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The Employee Free Choice Act

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The Employee Free Choice Act

Abstract
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Keywords
National Labor Relations Act, NLRA, Employee Free Choice Act, EFCA, Congress, legislation, union certification

Comments
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The Employee Free Choice Act

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Summary

This report discusses legislative attempts to amend the National Labor Relations Act ("NLRA") to allow for union certification without an election, based on signed employee authorizations. The Employee Free Choice Act ("EFCA"), introduced in the 111th Congress as H.R. 1409 and S. 560, would have allowed union certification based on signed authorizations, provided a process for the bargaining of an initial agreement, and prescribed new penalties for certain unfair labor practices. This report reviews the current process for selecting a bargaining representative under the NLRA, and discusses the role of the Federal Mediation and Conciliation Service in resolving bargaining disputes under that act. The EFCA has been introduced in the past four Congresses. During the 110th Congress, the measure was passed by a vote of 241-185 in the House. In the Senate, proponents of the EFCA fell nine votes short of the 60 votes needed to limit debate and proceed to final consideration of the measure. The EFCA is widely expected to be reintroduced in the 112th Congress.

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Legislation that would allow a union to become the exclusive bargaining representative of a unit of employees without an election has been introduced in the past four Congresses.[1] The Employee Free Choice Act ("EFCA" or "the act"), introduced in the 111th Congress as H.R. 1409 and S. 560, would have amended the National Labor Relations Act ("NLRA") to allow union certification based on signed employee authorizations, provided a process for the bargaining of an initial agreement, and prescribed new penalties for certain unfair labor practices. Labor officials indicated that the EFCA was "the most important work we'll be doing, because it's a key to succeeding on everything else."[2]

This report reviews the current process for selecting a bargaining representative under the NLRA, and examines how the EFCA would have altered that process. In addition, this report discusses the other changes proposed by the act. Some of these changes had been previously suggested in other past measures. For example, legislation that would have established a process for the bargaining of an initial agreement was first introduced in the 105th Congress.[3]

Union Certification Without Election

The EFCA would have amended the NLRA to allow an individual or labor organization to be certified as the exclusive representative of a bargaining unit without an election. The act would have required the National Labor Relations Board ("the Board") to conduct an investigation whenever a petition was filed by "an employee or group of employees or any individual or labor organization acting in their behalf," that alleged that a majority of employees in a bargaining unit wished to be represented by an individual or labor organization for the purpose of collective bargaining. If the Board found that a majority of employees in the unit signed authorizations designating the individual or labor organization as their bargaining representative, it would certify such individual or labor organization as the representative.

Currently, a labor organization usually becomes the exclusive representative for a bargaining unit following an election. Under existing law, the Board conducts an investigation following the filing of a petition that alleges that a substantial number of employees wish to be represented for collective bargaining and that the employer declines to recognize their representative as the exclusive representative for the bargaining unit.[4] To constitute a "substantial number of employees," at least 30 percent of the employees must indicate support for representation.[5] A representation hearing will be conducted if the parties cannot voluntarily resolve the details of an election.[6] Based on the record of such a hearing, the Board will direct an election by secret ballot and certify the results.[7]

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[1] H.R. 1409, 111th Cong. (2009); S. 560, 111th Cong. (2009); H.R. 800, 110th Cong. (2007); S. 1041, 110th Cong. (2007); H.R. 1696, 109th Cong. (2005); S. 842, 109th Cong. (2005); H.R. 3619, 108th Cong. (2003); S. 1925, 108th Cong. (2003).

[2] *See* Dale Russakoff, "Labor to Push Agenda in Congress It Helped Elect," *Wash. Post*, December 8, 2006, at A13.

[3] *See* S. 2389, 105th Cong. (1998).

[4] 29 U.S.C. § 159(c)(1).

[5] *See* 29 C.F.R. § 101.18(a).

[6] 29 U.S.C. § 159(c)(4).

[7] *But see* 29 U.S.C. § 159(c)(3) ("No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held."). In addition, an election will be denied for a bargaining unit where such unit is already covered by a valid collective bargaining agreement. The so-called (continued...)

Although a labor organization that has obtained signed authorizations from a majority of employees in a bargaining unit may request to be recognized voluntarily by an employer as the exclusive representative of employees in the unit, few employers engage in such voluntary recognition.[8] In *NLRB v. Gissel Packing Co.*, the U.S. Supreme Court confirmed that signed authorization cards from a majority of employees could give rise to bargaining obligations under section 8(a)(5) of the NLRA.[9] Section 8(a)(5) indicates that it shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees subject to the provisions of section 9(a) of the NLRA.[10] Section 9(a) provides that representatives "designated or selected for the purposes of collective bargaining by a majority of the employees" in an appropriate bargaining unit "shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining."[11] Because section 9(a) refers to exclusive representatives "designated or selected" by a majority of employees without specifying how the representatives must be chosen, it was understood that the showing of majority support through signed authorization cards could give rise to a duty to bargain.

The *Gissel* Court also noted, however, that an employer is not obligated to accept the authorization cards as proof of majority status, and could insist on an election.[12] Moreover, the Court maintained that an employer is not required to justify his insistence on an election by making his own investigation of employee sentiment or by providing affirmative reasons for doubting the majority status.[13] In a subsequent case, *Linden Lumber v. NLRB*, the Court further concluded that a union with authorization cards purporting to represent a majority of the employees, which is denied recognition by the employer, has the burden of invoking the Board's election procedure.[14]

Labor organizations contend that employers decline voluntary recognition based on authorization cards because they want to discourage support for representation in the period before an election is held.[15] During this period, it is believed that employers often hire anti-union consultants, terminate pro-union employees, and conduct captive-audience meetings where employees are exposed to the employer's views against representation.[16] Proponents of the EFCA maintained that certification based on a majority of signed authorizations would eliminate this misconduct.

(...continued)

"contract bar" to an election operates when there is a written bargaining agreement that has been properly signed by the parties, is binding on the parties, and is of a definite duration.

[8] *See* Stephen I. Schlossberg and Judith A. Scott, Organizing and the Law 173 (1991).

[9] 395 U.S. 575 (1969).

[10] 29 U.S.C. § 158(a)(5).

[11] 29 U.S.C. § 159(a).

[12] *Gissel*, 395 U.S. at 609.

[13] *Id.*

[14] 419 U.S. 301 (1974).

[15] *See* Steven Greenhouse, "Unions, Bruised in Direct Battles With Companies, Try a Roundabout Tactic," *N.Y. Times*, March 10, 1997, at B7.

[16] *See Witnesses at House Hearing Discuss Merits of Elections Versus Card-Check Recognition*, Daily Lab. Rep. (BNA), April 23, 2004, at A-7.

In FY2008, the median time to proceed to an election from the filing of a representation petition was 38 days.[17] According to the Board, in FY2008, 95.1% of all initial representation elections were conducted within 56 days of the filing of a petition.[18]

Those who have opposed the certification process proposed by the EFCA expressed concern for a union's possible use of coercive and intimidating tactics to obtain signatures.[19] They have also feared the increased possibility of forged signatures on authorization cards.[20] Consistent with those concerns, another measure would have made it an unfair labor practice for an employer to recognize or bargain with a labor organization that was not selected through an election. The Secret Ballot Protection Act, introduced in the 111th Congress as H.R. 1176 and S. 478, stated the following in its findings: "[T]he right of employees to choose by secret ballot is the only method that ensures a choice free of coercion, intimidation, irregularity, or illegality."[21]

Role of the Federal Mediation and Conciliation Service

In addition to providing for union certification without an election, the EFCA would have amended the NLRA to allow for the involvement of the Federal Mediation and Conciliation Service ("FMCS") during the negotiation of an initial agreement following certification or recognition of a labor organization.[22] If, after 90 days of bargaining or such additional period as the parties agreed upon, the parties failed to reach an agreement, the act would have permitted either party to notify the FMCS and request mediation. If, after 30 days from the date mediation was requested or such additional period agreed upon by the parties, the FMCS was unable to bring the parties to agreement, the FMCS would have referred the dispute to an arbitration board that would render a binding decision.

Under existing law, the FMCS may provide mediation and conciliation services upon its own motion or upon the request of one or more of the parties to the dispute whenever "in its judgment such dispute threatens to cause a substantial interruption of commerce."[23] Where state or other conciliation services are available to the parties, the FMCS is directed to "avoid attempting to mediate disputes which would have only a minor effect on interstate commerce."[24] Existing law does not distinguish between initial agreements and other agreements negotiated by the parties. Moreover, the NLRA does not provide for the use of binding arbitration to resolve disputes.

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[17] Memorandum from Ronald Meisburg, General Counsel, National Labor Relations Board, to All Employees of the Office of General Counsel, National Labor Relations Board (Oct. 29, 2008), *available at* http://www.nlrb.gov/shared_files/GC%20Memo/2009/GC%2009-03%20Summary%20of%20Operations%20FY%2008.pdf.

[18] *Id.*

[19] *Witnesses at House Hearing Discuss Merits of Elections Versus Card-Check Recognition, supra* note 16.

[20] *Id.*

[21] H.R. 1176, 111th Cong. § 2(2) (2009); S. 478, 111th Cong. § 2(2) (2009).

[22] H.R. 1409, 111th Cong. § 3 (2009); S. 560, 111th Cong. § 3 (2009).

[23] 29 U.S.C. § 173(b).

[24] *Id.*

Proponents of the EFCA have argued that legislation is needed to promote the prompt negotiation of initial collective bargaining agreements.[25] In 32 percent of all cases, the employer and the union reportedly fail to reach agreement within the first two years following an election.[26] Some have observed, however, that the availability of binding arbitration under the EFCA discouraged support for the legislation from the business community. Under the act, employers would have been faced with the possibility of having to accept what could have been viewed as unfavorable terms and conditions by the arbitration board. Under existing law, the employer does not have to accept such terms and conditions. The employer may decline unfavorable proposals with the hope that the union may change its position to avert a strike. If binding arbitration was required, the employer would lose that bargaining leverage.

Penalties Under the NLRA

The EFCA would have amended the NLRA to impose new penalties for specified existing unfair labor practices. For example, if the Board found that an employer discriminated against an employee with respect to his hiring, tenure, or any term or condition of employment to encourage or discourage membership in a labor organization either while employees of the employer were seeking representation by a labor organization or during the period after a labor organization was recognized as a unit's exclusive representative, but before the first collective bargaining agreement was executed, the Board would have been permitted to award employee back pay and 2 times that amount as liquidated damages.[27]

The EFCA would have also imposed a civil penalty for certain willful and repeated unfair labor practices. Any employer who willfully and repeatedly

> (a) interferes with, restrains, or coerces an employee in the exercise of his right to organize, or
> (b) discriminates against an employee with respect to his hiring, tenure, or any term or condition of employment to encourage or discourage membership in a labor organization

either while employees of the employer were seeking representation by a labor organization or during the period after a labor organization had been recognized as a unit's exclusive representative, but before the first collective bargaining agreement has been executed, would have been subject to a civil penalty not to exceed $20,000 for each violation. The exact amount of the penalty would have been determined by the Board based on the gravity of the unfair labor practice and its impact on the charging party, on others seeking to exercise rights guaranteed by the NLRA, or on the public interest.[28]

Under existing law, the Board may order any person committing an unfair labor practice to cease and desist from such misconduct.[29] The Board may also take such affirmative action, including reinstatement with back pay, as will effectuate the policies of the NLRA.[30] Section 12 of the

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[25] *Witnesses at House Hearing Discuss Merits of Elections Versus Card-Check Recognition, supra* note 16.

[26] *Id.*

[27] H.R. 1409, 111th Cong. § 4(b) (2009); S. 560, 111th Cong. § 4(b) (2009).

[28] *Id.*

[29] 29 U.S.C. 160(c).

[30] *Id.*

NLRA provides that any person who willfully resists, prevents, impedes, or interferes with any member of the Board or any of its agents or agencies in the performance of their duties under the act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.[31] However, no specific penalty currently exists for the kind of willful and repeated misconduct described in the EFCA.

Small Businesses and the EFCA

In 1959, Congress amended the NLRA to provide relief for small employers and their employees who occupied a so-called "no man's land" in labor-management relations. The Board, confronted with a rising backlog of cases, maintained a practice of declining jurisdiction in industries with revenue less than a certain dollar volume of business. This practice effectively excluded a significant number of smaller enterprises from coverage under the NLRA.[32] At the same time, in a series of cases, the Court concluded that parties denied coverage under the NLRA could not have their disputes settled by a state labor agency or in state court.[33] The House, in considering changes to the NLRA, noted, "Since, therefore, the excluded parties have neither Federal nor State remedies available to them, they are said to be in the 'no man's land.'"[34]

Congress responded to concerns over the "no man's land" for small employers and their employees by amending section 14 of the NLRA to add a new subsection (c). Section 14(c) states the following:

> (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.
>
> (2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.[35]

By enacting section 14(c)(1), Congress appeared to endorse the Board's practice of declining jurisdiction over smaller employers.[36] At the same time, however, Congress prevented the Board from refusing to assert jurisdiction over employers that met the jurisdictional standards in effect on August 1, 1959. These standards were established for 10 types of enterprises and, in general, continue to apply.[37] If the Board declines jurisdiction over a labor dispute in accordance with one

[31] 29 U.S.C. § 162.

[32] *See* S. Rep. No. 187, at 25 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2318, 2341.

[33] *See Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957); *Amalgamated Meat Cutters, et al. v. Fairlawn Meats, Inc.*, 353 U.S. 20 (1957); *San Diego Building Trades Council v. Garmon*, 353 U.S. 26 (1957).

[34] S. Rep. No. 187, *supra* note 32, at 25.

[35] 29 U.S.C. § 164(c)(1).

[36] The Developing Labor Law 2223 (John E. Higgins, Jr., et al. eds., 2006).

[37] *See Leedom v. Fitch Sanitarium, Inc.*, 294 F.2d 251, 255-56 (D.C. Cir. 1961) (identifying jurisdictional standards in (continued...)

of the standards, section 14(c)(2) authorizes a state or territorial agency or court to assert jurisdiction.

The jurisdictional standards that arguably have the broadest application are those for retail and non-retail enterprises. Pursuant to its standards for retail enterprises, the Board will assert jurisdiction if such an enterprise has an annual gross volume of business of at least $500,000 and has some business, greater than de minimis, across state lines. Under its standards for non-retail enterprises, the Board will assert jurisdiction if such an enterprise has a direct or indirect inflow or outflow of goods or services across state lines of at least $50,000.[38]

The EFCA would not have amended section 14(c) of the NLRA and did not specifically address the treatment of small employers. Opponents of the EFCA argued that the impact of the measure on small businesses could be significant given the financial thresholds in the jurisdictional standards for retail and non-retail enterprises.[39] Some maintained that the thresholds are so low that many businesses that are likely perceived as "small businesses" would have become subject to the EFCA.[40] Others argued, however, that the vast majority of small businesses are too small to have to worry about unionizing.[41]

Past Legislative Alternatives

While the EFCA received significant attention for the changes it would have made to the NLRA, some observed that other past measures proposed similar, but arguably less dramatic, amendments to the labor statute. Some of these measures, for example, would have required an expedited election, but not automatic certification, if a specified percentage of employees signed authorization cards. Other measures would have permitted automatic certification only if 75% of employees in an appropriate bargaining unit signed authorization cards.

The Labor Relations Representative Amendment Act, introduced by Senator Paul Simon in the 103rd and 104th Congresses, would have required the Board to direct an expedited election to be held within 30 days after the receipt of signed authorization cards from 60% of employees in an

(...continued)

effect on August 1, 1959, for the following: non-retail enterprises; office buildings; public utilities; newspapers and communications systems; retail enterprises; hotels; transportation enterprises, links, and channels of interstate commerce; transit systems; taxicabs; and national defense enterprises). Since 1959, the Board has established additional jurisdictional standards for other enterprises, including apartment houses and art museums. See Nat'l Lab. Rel. Board, An Outline of Law and Procedure in Representation Cases 1-24 (2005) (discussing jurisdictional standards).

[38] *See* Nat'l Lab. Rel. Board, An Outline of Law and Procedure in Representation Cases 2 (2005) ("Direct outflow refers to goods shipped or services furnished by an employer directly outside the State. Indirect outflow refers to sales of goods or services within the State to users meeting any standard except solely an indirect inflow or indirect outflow standard.").

[39] *See* Matthew Bandyk, *Small Business Issues in The Ballot Box: The Employee Free Choice Act* (Oct. 31, 2008), *available at* http://www.usnews.com/articles/business/small-business-entrepreneurs/2008/10/31/small-business-issues-in-the-ballot-box-the-employee-free-choice-act.html; James Sherk, *EFCA Authorizes Government Control of 4 Million Small Businesses* (Mar. 12, 2009), at http://www.heritage.org/Research/Labor/wm2341.cfm.

[40] *See* Sherk, *supra* note 39.

[41] *See* Bandyk, *supra* note 39.

appropriate unit.[42] Under the measure, an expedited election could not be delayed for any reason or purpose.

Similarly, the Right to Organize Act of 2001, introduced by Senator Paul D. Wellstone in the 107th Congress, contemplated an expedited election, but would have required the Board to direct such an election to be held within 14 days after the receipt of signed authorization cards from 60% of the employees in an appropriate unit.[43]

The National Labor Relations Fair Elections Act, introduced by Representative Major R. Owens in the 101st, 102nd, and 103rd Congresses, would have permitted the certification of an individual or labor organization as the exclusive representative of a bargaining unit without an election if 75% of the employees in an appropriate unit signed authorization cards.[44] If authorization cards were signed only by a majority of employees, the measure provided for an expedited election. Within 7 days after the filing of the representation petition and the receipt of the authorization cards, the Board would have been required to direct an election to be held no later than 15 days after the petition was filed.

The National Labor Relations Fair Elections Act would have also established a schedule for all other representation elections. Under the measure, such elections would have been required to occur no later than 45 days after the filing of a petition, unless the Board determined that the proceeding "present[ed] issues of exceptional novelty or complexity.[45] When such issues were involved, the election could occur no later than 75 days after the filing of the petition.

Past efforts to amend the NLRA to allow for expedited elections may prove instructive if, as widely expected, the EFCA is reintroduced in the 112th Congress. Opponents of the measure who maintained that it undermines the sanctity of the secret ballot election may support efforts to expedite elections under the NLRA rather than allow for the automatic certification of a union.[46]

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[42] S. 778, 104th Cong. (1995); S. 1529, 103rd Cong. (1993).

[43] S. 1102, 107th Cong. (2001). Other versions of the Right to Organize Act introduced in the 106th Congress did not include provisions for an expedited election.

[44] H.R. 689, 103rd Cong. (1993); H.R. 503, 102nd Cong. (1991); H.R. 4800, 101st Cong. (1990).

[45] H.R. 689, 103rd Cong. § 3 (1993); H.R. 503, 102nd Cong. § 3 (1991); H.R. 4800, 3 101st Cong. (1990).

[46] *See, e.g.*, 153 Cong. Rec. H2046 (daily ed. Mar. 1, 2007) (statement of Rep. Diaz-Balart) ("Now, I think we should work on expediting elections by the NLRB, and we should work to make sure elections for certification are as expedited as they are for decertification. That is another issue that I would like to work with my colleagues on. But I cannot support this legislation which goes to the heart of that most essential aspect of the right of human beings to express themselves in private, which is the secret ballot.").