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The GSH 60-Second Memo

January 13, 2010

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2010 Labor Law Outlook: Employee Free Choice Act to Resurface

By Vincent T. Norwillo, Esq.

The Employee Free Choice Act (EFCA) has been removed from the political radar screen for months. However, once Congress finishes dealing with health care, EFCA is expected to regain attention on Capital Hill. Organized labor and other supporters of this legislation know that their window of opportunity is closing - as the November 2010 election is the likely end to their 60 seat Senate majority - so yet another contentious debate is expected to erupt this spring.

EFCA is a union-backed proposal that would make it easier for unions to gain members by amending federal labor law in two significant respects. First, EFCA proposes to eliminate the current secret ballot election process and allow unions to represent an entire workforce, if the union can convince more than 50% of the affected workers to sign membership cards (the "card check" provision). Second, EFCA proposes to change the process by which unions secure their first contracts with employers. Rather than allow the parties to arrive at a first contract through good faith negotiations, EFCA would empower a government-mandated arbitrator to impose initial contract terms if the employer and the union cannot reach a complete agreement after 120 days of negotiations (the "mandatory arbitration" provision).

Wrangling over the extremely controversial card check provision forced a tabling of the Senate bill last year. Even with a 60 vote majority, most observers agree that this provision will have to be watered down if not eliminated from any EFCA bill that hopes to win Senate approval. However, business groups opposing EFCA say that its provision for mandatory binding arbitration in first contracts is just as bad as the card check dimension of the bill - if not worse - because it would allow a third party to determine compensation, benefits and work rules for two years.

Under EFCA, an employer and a union would have to begin negotiations 10 days after a union is formed. If they fail to come to a complete agreement after 90 days, the parties would have to submit their disagreements to a mediator. If no resolution is achieved after 30 days of mediation, the dispute would be subject to mandatory binding arbitration. The arbitrator's ruling would stay in effect for two years.

The mandatory arbitration provision includes another significant change. Presently, tentative bargaining agreements are submitted to the workers for a vote - giving employees the final say on their contract. However, the so-called "Free Choice Act" would eliminate this vote and impose the arbitrator's decision without seeking the employees' approval.

Not surprisingly, business and labor advocates disagree over the wisdom of the mandatory arbitration language. Steven Law, chief legal officer of the U.S. Chamber of Commerce, has described this provision as "an intrusion of federal government power into the workplace that has never been seen in American labor law." In contrast, Nancy Schiffer, AFL-CIO associate general counsel, points out that most first contracts are negotiated for more than a year and sees mandatory arbitration as "a positive process to help the parties reach a contract on their own."

One thing is certain about the EFCA debate - it is just getting started. Employers concerned about these amendments to federal labor law, and how they will affect their workplaces, can contact their legal counsel for guidance.

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