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Employment Newsletter

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UPDATE ON THE EMPLOYEE FREE CHOICE ACT

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By its title, the Employee Free Choice Act ("EFCA"), H.R. 1409, suggests that it provides employees with something they have lacked in the past - an opportunity to decide, free of unfair pressure or coercion, whether or not to join a labor organization. It is an appealing concept, one that the federal National Labor Relations Act was intended to make a reality. The question now facing Congress is whether the EFCA provides a better mechanism for achieving a "free choice" than the law that has been in effect for almost 75 years. While the EFCA seems likely to pass, a growing number of voices are answering this question with a resounding "no."

It helps to place the question in context. In 1935, Congress passed the National Labor Relations Act ("NLRA") and recognized the right of private sector employees, with some exceptions, to organize and bargain with their employers to improve their economic and working conditions. This is the process known as "collective bargaining." Enforcement of the right to bargain was vested in the National Labor Relations Board ("NLRB").

Under the NLRA, there are two primary mechanisms for employees to form collective bargaining units. The most commonly used mechanism is the "secret ballot" election. The process is initiated by filing a Petition for Election supported by "authorization cards" signed by 30 % of the employees in the proposed unit. The employer then provides the NLRB with a list of the names of all employees in the bargaining unit so that it can verify that the proposed unit has the requisite level of support.

The NLRB solicits the employer's position regarding the structure of the proposed bargaining unit. As a requirement to formation, bargaining units must be composed of employees who share a "community of interest" as to factors including the nature of the work, chain of command, common work rules, work schedules, work locations and other similar factors. Supervisory employees

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are not protected by the NLRA and may not be part of a bargaining unit. If the employer does not object to the composition of a bargaining unit, the NLRB schedules a secret ballot election. If the employer objects, the NLRB conducts a hearing and determines the appropriate composition of the unit. The election follows.

The secret ballot election ordinarily takes place no more than 45 days after the filing of the petition. The NLRB attempts to schedule the election at the employer's premises at a time convenient to most employees. If the workforce works in shifts, multiple voting sessions may be scheduled within a day. Voting occurs through a secret ballot process, and typically takes place at a distance from management offices. The determination of whether a bargaining unit should be formed is based on a simple majority of the votes cast.

The EFCA would eliminate secret ballot elections where a union has authorization cards signed by a majority of employees in the proposed bargaining unit. The creation of bargaining units would be based on a card check alone. The Act provides as follows:

> Notwithstanding any other provision of this section, whenever a petition shall have been filed by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a majority of employees in a unit appropriate for purposes of collective bargaining wish to be represented by an individual or labor organization for such purposes, the Board shall investigate the petition. If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of the employees in the unit, the Board shall not direct an election but shall certify and individual or labor organization as the representative described in subsection (a).

The card check process described in the law is not confidential. The identity of employees who have signed or not signed cards will be known to fellow employees and employer alike. Those opposing the EFCA express concern about the intimidation factor inherent in the card check process.

Interestingly, some of the fiercest opposition to the Act comes from individuals who have been very friendly to unions over the years. For example, former Senator George McGovern wrote an opinion piece for the Wall Street Journal in which he lamented the loss of secret ballot voting, noting that there are "many documented cases where workers have been pressured, harassed, tricked

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and intimidated into signing cards that have led to mandatory payment of dues." George McGovern, *My Party Should Respect Secret Union Ballots*, Wall Street Journal, August 8, 2008. Senator McGovern also shared his understanding that workers in developing countries such as Mexico insist on having a secret ballot process when asked to vote on whether their workplaces should have unions.

In addition to the loss of secret ballot elections, the EFCA imposes an obligation on employers to bargain with employees on an expedited basis following formation of a bargaining unit. In the event that bargaining is not successful, the EFCA requires mediation upon request of either party within ninety (90) days of commencing bargaining, and requires binding arbitration upon request of either party within one hundred twenty (120) days after the parties have failed to reach an agreement. From a real world perspective, negotiations often take considerably longer than the timeframes imposed by the EFCA. A collective bargaining agreement may be imposed by a federal mediator for an effective period of two (2) years in the event that the parties do not reach agreement on their own.

Why are unions so anxious for the EFCA to pass? As previously noted by Jim Roche, President and CEO of the Business and Industry Association of New Hampshire, labor unions represent an increasingly small percentage of the national workforce. Their membership has slipped from 32.5 % of the workforce in 1953 to a little over 12% today. Only 8% of the private sector workforce is currently unionized. In New Hampshire, approximately 10% of the private sector workforce is unionized. Clearly, the purpose of the EFCA is to help unions boost membership. This, in turn, is expected by proponents of the Act to lead to better working conditions for employees.

At a time when so many companies are struggling for survival and trying to avoid lay offs, there is no question that the prospect of unionization, especially for smaller companies, is daunting. For employers, the EFCA raises the specter of secretive union organizing with minimal opportunity for management or dissenting employees to be heard. While employer communications to employees considering unionization is heavily regulated, there can be no doubt that input from the union, the employer, and fellow employees create a more informed voter.

Representative Joe Sestak has recently introduced the National Labor Relations Modernization Act ("NLRMA"), H.R. 1355, as an alternative to the Employee Free Choice Act. The Bill would amend the NLRA to promote collective bargaining by requiring employers to give unions equal access to employees prior to a union representation election, increase penalties for unfair labor practices,

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and expedite collective bargaining by establishing timelines for bargaining and mediation. However, the provision for expedited bargaining would only apply to employers with at least twenty (20) employees. The bill also sets the timeframes for bargaining without government intervention that are substantially longer than those provided in the EFCA. Finally, the NLRMA would fully preserve the secret ballot voting process.

The EFCA was introduced in the House and Senate on March 10, 2009. If it accomplishes its purpose, the EFCA will certainly result in stepped up union activity and higher levels of union representation in the private sector workforce.

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