

EMPLOYEE FREE CHOICE ACT: A TEMPORARY REPRIEVE

By: *Mark Broth*
Email: mbroth@devinemillimet.com
Phone: 603.695.8558

APRIL 10, 2009

Several weeks ago, it appeared imminent that the Senate would consider and pass the Employee Free Choice Act (EFCA), a bill which would essentially eliminate the secret ballot election as the primary method for employees to decide whether or not to unionize. The EFCA would further require binding arbitration in employers and labor unions were unable to enter into a collective bargaining agreement within 90 days of the commencement of bargaining, and would enhance penalties for unfair labor practices. It was generally understood that if the EFCA passed the Senate, it would also pass the House and be signed into law by President Obama.

With the Democrats holding 58 Senate seats (59 if Al Franken is seated), there was more than enough support for the EFCA to pass. However, before the bill could be voted on, it needed to be able to survive an anticipated Republican filibuster. In order to stop a filibuster, the Democrats would need 60 votes for cloture, which is a parliamentary move that cuts off debate on a bill.

In prior years, the Democrats had the necessary 60 votes for cloture on this bill, in that Republican Senator Arlen Specter (R. Pa.) had agreed to cross party lines and vote with the Democrats, "not supporting the bill on the merits, but only to take up the issue of labor law reform." Senator Specter's Floor Statement on EFCA. However, Senator Specter was not expected to vote with the Democrats to override then President Bush's anticipated veto of the bill. With the election of President Obama, who was a co-sponsor of EFCA when he served in the Senate, no veto was anticipated, placing additional pressure on Senator Specter to join his fellow Republicans in voting against cloture and allowing a filibuster to prevent the bill from coming to a vote.

Senator Specter's change in position has set off a mad scurry by both parties to find additional votes. At present, it appears that

Labor, Employment & Employee Benefits

Mark Broth, Chair
603.695.8558
mbroth@devinemillimet.com

Aaron Gilman
978.475.9100
agilman@devinemillimet.com

Newton Kershaw
603.695.8571
nkershaw@devinemillimet.com

Karen Levchuk
603.695.8618
klevchuk@devinemillimet.com

Patricia McGrath
603.695.8537
pmcgrath@devinemillimet.com

Anthony Augeri
978.475.9100
aaugeri@devinemillimet.com

Margaret O'Brien
603.695.8631
mobrien@devinemillimet.com

Anne Scheer
603.410.1708
ascheer@devinemillimet.com

Laurel Van Buskirk
603.695.8565
lvanbuskirk@devinemillimet.com

Anne Trevethick
603.695.8725
atrevethick@devinemillimet.com

DEVINEMILLIMET.COM

EMPLOYMENT@DEVINEMILLIMET.COM

the current numbers will hold and that the EFCA will either not be introduced in the Senate or will be introduced largely for political theater, so that the Republicans can be forced to filibuster and the cloture vote fail.

In his floor speech in which he announced his change in position, Senator Specter indicated that he would welcome National Labor Relation Acts reforms that did not eliminate the secret ballot and impose mandatory arbitration. In an appendix to his speech, Senator Specter identified 12 different possible areas for reform, including a shorter time frame for holding elections after a petition is filed; providing union equal time if an employer conducts “captive audience” meetings with employees, enhanced civil penalties for unfair labor practices, and expediting case processing before the National Labor Relations Board (NLRB). It is not expected that there will be substantial movement on these suggested reforms until after the next round of senatorial elections, when the EFCA may again be in play. In that regard, the election of a successor to New Hampshire’s Senator Judd Gregg may be extremely important in shaping future labor policy.

Employers are reminded that even with the EFCA in abeyance, employees still retain the right to unionize through the traditional secret ballot elections. Further, the NLRB has the authority to sanction employers, including ordering employers to bargain with employees where employer conduct has made it impossible to conduct a fair election. Employers should consult legal counsel to understand employee rights and employer responsibilities under the NLRA, and what employers can and cannot do in responding to union organizing efforts.

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Office Locations:

111 Amherst Street
Manchester, NH 03101
T 603.669.1000
F 603.669.8547

300 Brickstone Square
Andover, MA 01810
T 978.475.9100
F 978.470.0618

43 North Main Street
Concord, NH 03301
T 603.226.1000
F 603.226.1001

