

Employment

COMMENTARY

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Employers Oppose Enactment of Employee Free Choice Act

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On March 1, by a vote of 241-185, the U.S. House of Representatives passed H.R. 800, the Employee Free Choice Act of 2007, a bill sponsored by House Education and Labor Committee Chairman George Miller, a Democrat from California.

That law would streamline the process for union organizing through a card-check process. While the White House has indicated its opposition to this law, employers continue to watch closely to see whether important rights would disappear after enactment.

Specifically, the bill would amend the National Labor Relations Act to require the National Labor Relations Board to certify a bargaining representative without directing an election if a majority of employees in a bargaining unit authorize the designation of the representative (the card-check process) and there is no other individual or union currently certified or recognized as the exclusive representative of any of the employees in the bargaining unit.

In effect, the bill would deprive employers of the opportunity to force a secret ballot election by the NLRB upon presentation of a majority of pro-union signatures on the authorization cards. While awaiting the election, employers have the right educate their workforce concerning the facts regarding union membership.

While unions have been critical of this process, they have the reciprocal right to present their perspective and most often have begun the process by the time the authorization cards are presented. Moreover, when unions resort to coercive or improper tactics, employers truly need the time prior to an election to counteract these measures to level the playing field.

A Senate version sponsored by Massachusetts Democrat Edward Kennedy is expected to be introduced shortly. The White House has expressed strong opposition to the bill and has indicated that President Bush intends to veto the bill should it pass the Senate.

In a recent statement the White House noted that the bill would "strip workers of the fundamental democratic right to a supervised private ballot election, interfere with the ability of workers and employers to bargain freely and come to agreement over working terms and conditions, and impose penalties for unfair labor practices only on employers — and not on union organizers — who intimidate workers."

Amendment of the National Labor Relations Act

Currently under the National Labor Relations Act employees are permitted to form or join a union in one of two ways.

The most common process is through a secret ballot election conducted by the NLRB. After an election the NLRB counts the ballots to determine whether the union received a majority of the votes. If a majority of the employees in the bargaining unit voted in favor of the labor organization, the NLRB certifies the union as the bargaining representative.

The second way is commonly known as the card-count process. The union obtains a majority of cards from the prospective bargaining unit and offers to send them to the employer for review. The employer would have the opportunity to review the cards and recognize the union, although this is generally inadvisable and does not often occur.

Rather, the employer typically declines to count the cards, claiming that the union does not represent an uncoerced majority of the prospective bargaining unit. The union would then file a petition for an election with the NLRB.

The Employee Free Choice Act would amend the law to require the NLRB to investigate any petition filed by an employee or group of employees or any individual or labor union acting in their behalf alleging that a majority of employees in a unit wish to be represented by a union.

If the NLRB determines that a majority of employees have signed valid authorizations designating a union and no other union is currently certified or recognized as the exclusive representative of any employees in the unit, the NLRB "shall not direct an election but shall certify the individual or labor organization as the representative described." Once the union is certified, bargaining is to begin immediately.¹

Perhaps the most significant change in the law is a provision allowing employers or a union to refer disputes regarding initial collective bargaining agreements that are not resolved through negotiations after the expiration of a 90-day period to the Federal Mediation and Conciliation Service for mediation. If an agreement is not reached after the expiration of the 30-day period, beginning on the date of the request for mediation, the contract dispute is referred to binding arbitration.

Summary of Other Provisions

The bill also provides for other significant changes in current law. For example, the bill revises enforcement requirements regarding unfair labor practices during union organizing drives. Specifically, the bill requires a preliminary investigation of an allegedly unfair labor practice, which can lead to proceedings for injunctive relief.

Priority is given to a preliminary investigation of any charge that, while employees were seeking representation by a labor organization or during the period after a labor organization is recognized as a representative until the first collective bargaining contract is entered into, an employer:

- Discharged or otherwise discriminated against an employee to encourage or discourage membership in the labor organization;
- Threatened to discharge or to otherwise discriminate against an employee in order to interfere with, restrain or coerce employees in the exercise of guaranteed self-organization or collective bargaining rights; or

- Engaged in any other related unfair labor practice that significantly interferes with, restrains or coerces employees in the exercise of such guaranteed rights. Under the bill, the NLRB general counsel is required to seek a court injunction in such cases.²

As remedies for those violations, the bill provides for back pay and liquidated damages for employees discriminated against during those periods. The bill also amends the NLRA with respect to civil penalties against employers that willfully or repeatedly commit any unfair labor practice during the same time frames. An employer is subject to a civil penalty of up to \$20,000 for each violation.

In determining the amount of the penalty, the NLRB is to consider the seriousness of the unfair labor practice and the impact of the practice "on the charging party, on other persons seeking to exercise rights guaranteed by this act or on the public interest."

Impact on Employers

The Employee Free Choice Act contains numerous anti-employer provisions, including the prioritization of investigations of unfair-labor-practice charges with possible injunction proceedings in federal court, as well as liquidated damage and civil penalties. In that regard the bill would increase penalties against employers, but not unions, that commit unfair labor practices.

Several business groups, such as the U.S. Chamber of Commerce, the Society for Human Resource Management and the National Federation of Independent Business have expressed opposition to the bill, citing the elimination of the secret ballot process and the compulsory binding arbitration provision, and have vowed to fight passage of the Senate bill.

Perhaps the bill's most significant provision effectively requires that any bargaining disputes must be submitted to binding arbitration after 120 days on an initial collective bargaining agreement. Mandatory binding arbitration could foster bad-faith bargaining until the end of the 90-day period, thus allowing an arbitrator to impose unwanted employment conditions on both employees and employers.

In other words, binding arbitration may cause parties to stay far apart in their bargaining positions with the hope that their position would prevail in arbitration and may discourage them from resolving their bargaining differences.

The legislation also has been criticized because it would take away employees' private and free choice and force them to make public their decisions on whether to support

a union, thereby exposing them to pressure and coercion and promoting a threatening work environment. Their decisions would be made known to union officials, their employers and their co-workers.

In that regard, some have observed that NLRB-conducted secret-ballot elections are preferable to the card-check process, in which employees can be observed signing or declining to sign a union authorization card and the employer does not necessarily have an opportunity to speak against union representation.

In fact, because the union only needs authorization cards from a majority of employees, the remainder of the employees in the bargaining unit might not even be aware of the organizing campaign before the union is certified under the bill.

Furthermore, the provisions in the bill, unlike an NLRB-conducted election, do not require that employees receive information on both the costs and benefits of union

representation and leave employers with no opportunity to educate employees.

Notes

¹ The bill would still permit unions to continue to petition for NLRB-supervised secret-ballot elections if they so choose.

² Under current law the NLRB general counsel is required to seek a court injunction if there is reasonable cause to believe a union has engaged in a secondary boycott. It is within the general counsel's discretion, with the NLRB's permission, to seek an injunction to address an employer's probable illegal actions.

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