

PUBLICATION

What's Happening With the Employee Free Choice Act?

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The intense lobbying over this controversial piece of legislation continues unabated. As currently drafted, the most contentious parts of the bill would amend the National Labor Relations Act to allow a union to become the certified bargaining agent for a group of employees upon a majority of those employees signing authorization for the union on cards or a petition. In addition, it would require an arbitrator to establish the terms of an initial collective bargaining agreement if the parties could not agree after 120 days of bargaining.

The National Association of Manufacturers (NAM) and the United States Chamber of Commerce are spending millions of dollars in a nonstop effort to kill this legislation. In early April, five minority business associations, including the National Association of Black Hotel Owners, Operators and Developers and the U.S. Hispanic Chamber of Commerce, announced their opposition to the proposed legislation. Recently, the U.S. Chamber of Commerce sent a letter from over 3,000 companies to Congress opposing the bill. Meanwhile, the bill's supporters are rallying groups to support its passage.

On May 7, more than 1,100 college professors and scholars signed a letter to be delivered to Congress supporting the EFCA. The professors signing the letter range from teachers of economics to sociology claiming that the decline in the percentage of workers covered by collective bargaining agreements has contributed to the current financial crisis. On May 11, an international coalition of institutional investors sent a letter to Congress asking that the bill be passed. Many of the signatories to this letter have ties to union pension plans, including the AFL-CIO and the Service Employees International Union. Vice President Biden has also kept up the drum beat. In speaking to the annual legislative conference of the American Federation of State, County and Municipal Employees (AFSCME), Biden said, "There is no way to restore the economy without restoring the middle class. And there is no way of restoring the middle class without unions." Finally, a group of religious leaders are forming an organization entitled "Faith Leaders for Workplace Fairness," which intends to vocally support the EFCA.

Most recently, President Obama, again speaking in support of the EFCA, admitted that compromises must be reached in order for the bill to become law. Along those lines, Senators Arlen Specter of Pennsylvania, Jim Webb of Virginia, Mark Pryor of Arkansas, and Dianne Feinstein of California are participating in talks to modify the EFCA. Senator Tom Harkin of Iowa is also holding daily closed door talks with business groups and unions to try and fashion a compromise.

Among the many compromises suggested (none of which currently appears to have any traction) are:

- Employees could mail their ballots into the NLRB instead of signing cards to determine if a majority wanted a union to represent them.
- Instead of the current mandatory arbitration after 120 days of negotiations on a first contract, an arbitrator would only become involved after the parties fail to reach agreement on each of their last and best final offers.
- Maintaining the secret ballot election, but instead of the current 40 to 45 days between the filing of a petition by a union and the holding of secret ballot election, the time period would be shortened to 5 to 10 days for an election after the petition is filed.

Significantly, none of the opposition to the bill has focused on the enhanced penalties, including triple back pay for employees found to have been terminated in violation of the National Labor Relations Act and civil money penalties for repeat violators.

Unions anticipate passage of the bill, in some form, by October. Accordingly, employers should be prepared for a resurgence of union organizing with a solid union-backed majority on the National Labor Relations Board, a pro-union United States Department of Labor, and a Democratic administration. It is significant that the latest NLRB statistics show that unions are currently winning more than 60% of NLRB supervised secret ballot elections.

Baker Donelson stands ready to assist you in preparing for these and other employment-related challenges. For assistance, please contact your Baker Donelson attorney or any of our nearly 70 Labor & Employment attorneys in the Firm's Labor & Employment Department, located in *Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; and Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee.*

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