Potential Impact of Employee Free Choice Act

by Judd H. Lees

Organized labor, with the assistance of many of the Democrats it helped elect to Congress, is attempting to push through its union card-check bill, called the "Employee Free Choice Act." The premise of the bill is that employees only exercise their "free choice" when signing authorization cards under the supervision of union business agents rather than when voting in the privacy of polling booths under the supervision of agents of the National Labor Relations Board. According to labor, the primary benefit of the new legislation, aside from choosing a very public "vote" over a private vote, is the absence of "coercive" employer messages about why the employees may not wish to be represented by a third-party union. The premise that "free choice" is better achieved without a balanced view point and without any privacy safeguards would be laughable if the proposed legislation was not gathering a head of steam. Let's quickly review the key ingredients of the so-called Employee Free Choice Act.

First, the cornerstone of the legislation is a requirement that the National Labor Relations Board certify a union as the bargaining representative in the event an election petition is accompanied by signed authorization cards from more than 50% of the employees in the proposed unit. Under the current law, submission of authorization cards from 30% of the employees results in an election, not certification. Typically, a union will not petition for an election unless it possesses signed authorization cards from more than half of the work force. Despite this, unions still regularly lose resulting elections for a variety of reasons, among them that employees often sign cards in response to union or peer pressure even though they don't intend to vote for the union, and that employees haven't heard or considered all the "costs" associated with surrendering their right to bargain to a third party union. Under the proposed legislation, this process will be short-circuited and unions will be declared winners without any employee campaigning.

Second, the legislation accelerates contract negotiations in the event the union is certified as a result of the card check. Initial contracts are notoriously difficult to get and are extremely time consuming because the parties do not have an existing agreement or track record from which to build. Under the legislation, initial negotiations will have to begin no later than ten days after the union's initial written request to bargain.

Third, the legislation replaces the existing employer duty to "bargain in good faith" with a new duty to "make every reasonable effort to conclude and sign a collective bargaining agreement." No one knows what this standard means but it does appear to create a much higher threshold for employers engaged in initial bargaining.

Fourth, the parties have to conclude negotiations and sign a collective bargaining agreement within 90 days from the commencement of negotiations. If they do not, either party may bring in the Federal Mediation and Conciliation Service ("FMCS") to force the parties to reach agreement.

Fifth, if the FMCS is unsuccessful in bringing the parties to a final contract, the FMCS will forward the parties to an arbitration board established by the FMCS and the board will have the power to force a final contract on the parties.

Sixth, under the Act, the initial contract shall be of at least two years duration.

Finally, the damages for violations of the National Labor Relations Act will go up - way up. The union or employee may recover civil penalties against the employer for unfair labor practices, including fines up to $20,000 for each occurrence during an organizing campaign and bargaining. There are no corresponding penalties for union or employee misconduct. Employees may also recover treble back-pay damages if they are discharged or discriminated against during this period of organizing and/or bargaining for an initial contract.

The bill has passed the House and was recently introduced in the Senate. It is breathtaking in its scope and audacity. The cynicism underlying organized labor's effort to change the law is striking since it is based upon the premise that any employer campaign is, by definition, coercive and deprives the employee of free choice. According to labor, the primary reason for its shrinking numbers has nothing to do with employee choice and everything to do with employer coercion. The potential success of this bill is truly remarkable.