unfair labor practices taint an election.

Others forecast that card check recognition may end up a two-way street: for both union recognition and decertification. This is because the current decertification process is viewed by many as much more arduous than the process to certify a union as a bargaining representative. Allowing workers to decertify a union without an election would make the representation process reciprocal, and in the views of many, more fair.

Both management and labor have raised concerns regarding the interest arbitration provision. Unions note that an interest arbitration provision will be helpful in reaching a first contract, but does nothing to assist unions thereafter. Further, the proposed EFCA is silent regarding the way that

interest arbitration would be implemented. For instance, EFCA does not state whether an arbitrator must accept a party's entire proposal on every topic (as is the case in Major League Baseball), choose among various proposals from both sides on an issue-by-issue basis, or simply draft the contract as they desire. There is also no guidance on the factors that an arbitrator should consider when fashioning a contract or what subjects should be addressed in the contract. Some commentators also believe the interest arbitration provision raises constitutional issues. This dissonance surrounding the interest arbitration provision of EFCA suggests that it will be jettisoned or significantly watered down as part of any compromise bill.

## Conclusion

Although the economic recession and conflicts abroad have pushed the spotlight away from the Employee Free Choice Act for now, it remains likely that a bipartisan compromise bill will emerge that will include either card check recognition or a quick secret ballot election, plus increased penalties for unfair labor practices. For many employers this would be an improvement from the original EFCA, but it would still represent a significant and unfavorable change in the law. An employer facing a seven-day secret ballot election will encounter many of the same communication challenges that it would face under card check recognition. Realizing this, many employers are taking a proactive approach through management training and union-free audits to ensure that they will be prepared regardless of the final form of EFCA.

If you have questions about this proposed legislation, please contact J. Kevin Hennessy (312-609-7868), Kenneth F. Sparks (312-609-7877), James A. Spizzo (312-609-7705), Mark L. Stolzenburg (312-609-7512), or any other Vedder Price attorney with whom you have worked.

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