Labor and Employment Law

EFCA's *Other* Provisions

*By Homer L. Deakins, Jr.**

Employees in America have long enjoyed and exercised the right to a secret ballot election when deciding whether to be represented by a union. But union leaders are now pushing to end secret ballot elections as part of a comprehensive labor reform bill labeled the Employee Free Choice Act (EFCA). EFCA is more popularly known as the "card check" law. This is because EFCA requires employers to recognize a union if a majority of workers sign cards "authorizing" it as their representative. The remaining employees will then be governed by a union regardless of their views. Under card check, all employees lose the opportunity of debating the pros and cons of union representation, as well as the right to vote their true feelings in the privacy of a polling booth.

As the controversy of eliminating secret ballot elections has become more widely known, a few Democrat Senators have reconsidered their support of EFCA. Senate leaders are even suggesting that some compromise be reached, preserving a measure of the current secret ballot process in exchange for passing the rest of EFCA.

But flying under the radar screen of public debate are several other provisions in EFCA whose little discussed changes are far more important to the long-term interests of labor unions than the elimination of secret ballot elections.

First, EFCA grants to government agents the power to dictate wages, hours, and working conditions. Under current law, neither an employer nor a union can be compelled to reach an agreement with the other party. In contrast, EFCA requires that an employer and union reach an agreement within approximately 120 days after the union is certified as the bargaining agent of employees. If no agreement is reached, a federal agency will appoint a panel of "interest arbitrators," who will then make binding decisions regarding salaries, health insurance, hours worked, whether the employer must make contributions to union-controlled pension funds, whether employees must join the union and pay union dues, the scheduling of vacations, and all other related issues.

EFCA provides no standards for future interest arbitrators to follow. Instead, these government appointees will have unfettered discretion to establish work place rules and mandate what owners must allocate to labor costs. Employee ratification of the terms is not permitted, and there are no appeals.

A second change concerns fines and damages that can be awarded against employers. Under current law, improper acts by employers or unions are called unfair labor practices. If an employer or union commits unfair practices, the offending party will be ordered by an administrative judge to stop its unlawful conduct. In addition, if an employer fires an employee for supporting a union, he will be ordered to make the employee "whole" by ordering his reinstatement and awarding full back pay.

EFCA changes the equitable remedial scheme by authorizing the punishment of offending employers. Fines up to $20,000 per unfair practice are permitted. Further, in cases involved alleged wrongful discharges, the employer may be ordered by an administrative judge to pay a discharged employee back pay *plus* two times that amount as "liquidated damages." None of these new remedies apply to unions.

Should employers, but not unions, be fined for equivalent misconduct? What about a jury trial under the Seventh Amendment if a government official can award the equivalent of capped punitive damages? Where is the constitutional right of both sides to make their own contract decisions as guided by respective interests? Is it due process of law when government appointees set the salaries that private business owners must pay? Does the government have the power to transfer wealth from private party "A" to private party "B" for a non-public use? And can this be done without paying just compensation to the victim of the "transfer"?

In 1937, current labor law, originally called the Wagner Act, survived constitutional challenge in the case of *NLRB v. Jones and Laughlin Steel*. The vote was 5-4. The bare majority defended its holding because the Wagner Act did not "compel agreements between employers and employees." Unlike the Wagner Act, however, EFCA compels employers and unions to accept contracts set by the government. Thus, if you the reader conclude, through the exercise of your common sense, that a law like EFCA could never possibly be considered constitutional in our country, applicable Supreme Court precedent supports your way of thinking.

* *Homer L. Deakins, Jr., is a Partner with the national labor and employment law firm of Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*