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Senate Democrats Progress on EFCA Compromise

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The past several days have brought potentially significant developments with respect to Senate Democrats' efforts to enact labor law reform and bring the Employee Free Choice Act to a vote on the Senate floor. Reports have circulated that a consensus has begun to emerge among Senate Democrats for a bill that would remove EFCA's controversial provisions eliminating secret ballot elections where a union has obtained signatures from more than 50 percent of the employees in the proposed bargaining unit, and instead would provide for significantly faster NLRB-conducted elections, within five to ten days of the filing of a representation petition. The bill would also provide for greater access to employees and to employer property during the campaign period. Presently, NLRB-conducted elections are typically held an average of 45 days after the union files a petition. Along with faster elections, the reported compromise would include increased access by unions to employer premises to campaign among employees, as well as increased restrictions on employer campaign rights. EFCA's other most controversial component, compulsory binding arbitration of the economic and other terms of initial collective bargaining agreements where the parties do not quickly reach agreement, is reported to remain a part of the compromise bill.

While the Democrats reached 60 votes in the Senate when Arlen Specter of Pennsylvania switched his party affiliation from Republican to Democrat and Al Franken was finally declared the victor over Norm Coleman in Minnesota, the fact is that there remain a substantial block of Democratic senators who have expressed doubt about EFCA's card check language and who have indicated that they are not prepared to support a bill that would eliminate secret ballot elections. The compromise language is intended to draw their support, while fulfilling the Democrats' commitment to change the law to make it easier for unions to organize.

This past Friday, The *New York Times* reported that a number of key Democratic Senators, including supporters of the card check bill, had indicated their willingness to compromise on an alternate form of EFCA that preserved secret ballot elections. A number of union leaders have indicated that such a compromise bill would still, from their perspective, represent an "important victory" because it would lead to faster elections and make it easier for workers to unionize. That compromise would eliminate EFCA's provisions calling for recognition on the basis of a card check and preserve NLRB-conducted secret ballot elections but would

significantly change the procedures surrounding elections in a number of ways that would make it easier for unions to win and much more difficult for employers to ensure that employees were fully informed and able to weigh all of the facts before casting their votes.

- First, it is reported that the proposed amendments to EFCA would require that representation elections take place within five and ten calendar days of the union's filing a petition for an election.
- The compromise legislation would include "access," meaning that employers would be required to permit a union trying to organize to come onto its property to seek signatures on cards (which unions would still use as evidence of a showing of interest to secure an election), to hold meetings at which it would be able to campaign with the employees during the days preceding the election and to counter any messages the employer might seek to convey.
- Under the current law, employers have the right to require their employees to attend meetings (so long as they are not held during the last 24 hours before the voting begins) where the employer may present its views to the employees about why they would be better off voting against union representation. Organized labor has dubbed these meetings and the remarks presented at them as "captive audience speeches" because the employer is able to require employees to attend—the unions claim the employees are held captive. One proposed amendment to EFCA would make it unlawful for employers to require employees to attend meetings where the employer presents its point of view.
- The compromise also reportedly calls for increased use of voting by mail in representation elections. While the NLRB has long used mail ballots where it deems them necessary, they have generally been viewed as less reliable and have been disfavored and only used in a small percentage of elections today.

Significantly, the compromise bill would continue to include the other most controversial provision of EFCA, that is, the requirement of government-conducted binding interest arbitration to set the terms of a first collective bargaining agreement where the parties do not reach quick agreement. Under EFCA, an arbitrator would set the terms of an initial two-year contract. EFCA does not provide any real detail as to what limitations or direction would apply to the arbitrator in doing so.

From an employer's perspective, the reported compromise continues to represent a serious concern and in many respects is not significantly better than the original version of the EFCA bill. While it would preserve the concept of a secret ballot election, the call for a very short, five to ten day time span between the filing of a petition and the NLRB conducting the vote means, realistically, that employers will not have any meaningful opportunity to put together a campaign and present the important counter arguments to the promises that the union will have made while it has been collecting signatures on cards. Such fast elections would follow the lines of the model followed in Canada under the various provincial labor relations laws. This means that the resolution of such critical issues, such as the determination of what is the appropriate unit for bargaining, which employees are supervisors and/or managers and thus who is actually eligible to vote and take part in the election and organizing campaign would not be addressed and resolved until after the election is held.

As noted, the proposed compromise bill would also not only take away such communications

tools as mandatory all employee meetings, the revised legislation appears likely to also provide unions and organizers with access to employers' facilities, such as meeting rooms, email systems, and the like to conduct their campaigns.

It is worth noting that, under existing law, the NLRB already has held that in some cases employers must allow unions such access as "special remedies" where the Board finds that employer unfair labor practices have seriously interfered with its election processes and employees' rights under the Act. The courts have affirmed the Board has the authority to grant such relief and thus it should be noted that an "Obama Board" might well seek to expand the use of such remedies even before or without Congressional action on EFCA.

Given all of the above, if EFCA were to be enacted in the modified form described above or in some similar form, employers would clearly be facing a significantly altered organizing landscape, one in which unions would have many tools and tactical advantages that they do not have today. This will likely be true regardless of whether card check is ultimately included in EFCA or other labor law reform legislation. Employers need to face the reality that union organizing will likely move deeper underground and that by the time that an employer receives notice that a representation petition has been filed with the NLRB and that an election will be held within the following week, it will often be too late to begin the process of convincing the employees why they are better off without representation.

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