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It's Not Over Yet: What You Don't Know About the EFCA

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After overwhelming opposition from businesses, other employers and a tremendous investment of resources by the U.S. Chamber of Commerce, supporters of the so-called "Card Check" bill have conceded defeat with respect to the most controversial provision of the Employee Free Choice Act (EFCA) and abandoned the idea of trying to convert the National Labor Relations Act's (NLRA) current secret ballot system to one where a simple majority of eligible employees' signing union cards would establish a union. It became apparent in late spring that certain moderate Democratic Senators would not vote in favor of the card-check provision, making it impossible for the EFCA's supporters to acquire the filibuster-proof 60 votes necessary to pass the bill in its current form.

Does this mean that employers can forget about the EFCA? Not if you have concerns—as do most employers—with the other half of the EFCA. While the card-check portion of the bill received the most press and became the fault line between the bill's proponents and opponents, the other major component remained relatively obscure. The EFCA also seeks to change the nature of the bargaining process for the first contract between a new union and the employer via its "first contract arbitration" provision.

Under current law, an employer's only duty under the NLRA with respect to negotiation of a first contract with a new union is to negotiate "in good faith." Provisions of the EFCA would change the current rules to instead provide for only a 90-day period of good faith negotiation. If the parties cannot negotiate a contract within 90 days, the government-run Federal Mediation and Conciliation Service would appoint a mediator to assist the parties for another 30 days. If the mediation still did not result in a new contract, the matter would then be referred to an arbitration board to hear the union and employer's arguments concerning a contract. The arbitration board would then unilaterally decide the terms of the first contract. The employer would be bound by this contract and prohibited from a de-certification campaign (to seek removal of the union) for two years after the first contract.

The EFCA's provisions compelling "interest arbitration" and the resultant arbitration of terms of employment between the parties, are fundamentally at odds with current labor law principles and U.S. Supreme Court precedent, and they are equally as alarming, albeit less publicized, as the card-check provision.

There are already leaks from those on Capitol Hill who have been negotiating the EFCA that the abandonment of the card-check provision has set up the likelihood of compromise legislation that will include the "interest arbitration" provisions and continue to provide for additional one-sided penalties applicable only to employers similar to those in the original EFCA bill. The unions will now push interest arbitration as the centerpiece of the new labor bill. The revised written bill may emerge as soon as late summer.

There is also discussion that the alternative bill should provide for a drastically shortened time for secret ballot election campaigns under the NLRA. This is proposed as a compromise to the card-check provision. A shortened time period for election campaigns (a window as short as five days has been discussed) would tremendously disadvantage employers, who may be caught by surprise by a union that has prepared all aspects of an election campaign prior to petitioning the NLRB. Because the union will control when the election petition is made, it will be fully prepared to launch the campaign immediately and full-throttle before the start of the campaign. The shortened election cycle undoubtedly will increase most companies' exposure to

unionization. Thus, year round training of management regarding union avoidance, regular reinforcement of the dangers of unionization, and constant vigilance will be of great importance to employers wishing to remain union free. Pre-campaign preparedness will be a key to winning campaigns if the proposed shortened election cycle provisions become law.

Card check may be dead, but its demise may actually make enactment of instant campaigns and interest arbitration more likely. This raises the stakes to an even greater degree on the importance of employers thorough pre-campaign preparedness.

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