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The Employee Free Choice Act's Remedial Changes

Law360, New York (October 14, 2008) -- To date, the card-check provisions of the proposed Employee Free Choice Act have dominated the debate over this misguided legislative proposal.

The bill's mandatory interest arbitration provisions are now beginning to attract more attention as people begin to recognize the threat to American competitiveness posed by government-appointed arbitrators setting wages, benefit levels, work rules and other terms and conditions for private industry.

But very little attention has been paid to Section 4 of the act, which significantly increases legal and financial penalties — against employers only — for conduct occurring during organizing drives and first contract negotiations. Section 4 of the act would change the remedial structure of the National Labor Relations Act in at least three significant ways:

Mandatory Injunctions

Whenever a union charges that an employer has violated the NLRA during the course of an organizing drive or while negotiating a first contract, the EFCA would make the National Labor Relations Board's investigation of such charge a priority over all other NLRB cases and require the board to seek immediate injunctive relief from the federal courts in any case it does not summarily dismiss.

Liquidated Damages Language

If the board finds that an employer has discriminated against an employee on the basis of union support during an organizing drive or while the parties are negotiating a first contract, EFCA would require the board to award the employee triple back-pay.

Civil Penalties Language

In cases where an employer is found to "willfully or repeatedly commit" unfair labor practices during an organizing drive or first contract negotiations, in addition to traditional make-whole remedies, EFCA would authorize the imposition of additional civil penalties in the amount of \$20,000 for each

violation.

These are sweeping and substantial changes to the National Labor Relations Act and the traditional remedial structure employed in these types of cases.

In his opening remarks at the Feb. 8, 2007, hearing on EFCA, Rep. Robert Andrews, D-N.J. and chairman of the House subcommittee on health, employment, labor and pensions, said, "Most employers are not bad actors; however, I do believe the current structure of the representation process perpetuates the ability of a few employers to coerce employees without consequence."

One may certainly question the wisdom of radically overhauling long-established labor policy as a result of the actions of only "a few" "bad actors."

But beyond that, Andrews and EFCA's other proponents are simply wrong that there are currently no consequences in the law with which to punish those few bad actors.

In addition to the traditional remedies that the NLRA and accompanying regulations expressly provide, case law developed by the NLRB and federal courts authorizes a number of rather serious additional consequences that a recalcitrant employer can face. Specifically:

Gissel Bargaining Orders

Where an employer's unlawful actions have undermined the union's majority and made a fair election an unlikely possibility, the board has the authority to order the employer to recognize and bargain with the union even where there has been no secret ballot election or where the union has lost an election.

This authority was upheld in the U.S. Supreme Court's 1969 decision in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

The Sept. 21, 2006, case of *Evergreen America Corp.*, 348 NLRB No. 12 (2006), illustrates perfectly the board's use of the Gissel bargaining order.

The board found that the union had possessed signed cards from 62 of 115 bargaining unit employees, yet lost the election by a vote of 61 to 52. In response to the union's objections, the board held that the employer had engaged in unlawful activity that undermined the employees' free choice. For example:

—Approximately 27 employees received threats of job loss and plant closure;

—13 employees were unlawfully instructed not to attend union meetings, not to read the union's literature and to throw the material away;

—nine employees were unlawfully interrogated

—seven employees were subjected to the impression that their union activities were under surveillance;

—on 23 occasions, managers made express or implied promises to remedy solicited grievances;

—the company granted unprecedented and excessive across-the-board wage increases to bargaining unit employees;

—and managers made workplace changes designed to undermine union support, including liberalizing the promotion and attendance policies and improving other benefits.

Far from being “without consequence,” the board ordered the employer to recognize the union on the basis of the card majority, noting:

“[S]imply requiring the respondent to refrain from unlawful conduct will neither eradicate the lingering effect of the violations it committed nor deter their recurrence. Rather, we find that the employees’ representational desires, expressed through authorization cards, would be better protected by a bargaining order than by traditional or special remedies that the respondent asserts were not considered by the judge. Accordingly, because we conclude that it is unlikely that a fair rerun election can be held because of the lasting effects of the respondent’s violations, we affirm the judge’s finding that a Gissel bargaining order is appropriate.”

Section 10(j) Injunctions

Section 10(j) of the National Labor Relations Act gives the National Labor Relations Board the authority to seek petition in any U.S. district court in any representation proceeding for “such temporary relief or restraining order as it deems just and proper.”

This can include the immediate reinstatement of a discharged union supporter while unfair labor practice proceedings are pending.

EFCA will cast aside the current administrative investigatory process and the discretion of the board to pursue preliminary injunctive relief.

Ironically, it was the excessive and abusive application of the “injunction power” by the courts in labor cases throughout the late 19th and early 20th centuries that inspired progressive lawyers and labor activists to establish the current legal framework to begin with.

These legal reforms provided a specific statutory and dedicated administrative framework, taking authority away from activist courts and giving it to an independent, expert federal agency — the

NLRB.

The EFCA now seeks to take all the power of enforcing the labor laws against employers away from the specific experts at the agency and dump thousands of cases back on federal court dockets.

Civil Contempt Sanctions

Where a party refuses to comply with a circuit court's order enforcing an NLRB decision, the NLRB's Contempt Litigation and Compliance Branch can seek civil penalties, criminal sanctions and extraordinary injunctive relief.

In *NLRB v. Local 3, International Brotherhood of Electrical Workers*, Case No. 04-5912ag (2nd Cir., Dec. 12, 2006), for example, the Court of Appeals for the Second Circuit awarded civil contempt damages against the respondent upon the NLRB's petition.

In response to the respondent's repeated misconduct in the face of prior adverse judgments and consent decrees, the court adopted the special master's levy of civil fines in the amount of \$33,500, award of attorneys' fees, and grant of costs and fees.

Now, certainly EFCA proponents will point out that this was a ruling against a labor union — hardly an exercise of authority they welcome. Yet it shows the full range of remedial power available to the board to punish parties who repeatedly violate the law.

"First Contract" Remedies

Finally, to the extent that first contract negotiations are a focus of EFCA's remedial provisions, current law also provides mechanisms for dealing with bad-faith bargaining by employers in those situations.

In a series of memorandums issued to regional offices, NLRB General Counsel Ronald Meisburg provided clear instructions to agency officials to pursue injunctions and special remedies in "first contract" bargaining cases. See GC Memorandum 06-05, April 19, 2006; GC Memorandum 07-08; May 29, 2007; GC Memorandum 08-08, May 15, 2008; and GC Memorandum 08-09, July 1, 2008.

The specific remedies authorized by the General Counsel include: extensions of the certification period (which would prohibit decertification elections) by 6 to 12 months; requiring bargaining on a prescribed or compressed schedule; requiring periodic reports to the NLRB on the status of negotiations; ordering reimbursement of bargaining costs; multi-facility postings; and union access to employer bulletin boards.

EFCA proponents argue that the extraordinary remedies discussed in this section are rarely sought

by the NLRB.

This is true. There are numerous cases reported each year that would seem to be ideal candidates for injunctive relief, bargaining orders and civil contempt penalties.

However, the NLRB has historically suffered from very tight budgetary constraints, and this is likely the reason that more cases are not aggressively pursued.

Because EFCA would undoubtedly require significant increases in agency funding, one wonders why Congress would not simply provide that funding now and allow the existing remedial options to function in the way that they were intended.

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