

Government Relations Update

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Employee Free Choice Act Likely to Re-Emerge in the 111th Congress

With the election of Senator Barack Obama (D-IL) to the presidency and increased Democratic majorities in both the House and Senate, labor leaders have made passage of the Employee Free Choice Act, also known as “card check,” their top priority during the 111th Congress.

The Employee Free Choice Act (H.R. 800 in the 110th Congress) aims to change the union certification process. Introduced by Congressman George Miller (D-CA) during the 110th Congress, the legislation requires the National Labor Relations Board (NLRB) to certify a union if a majority of employees signs authorization cards. Employers would lose the right to require a union demonstrate majority support through an NLRB-administered secret ballot election.

Under current law, a union becomes the bargaining representative of workers if a majority of workers have signed a petition or card authorizing the union to represent them and the employer has agreed to recognize the union. However, any union, worker, or employer can file a petition with the NLRB asking the board to administer a secret ballot election prior to certifying the union as the worker’s representative. The NLRB will only certify the union as the worker’s representative if a majority of workers vote for certification during the secret ballot election. In practice, elections are the method by which most unions become certified.

In its current form, the bill sets strict time lines for negotiations between management and labor. Negotiations have to begin within 10 days of a written request by the Union. If management and labor cannot reach an agreement within 90 days, either party can refer the dispute to Federal Mediation and Conciliation Service for mediation. If, after the 30 days of mediation, the parties still cannot reach an agreement, an arbitrator would issue a decision setting wages and other terms and conditions of employment. The arbitrator’s decision would be binding for two years.

The bill also increases the penalties imposed on employers found to discriminate against an employee during union organization or contract negotiation. Such remedies include back pay plus liquidated damages and civil penalties up to \$20,000. Presently, no such penalties exist.

Action on the measure occurred in 2007. The bill’s list of cosponsors in the House eventually grew to 226 and it passed the chamber in March 2007 by a vote of 241-185. Despite its swift advancement through the House, the bill stalled in the Senate. A vote on cloture (to allow the bill to come up for debate) failed to reach the 60 votes necessary in June 2007 by a vote 51-48. Senator Arlen Specter (PA) was the only Republican to support the bill.

Democrats are expected to introduce card check, or

a very similar measure, in the 111th Congress. President-elect Obama was a strong supporter of the Employee Free Choice Act while on the campaign trail and he is expected to sign such a bill should it reach his desk. The increased Democratic margin in the House only strengthens the already solid support for the bill in the lower chamber, but Republicans may retain enough votes to filibuster in the Senate. With the results of one Senate race still unknown, Democrats hold 58 seats including the two Independents who caucus with the Democrats; therefore, even if Democrats are victorious in the still undecided Minnesota Senate race, supporters of the Employee Free Choice Act may still be one vote short of 60—the number needed to quash debate. Senator Specter's vote as the sole Republican supporter would become crucial at that point, but it is unclear if he will continue to support the original legislation as written. Specter recently alluded that he may decide to support something other than card check if an alternative process could be deemed fair to both employees and employers.

As a result of the potential shortage of votes in the Senate, supporters of the bill may need to fashion a compromise to gain final passage. While unions are likely to insist on a vote on the 2007 version of the bill, deciding on when it's time to cut a deal will be an early test of the new Administration's ability to manage issues on Capitol Hill.

Neither congressional leaders nor the Obama team have indicated when they might want to see this measure come up for a vote.

Business groups have vowed to continue their fight against the legislation. U.S. Chamber of Commerce President Thomas Donohue held a news conference the day after the election and indicated that even though increased Democratic numbers make the task more difficult, the consequences of passage are simply too harmful for the business community to give up the fight.

In particular, he noted that with the current talk of the need to stimulate the economy, the new Congress "cannot rationally drop the Employee Free Choice Act on top of a stimulus plan." The harm in passing this type of legislation in the midst of an economic downturn will likely be one of the arguments the business community uses. Whether such an argument succeeds in postponing action on the bill remains to be seen.

At this time, neither the incoming Obama administration, nor Democratic congressional leadership has provided specific details as to when the legislation may be brought up next year.

Blank Rome Government Relations professionals and members of the Employment, Benefits and Labor group are monitoring developments on this issue closely. We are available to assist both existing and potential clients with an understanding as to how the Employee Free Choice Act may affect your company and its business objectives. ■

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