1-26-2009

The Employee Free Choice Act

Jon O. Shimabukuro
Congressional Research Service

The Employee Free Choice Act

Abstract
[Excerpt] 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") has been introduced in the past three Congresses to allow union certification based on signed authorizations, provide a process for the bargaining of an initial agreement, and prescribe new penalties for certain unfair labor practices. The 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 was introduced in the 110th Congress as H.R. 800 and S. 1041. H.R. 800 was passed by the House on March 1, 2007, by a vote of 241-185. On June 26, 2007, proponents of S. 1041 fell nine votes short of the 60 votes needed to limit enate debate and proceed to final consideration of the measure. The EFCA is expected to be reintroduced in the 111th Congress.

Keywords
Employee Free Choice Act, National Labor Relations Act, Congress, public policy

The Employee Free Choice Act

Jon O. Shimabukuro
Legislative Attorney

January 26, 2009

Congressional Research Service
7-5700
www.crs.gov
RS21887

CRS Report for Congress
Prepared for Members and Committees of Congress

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") has been introduced in the past three Congresses to allow union certification based on signed authorizations, provide a process for the bargaining of an initial agreement, and prescribe new penalties for certain unfair labor practices. The 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 was introduced in the 110th Congress as H.R. 800 and S. 1041. H.R. 800 was passed by the House on March 1, 2007, by a vote of 241-185. On June 26, 2007, proponents of S. 1041 fell nine votes short of the 60 votes needed to limit Senate debate and proceed to final consideration of the measure. The EFCA is expected to be reintroduced in the 111th Congress.

Contents

Contacts

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 three Congresses.[1] The Employee Free Choice Act ("EFCA" or "the act"), introduced in the 110th Congress as H.R. 800 and S. 1041, would amend the National Labor Relations Act ("NLRA") to allow union certification based on signed employee authorizations, provide a process for the bargaining of an initial agreement, and prescribe new penalties for certain unfair labor practices. Labor officials maintain that the EFCA is "the most important work we'll be doing, because it's a key to succeeding on everything else."[2] The measure is expected to be reintroduced in the 111th Congress.

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

Union Certification Without Election

The EFCA would amend 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 require 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," alleging that a majority of employees in a bargaining unit wish 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]

---

[1] 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 (statement of John J. Sweeney, President, AFL-CIO). Unions also contend that they have won pledges from almost all Democrats to support the Employee Free Choice Act.

[3] *See, e.g.*, S. 1102, 107th Cong. (2001), S. 654, 106th Cong. (1999); 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 (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 maintain that certification based on a majority of signed authorizations would eliminate this misconduct.

(...continued)

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 "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.

Those who oppose the certification process proposed by EFCA express concern for a union's possible use of coercive and intimidating tactics to obtain signatures.[17] They also fear the increased possibility of forged signatures on authorization cards.[18]

In FY2008, the median time to proceed to an election from the filing of a representation petition was 38 days.[19] According to the Board, in FY2008, 95.1% of all initial representation elections were conducted within 56 days of the filing of a petition.[20]

Role of the Federal Mediation and Conciliation Service

In addition to providing for union certification without an election, the EFCA would amend 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.[21] If, after 90 days of bargaining or such additional period as the parties may agree upon, the parties fail to reach an agreement, the act would permit 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 refer 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."[22] 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."[23] 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.

Proponents of the EFCA argue that legislation is needed to promote the prompt negotiation of initial collective bargaining agreements.[24] In 32 percent of all cases, the employer and the union reportedly fail to reach agreement within the first two years following an election.[25] Some observe, however, that the availability of binding arbitration under the EFCA would likely discourage support for the legislation from the business community. Under the act, employers

[17] *Id.* Legislation that would make it an unfair labor practice for an employer to recognize or bargain with a labor organization that has not been selected through an election has been introduced in the past. *See e.g.*, H.R. 4343, 108th Cong. (2004).

[18] *Id.*

[19] 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.

[20] *Id.*

[21] H.R. 800, 110th Cong. § 3 (2007); S. 1041, 110th Cong. § 3 (2007).

[22] 29 U.S.C. § 173(b).

[23] *Id.*

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

[25] *Id.*

would be faced with the possibility of having to accept what they view 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 amend 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 be permitted to award employee back pay and 2 times that amount as liquidated damages.[26]

The EFCA would also impose 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 are seeking representation by a labor organization or during the period after a labor organization has been recognized as a unit's exclusive representative, but before the first collective bargaining agreement has been executed, would be subject to a civil penalty not to exceed $20,000 for each violation. The exact amount of the penalty would be 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.[27]

Under existing law, the Board may order any person committing an unfair labor practice to cease and desist from such misconduct.[28] The Board may also take such affirmative action, including reinstatement with back pay, as will effectuate the policies of the NLRA.[29] Section 12 of the 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.[30] However, no specific penalty currently exists for the kind of willful and repeated misconduct described in the EFCA.

---

[26] H.R. 800, 110th Cong. § 4(b) (2007); S. 1041, 110th Cong. § 4(b) (2007).

[27] *Id.*

[28] 29 U.S.C. 160(c).

[29] *Id.*

[30] 29 U.S.C. § 162.

Past Legislative Alternatives

While the EFCA has received significant attention for the changes it would make to the NLRA, other past measures have 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 appropriate unit.[31] 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.[32]

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.[33] 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.[34] 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 expected, the EFCA is reintroduced in the 111th Congress. Opponents of the measure who maintain 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.[35]

---

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

[32] 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.

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

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

[35] *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 (continued...)

Author Contact Information

Jon O. Shimabukuro
Legislative Attorney
jshimabukuro@crs.loc.gov, 7-7990

(...continued)

express themselves in private, which is the secret ballot.”).