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Practical Effects of the Proposed Employee Free Choice Act

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As seen in the May issue of Louisville *Bar Briefs.*

Overlooked in the hue and cry generated over so-called "card check" unionization in the private sector, are equally if not more troublesome features of the proposed Employee Free Choice Act.[1] While, to be sure, risks of coerced card-signing and potential fraud are magnified by a selection process involving mere card signing, as opposed to a government-run secret ballot election, the more significant upset to labor-management relations surfaces in the realm of "what happens next?"

Thus, while the seemingly undemocratic process of card-check has resonated with the general public as the principal criticism of the EFCA, less trumpeted has been one additional revolutionary feature of the EFCA which tilts the historical "playing field" dramatically. This proposed change, if enacted, will substantially impact the relationships amongst employers, unions and employees.

The National Labor Relations Act defines the "obligation to bargain collectively" in only the most general terms. In Section 8(d)[2] , that duty is stated as requiring merely that the parties to a collective bargaining relationship "meet at reasonable times and confer in good faith" concerning employment terms, and "the execution of a written contract incorporating any agreement reached …." However, Section 8(d) continues:

"…[B]ut such obligation does not compel either party to agree to a proposal or require the making of a concession…"

Under the proposed EFCA, the freedom to reject a proposal or to refrain from making a concession would be, in the context of initial contract bargaining, illusory at best. EFCA would subject such decisions to agency second-guessing. That is because EFCA proposes to amend Section 8 of the National Labor Relations Act in a way that prescribes an extremely narrow window for achieving an agreement, and substitutes federal agency-conducted arbitration of unresolved contract issues.

While EFCA would allow the labor organization and employer engaged in first contract bargaining to agree to enlarge upon the time limits imposed for the conduct of negotiations, the absence of such an agreement would require that negotiations commence within 10 days of receipt of a written request from a newly "organized or certified … representative." If a complete agreement is not achieved within a "90-day period of beginning on the date on which bargaining is commenced," there follows a 30-day period of mediation under the auspices of the Federal Mediation and Conciliation Service (FMCS). Failure of mediation to achieve an agreement through conciliation, requires the FMCS to "refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service."[3]

Arbitration for the purpose of establishing contract terms, commonly referred to as "interest arbitration,"[4] can, and does, take different forms. For instance, "final offer" interest arbitration challenges the decision-maker to choose between each of the two offers of the parties to the negotiations, without compromise to or amendment of the chosen offer. Even then, however, the criteria to be examined and subject to analysis in

arriving at a decision may be significantly restricted by the agreement to arbitrate, itself. An example of this modified form of "final offer" arbitration is the salary arbitration procedure utilized by Major League Baseball and its Players Association. Interestingly, the criteria upon which evidence can be presented and upon which decisions are to be made do not include profitability of the individual club engaged in arbitration with a particular player.[5]

In contrast to this limited form of interest arbitration is the prospect of submission to arbitral decision-makers a wealth of issues. Rarely, in the context of first contract bargaining, are unresolved issued limited to purely economic, "dollars and cents," matters. Instead, because the duty to bargain applies to virtually every term or condition of employment, disagreement over operating matters and even philosophical differences are likely to persist. For instance, just as controlling labor costs is a fundamental challenge and interest of management, work schedules and shift assignments may be equally important to employees. Likewise, a contractual provision requiring membership in the representative labor organization as a condition of employment in those states which permit it, is a core concern interest of unions in every first contract negotiation.[6]

Despite the seeming disparity amongst the above interests of those concerned, one can rarely be addressed in isolation without regard to the impact on others. For example, a "just in time" manufacture with fluctuating customer orders will be concerned with avoiding contractual restraints on work scheduling. Should the work available be subject to seasonal peaks and valleys, the same employer would have to concern itself with the impact of union membership costs on employees and effect on its ability to hire temporary or short term workers.

This illustration is but a microcosm of the myriad interconnected issues and bargaining pressures facing parties who enter the collective bargaining arena. Nevertheless, for those who would champion EFCA as a viable solution to whatever they may find problematical with the existing system, arbitration of contract issues which remain unresolved is of questionable benefit. Arbitration of initial contract terms is plainly at odds with the purpose of the NLRA to promote, "industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers,"[7] in a system, "[w]here the Government does not attempt to control the results of negotiations…."[8] And yet, with interest arbitration decisions of the FMCS proposed as the mechanism for setting unresolved contract issues, neither the process nor the results amount to voluntary, non-governmental settlement of labor disputes.

Regardless of uncertainty of process which the FMCS may decide upon to regulate arbitration under EFCA, matters of significant concern seem unavoidable. Consider:

- Will an employer's financial condition, in the nature of specific detailed information, necessarily be interjected into every post-EFCA first contract negotiation, contrary to existing law that such information need be produced only in response to an employer's unequivocal plea of "poverty," and inability to pay for union demands?[9]
- If financial information is not produced in bargaining, is the prospect of pre-arbitral resolution of economic issues illusory?
- Will unnecessary "gamesmanship" be practiced, or even permissible as good faith bargaining, by advancement of proposals contingent upon acceptance on a pre-arbitration basis; e.g. a better wage/benefit offer is accepted before invocation of arbitration?
- Will such offers be admissible in arbitration presentations so as to virtually assure that they will be deemed reasonable by arbitration boards?
- Will negotiations necessarily involve retention of some degree of flexibility in order to insure that any decision of an arbitration board is within a party's realm of tolerance?

These questions are raised as mere exemplars to the wealth of unanswered questions concerning EFCA's proposed impact upon private sector collective bargaining. Moreover, and as hopefully illustrated above,

there is strong reason to believe that its intended effect, expeditious resolution of management-labor disputes, is disserved by third-party governmental intrusion into substantive contract terms.

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(1) H.R. 1409, S. 560 (111th Congress), introduced simultaneously on March 10, 2009.
(2) 29 U.S.C. §158(d).
(3) EFCA, Sec. 3, proposed as amending 29 U.S.C. §158.
(4) As explained in *Sheetmetal Workers International Association, Local Union No. 24 v. Architectural Metal Works, Inc.*, 259 F.3d 418 (6th Cir. 2001) quoting *Federated Dept. Stores, Inc. v J.V.B. Indus., Inc.*, 894 F.2d 862, 866 (6th Cir. 1990).
(5) The agreement, including salary arbitration rules, can be viewed at http://mlbplayers.mlb.com/.
(6) See NLRA §8(a)(3), 29 U.S.C. §158(a)(3), permitting an employer to agree to compulsory union membership as a condition of continuing employment in states which have not separately enacted legislation prohibiting this form of so-called "union security."
(7) *NLRB v. American National Insurance Co.*, 343U.S. 395, 72 S.Ct. 824 (1952).
(8) *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 80 S.Ct. 419 (1960).
(9) *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 76 S.Ct. 753 (1956).