

EMPLOYEE FREE CHOICE ACT (EFCA) UPDATE:

For the past few months, Senate leadership has been managing expectations on the Employee Free Choice Act (EFCA), the bill backed by organized labor designed to make it easier to organize employees and negotiate first-time contracts. Senate leaders have been publicly bracing supporters of the bill to expect delay, given everything already on the Majority's agenda. Even union leaders have downplayed expectations noting formal consideration of the bill is a moving target. Given these statements and the recent focus on healthcare, most observers have speculated that consideration of EFCA will slide to 2010.

However, at the AFL-CIO convention in mid-September, Senator Arlen Specter (D-PA) surprisingly announced that a compromise deal on EFCA had been reached in the Senate. Although Senators and labor leaders quickly denied that a final deal had been negotiated, Sen. Specter's comments raise questions as to when EFCA will be addressed and what a compromise version of the bill might look like.

Sen. Specter has stated that he did not believe it possible to pass a bill that eliminated the secret ballot election. As a result, he claimed the card check provision was dropped from the bill and replaced with a shortened time period for processing an election. Richard Trumka, newly seated president of the AFL-CIO, quickly responded to Sen. Specter's comments by denying that card check had been dropped from the legislation.

In addition, Sen. Specter indicated that mandatory arbitration for first time contracts would be in the form of "final offer arbitration" where the arbitrator will decide between each side's final proposal and a compromised decision cannot be fashioned. This is the same arbitration process used in professional baseball. Larry Cohen, President of the Communication Workers, said such a process would be acceptable if the arbitrator was able to decide the contract on an issue by issue basis.

Though Sen. Specter claimed these modifications were sufficient to secure passage of EFCA in the Senate, it appears certain that it will be necessary to fill the seat vacated by Senator Kennedy before any attempt to pass EFCA is possible. As a result, many questions continue to surround the consideration of EFCA by the Senate and the chances for its passage remain uncertain.

However, employers should remain vigilant and should keep a close watch on the confirmation of President Obama's appointments to the NLRB. Currently, the NLRB is operating with two members: Chairman Wilma Liebman (D) and Peter Schaumberg (R). President Obama has appointed three individuals to fill the remaining seats: SEIU Associate Counsel, Craig Baker (D); union lawyer, Mark Pearce (D); and, Labor Policy Director for the Senate Committee on Health, Education, Labor and Pensions, Brian Hayes (R).

Even if EFCA does not become law, it is highly likely a pro-union NLRB will attempt to implement portions of EFCA that could not be passed in Congress. For example, the NLRB could decide administratively to shorten the time period for processing representation elections to as little as twenty-one days without input from Congress. Similarly, the NLRB could broaden the application of *Gissel* orders requiring employers to recognize and bargain with unions without first conducting a secret ballot election. Finally, the NLRB could use its broad remedial powers to impose additional penalties upon employers for unfair labor practices and also seek to expedite the collective bargaining process through its interpretation of the duty to bargain in good faith.

Although Senate action on EFCA does not appear to be close on the horizon, employers should to stay tuned to developments at the NLRB.