

Electronic Letterhead

J. Michael McGuire
mcguire@shawe.com
410-843-3461

To: Maryland Chamber of Commerce
Legislative Committee

From: J. Michael McGuire
Shawe & Rosenthal LLP

Date: February 16, 2009

**Labor Law Changes Backed By Unions
Would Eliminate Secret Ballot Elections
And Impose Binding Arbitration**

The Employee Free Choice Act (“EFCA”), which died in the Senate in June of 2007, remains the top priority for organized labor. As the Wall Street Journal reported in a November 6, 2008 article, organized labor is “counting on the incoming Obama administration to back its agenda” and the EFCA is “at the top of labor’s wish list.” Labor’s expectations are not without foundation. President Obama was a Senate sponsor of the EFCA and promised during the election to fight for the legislation. He has “delivered” on that promise with his nomination of Hilda Solis to be Secretary of Labor. Ms. Solis voted in favor of the EFCA when she served in the U.S. House of Representatives and pushed for its passage as Director of the pro-union lobbying group, American Rights at Work (a position she held while serving in the House). Our sources in Washington report that the ECFA will be introduced soon and will likely be taken up in the Senate in early summer 2009.

The Maryland Chamber is taking the lead in Maryland in voicing opposition to the EFCA. Kathy Snyder, Allyson Black and Steve Shawe of Shawe & Rosenthal met with Senators Mikulski and Cardin in January of this year to explain the business community’s concerns about the legislation. The Maryland Chamber’s decision to make its opposition to SJ5 and HJ 4 a priority matter is further evidence that business interests are being well articulated by the Chamber. Employer groups must explain to their elected officials why EFCA would be bad for business *and* the individuals who they employ if the legislation is to be defeated.”¹

¹ In that regard, recommended reading is *The Case Against the Employee Free Choice Act*, a study prepared by University of Chicago Professor Richard Epstein in which he concludes that the EFCA would “reduce income and employment across the board” and increase “the level of

In the following pages, we provide an analysis of the key provisions of the EFCA as introduced in the 110th Congress. We then supply an explanation of how the EFCA would change current law and thereby upset the balance between management and labor that is the hallmark of the National Labor Relations Act.

EFCA Key Provisions

Introduced in the House of Representatives on February 5, 2007, by U.S. Representative George Miller (D-CA), Chair of the House Education and Workforce Committee, the Employee Free Choice Act (H.R. 800, copy attached) contained five key provisions:

1. First and foremost, the EFCA would require that employers recognize a union as the exclusive bargaining representative for a group of employees where a majority of the employees have signed union authorization cards (*i.e.*, the “card check” process). The secret ballot election process would be eliminated. (The Employee Free Choice Act is a remarkable misnomer, and a blatant effort by its sponsors to disguise the purpose of the statute.)
2. If a union is certified and the employer and the union cannot agree on a first contract after 90 days, either party can request assistance from the Federal Mediation and Conciliation Service and, if mediation does not result in a binding contract within 30 days, the FMCS must refer the matter to binding arbitration (which would result in a collective bargaining agreement that is binding on the union and the employer for two years). An arbitrator would set the terms of the labor agreement.
3. Employers found to have unlawfully discriminated against an employee in connection with a union campaign or in relation to the first contract will be liable not only for back pay but also two times the amount of backpay as liquidated damages.
4. In addition to any other make-whole remedy, civil penalties of up to \$20,000 per violation can be imposed against employers who willfully or repeatedly violate employees’ rights in either a campaign or in negotiation of the first contract.
5. Injunctive relief is available whenever the NLRB has “reason to believe” that an employer has discharged or threatened to discharge an employee, or has engaged in

labor unrest . . . at a time when the economy is still likely to suffer from a general economic slowdown.” To read the study, to go http://www.uschamber.com/assets/wfi/090203_epstein.pdf. It will be published soon by the Hoover Institution of Stanford University.

conduct that significantly interferes with employee rights either during an organizing campaign or in negotiation of the first contract.

How EFCA Changes Current Law

While an employer, under current law, may agree to recognize a union under the card check method, it is not required to do so, and few employers agree to union recognition based on a card check. Typically, a union secures its status as bargaining representative only by winning an NLRB-supervised secret ballot election. Under the EFCA, an employer would be required to recognize a union under the card check method and could no longer insist on a secret ballot election. Moreover, the binding arbitration provision for first contracts would give unions significantly increased authority to influence the terms of a first collective bargaining agreement. Currently, employers and unions are free to bargain as they please so long as they both act in good faith. Imposing mandatory arbitration after 90-120 days of negotiations will limit the employer's bargaining power and make the first CBA subject to the decision of a panel of arbitrators who are free to order the agreement they deem best.

The Potential Impact of EFCA Passage in 2009

If the EFCA becomes law, the most significant effect on employers will be increasingly successful union organizing campaigns. Labor unions will be able to forego the election process in favor of a stealth campaign with the card check system. This will likely delay management's perception of the union campaign, causing it to lose critical time in informing employees of the company's position, the risks of unionization, and the benefits of remaining union free. Moreover, under the card check system, instead of a secret ballot system in which each employee can freely vote his or her conscience, unions can more easily exert pressure on employees to simply sign the card favoring the union. Unlike the current secret ballot election process that takes a "snap shot" of employee sentiment on a given day, the card check process is cumulative over time. Will there be a process for employees to "revoke" their authorization if there is a change of mind? The current version of EFCA is silent.

With the mandatory arbitration provisions, management will have lost critical leverage in negotiating an initial contract with the newly-formed union. Usually an employer negotiating a first contract can withhold provisions such as union shop and dues check off,² and later trade

² "Union shop" is a contract provision requiring all employees to pay dues to the union as a condition of continued employment.

"Check off" is a contract provision whereby the employer agrees to deduct those union dues from the employee's paycheck each month (if authorized by the employee) via payroll deduction and remit the dues to the union on the employee's behalf.

them off for a reasonable economic package and strong management rights provisions in the collective bargaining agreement. With EFCA, the union may have little incentive to accept what management offers and can instead hold out for the mandatory arbitration process. This could result in stalled negotiations, as unions resist management's good faith offers and wait out the clock to force arbitration. Alternatively, management, in seeking to avoid the uncertainty (and cost) of arbitration, may accept union demands it otherwise would have steadfastly rejected.

Clearly the EFCA would do far more than eliminate secret ballot elections. In requiring first labor contract disputes to be submitted to binding arbitration, unions will be able to *guarantee* employees whom they are trying to convince to sign union cards that the union will get a labor contract. The EFCA itself sets no standards or guidelines for the substantive terms of any labor contract.

The EFCA greatly increases penalties for unfair labor practices. If a pro-union employee is fired during an organizing campaign or first contract negotiations, and the NLRB finds unlawful anti-union animus motivated the company, the employee will be awarded *triple* back pay damages. If a company engages in unlawful "restraint or coercion" of an employee, for example by "listening in" to employees' union talk, currently the only statutory penalty is posting a notice in the workplace informing employees of their union rights and that the employer will not violate them in the future. Under the EFCA, a financial penalty of up to \$20,000 per violation could be imposed.

Employer groups are united in their opposition to the EFCA. Their unlikely ally, former Senator George McGovern, wrote in an August 2008 Wall Street Journal editorial (copy attached):

To my friends supporting the EFCA I say this: We cannot be a party that strips working Americans of the right to a secret ballot election. We are the party that has always defended the rights of the working class. To fail to ensure the right to vote free of intimidation and coercion from all sides would be a betrayal of what we have always championed.

In conclusion, the EFCA is not about "free choice." It is about "forced choice" (an oxymoron indeed).