

Bill Sparks Heated Debate Between Employers, Unions

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Wednesday, Mar 26, 2008 --- A deep divide is emerging between employers and unions over the Employee Free Choice Act, which would allow employees to form unions through card checks and stiffen penalties against employers that interfere with union efforts.

Lawyers representing employers claim the bill could embolden unions to increase pressure on employers that have consented to neutrality agreements and card checks to force their sub-employers into similar agreements. On the other end, unions hail the bill as a move toward bringing an end to negative campaigns against them by employers.

They remain on opposite sides of the fence when it comes to EFCA, but it appears both parties are claiming they are the victim of coercive tactics.

EFCA, which passed in the House of Representatives last March and is pending before the Senate, would let unions bypass a government-held election to form a union by getting the majority of a company's workers to sign authorization cards designating the union as their bargaining representative. Card checks are legal, but this law would be the first to make this recognition mandatory.

In addition to card checks, the bill would provide mediation and arbitration for initial contract disputes and increase civil fines up to \$20,000 per violation of the National Labor Relations Act.

Many employment experts believe EFCA would encourage unions to be more aggressive in trying to get an employer, such as a manufacturing firm or a sports arena owner, to agree to only do business with other firms that are open to union campaigns.

William Bevan III, an employment partner at Reed Smith LLP's Pittsburgh office, said the card checks process would change from being a permissive subject of bargaining to a right for unions.

"The union could have a legislative basis to insist the employer submit to these procedures, and it could try to do this with the employer's subcontractors," he said.

Sheldon M. Kline, an employment partner at Sheppard Mullin Richter & Hampton LLP's Washington, D.C., office, said unions and employers are free to make a deal regarding neutrality agreements and card checks, but red

flags are raised when third parties become involved.

“If an employer and union reach an agreement and then attempt to push it on a second employer, that’s when they run afoul of the law,” Kline said. “If the second employer doesn’t want a union and refuses, it could lose business as a result, and it could file charges against the union and the first employer.”

The second employer could bring a claim under Section 8(e) of the NLRA, which bars parties from entering into an agreement in which an employer “agrees to refrain from dealing in the product of another employer or to cease doing business with any other person.”

Bevan said while it is legal for a building owner to decide on its own behalf only to deal with union-made products, it cannot require a third party to adopt a certain labor relations position based on its neutrality agreement with a union.

“You’re interfering with the labor relations of that employer and you could be held liable for unfair labor practices of that entity,” Bevan said.

Union representatives maintain that EFCA’s purpose is to restore uncoerced employee choice of union representation in the workplace and that nothing in the law extends recognition to a union.

“Traditionally, unions during collective bargaining agreements ask that an employer not subcontract out that work being done because they want to continue to do that work,” said Bill Lurye, an AFL-CIO attorney. “If an employer subcontracts the work, there’s nothing in the law that prohibits a union from trying to organize that particular shop.”

Brent Garren, senior associate general counsel for Unite Here, disagreed that the passage of EFCA and recognition of card checks would embolden unions.

“Employees would be able to exercise the right to join a union without the need for economic pressure,” he said.

But John W. Robinson IV, a shareholder at Fowler White Boggs Banker PA’s Tampa office, said the proposed bill would give unions the tools to deal more aggressively with government and private employers.

“Card checks are the easiest, cheapest and quickest way for unions to organize and deprive employees of their secret ballot elections regarding unions. So unions have nothing to lose in seeking card checks and neutrality agreements,” he said.

Robinson, who once clerked at the NLRB, noted that the traditionally unionized industries, such as manufacturing, steel and auto sectors, are declining, and unions are trying to make inroads with government workers, including teachers and police, as well as the private sector, including health

care workers and janitors.

He added that a host of labor laws protecting against discrimination and whistleblower retaliation has gone into effect compared to 70 years ago, which has in turn put the role of unions in question.

“If an employee is unhappy, they don’t have to join a union. They can go to state or federal court. Meanwhile, unions are trying to hold onto the industries they have. Card checks may help them get affiliate vendors and subcontractors,” Robinson said.

Mary Beth Maxwell, executive director of American Rights at Work, said EFCA is simply aiming to level the playing field between unions and employers.

“All EFCA is saying is if workers want to form a union at their workplace, here’s a fair set of rules to do that. It doesn’t force anybody’s hands,” she said.

She also said the law is trying to modernize an outdated labor relations framework.

“People are going outside of NLRB elections because that current system is failing. EFCA updates public policy and catches up with innovations in the private sector and public sector,” she said.

In an attempt to bridge the gap, employment lawyers are trying to help employers and unions avoid the legal repercussions of violating Section 8(e) of the NLRA by citing the NLRB’s 2006 ruling in Heartland Industries Partners LLC.

In that case, investment firm Heartland and the United Steelworkers of America entered into a deal that governed union organizing at companies that Heartland could acquire. The complaint alleged that the agreement illegally required Heartland to cease doing business with other employers.

While the NLRB held that the parties had not breached the law because Heartland had sufficient control over the companies it acquired, employment lawyers say the case serves as a valuable lesson for employers and unions to beware pushing an agreement related to union organizing on third parties that are not under the employer’s control.

Otherwise, they may find themselves on the hook for breaking the law.