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Fast Track Elections Likely To Replace Card-Check in EFCA Compromise Bill

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When President Obama was elected last November, it was widely speculated that the Employee Free Choice Act would be among the first pieces of significant legislation to be pushed through Congress, with the possibility that the National Labor Relations Board might be running card-checks in place of secret-ballot elections by the middle of this year. That, of course, has not happened. The NLRB is still conducting elections in workplaces across the country, and there is every reason to believe that it will continue to do so for some time to come. In fact, it now appears that EFCA's highly politicized card-check provision, once its "sacred cow," may not be "in the cards" at all. Organized labor has not conceded that, but has shown signs of its willingness to accept, albeit reluctantly, expedited elections in lieu of card-checks.

There are many explanations for the delay and apparent turnaround on the controversial card-check provision. The Obama administration's preoccupation with the crisis in the financial markets through the first half of 2009 certainly took attention away from EFCA. As a result, the employer community, led by the U.S. Chamber of Commerce, was able to intensify its lobbying to convince members of Congress that the fundamental changes that EFCA would make to the National Labor Relations Act, and the impact that those amendments would have on the delicate balance of labor-management relations, was simply not good for America, particularly at a time of economic turmoil so severe that both General Motors and Chrysler were forced into bankruptcy, capping their decades-long struggle to survive under the burden of onerous collective bargaining agreements that had made it all but impossible for them to keep pace with foreign competition.

After passage of the American Recovery and Reinvestment Act of 2009, and as the financial markets were just beginning to slowly rebound, Washington became mired in the debate over healthcare reform. The end of that debate is nowhere in sight. This focus on healthcare has slowed EFCA's momentum even further. At this point, it appears increasingly unlikely with each passing week that there will be any significant action on EFCA until some time in 2010, at the earliest.

EFCA's prospects also have been hurt by support lost from certain influential members of the Senate, most notably Arlen Specter (PA), who in 2007 was the only Republican Senator to cast a vote for cloture to cut off debate on EFCA. In March of this year, before jumping the fence and joining the Democratic Party, Senator Specter made big news when he came out against card-check, maintaining that the "secret ballot . . . is the cornerstone of how contests are decided in a democratic society." At the same time, Senator Specter criticized EFCA's imposition of compulsory arbitration of first contracts because it "runs contrary to the basic tenet of the Wagner Act, . . . which makes the employer liable only for a deal he or she agrees to," adding that "[t]he problems of the recession make this a particularly bad time to enact Employee Free Choice legislation."

On the heels of Senator Specter's unexpected announcement, several other prominent members of the Senate followed suit, including Democrats Dianne Feinstein (CA), Thomas Carper (DE) and Blanche Lincoln (AR). All expressed their own reservations about EFCA, particularly the card-check procedure, dealing it what may have proven to be a life-threatening blow. Not even Senator Specter's later departure from the Republican Party, or the final confirmation of Senator Al Franken's victory in Minnesota, has been enough to turn the political tide back in favor of card-check. Senator Kennedy's death this summer and Senator Byrd's continuing illness, which has sidelined him for months, have presented additional obstacles to EFCA's passage this year in any form. It is clear that EFCA's supporters in the Senate do not now have the 60 votes needed to invoke cloture on the bill as presently written.

EFCA was reintroduced earlier this year with no change from the 2007 bill (S. 560; H.R. 1409), but it had far fewer sponsors in both the House of Representatives and the Senate. EFCA still would amend the NLRA by giving the NLRB the authority to certify labor organizations and order employers to bargain solely on the basis of authorization cards purporting to demonstrate the union's majority status. In other words, employers no longer would have the right to insist that "questions concerning representation" be decided in a secret-ballot election supervised by the NLRB, and would be denied any meaningful opportunity to counter the union's campaign through communications with employees. The "free speech" provision of the NLRA (Sec. 8(c)) effectively would be read out of the statute, to the detriment of employers and employees alike.

The current version of EFCA also would mandate mediation and ultimately arbitration (by a board of arbitration appointed by the Federal Mediation and Conciliation Service) of the terms of an initial collective bargaining agreement, if the employer and union are unable to agree on a contract within 120 days after the start of negotiations. For nearly 75 years since passage of the NLRA, the substantive terms of a labor agreement have been left entirely to the employer and union to determine. In fact, the NLRB consistently has held that arbitration of contract terms is a non-mandatory subject of collective bargaining. Interest arbitration, as it is known, is common in the public sector where employees have no right to strike, but is extremely rare in the private sector. The prospect that contract terms could be imposed by an arbitrator poses tremendous problems for business and has been vigorously opposed by the Chamber and other trade groups.

Lastly, EFCA would amend the NLRA to strengthen the NLRB's enforcement authority. It would make interim injunctive relief mandatory in unfair labor practice cases involving the discharge or discipline of employees in retaliation for their protected activity during an organizing campaign or negotiation of a first contract. It also would allow the Board to award triple back pay as a remedy for unlawful discrimination. And, for the first time ever, the Board would have statutory authority to impose fines of up to $20,000 for employer unfair labor practices such as interrogation, surveillance, threats of reprisal and promises of benefit, when willful and repeated. Together, these new remedies would go very far toward addressing organized labor's concern about employer interference with the organizing process, which it claims is the reason why unions lose so many elections, and why even when they win, many unions are unable to achieve a first contract. Interestingly, EFCA adds nothing to the Board's powers of enforcement against union coercion of employees.

In response to increasing employer opposition and wavering support in Congress, John Sweeney, the outgoing president of the AFL-CIO, recently made public that organized labor would accept a version of EFCA that did not include the card-check provision that has been such a hot button, provided that "there is a fair process that protects workers against anti-union intimidation by employers." However, his successor Richard Trumka, and other influential labor leaders including Andy Stern, have not expressed that same flexibility.

At the AFL-CIO Convention in September, where President Obama spoke passionately in support of EFCA but without making a single reference to card-check, Senator Specter announced that he and a small group of his Democratic colleagues had hammered out a compromise bill that was passable by both houses. In lieu of card-check, the supposed compromise would bring on an election within as few as five to ten days after a petition is filed with the NLRB. (Currently, the NLRB follows a 42-day schedule from petition to election.) Plainly, elections held on such a fast track still would deprive employees of the opportunity to hear both sides of the story, not just the union's version, before casting a ballot. From the beginning, that has been one of management's principal objections to EFCA. Another alternative that has been floated is the use of mail ballots instead of in-person elections in the workplace. But mail ballots are subject to many of the same abuses as authorization cards -- explaining why they are used so sparingly by the Board -- and arguably would be worse than card-checks because such elections are decided by a mere majority of the ballots returned to the NLRB, regardless of the actual number of eligible voters.

In addition to "quickie" elections, the compromise bill reportedly would give unions access to the employer's property to address employees during working time to counter the effects of "captive audience" speeches. It would strengthen the NLRB's enforcement authority by empowering the agency to award triple back pay. And, we understand that it would provide for "last best offer arbitration" of contract disputes when parties are unable to reach agreement on their own, so-called "baseball arbitration," although there also has been talk that the arbitration of contract terms would be limited to situations where the employer has refused to bargain in good faith with the union, *i.e.*, "remedial arbitration." This offers little if any comfort to employers and the battle over arbitration is certain to continue. It is unacceptable in any form.

EFCA has been and will continue to be a moving target. Predictions as to how it will all shake out are difficult to make, but it does appear that the final outcome may not be as disastrous as initially appeared. We will have to wait and see. If the compromise bill that is in the works proves unacceptable to the labor community and/or to EFCA's principal proponents in the Senate, the thinking has been that they may just wait until after the elections in 2010 in the hope of picking up additional seats in the Senate to secure the card-check procedure that has been the AFL-CIO's number one priority for many years.

Finally, whatever may or may not happen with EFCA, once appointments are made to fill the three vacancies on the NLRB, the Board is bound to start issuing decisions and possibly modifying election procedures that will at least level the playing field if not tilt it in favor of labor. As anyone who practices before the agency knows, scheduling of quicker elections does not require amendment of the NLRA.

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