

Consequences of the Employee Free Choice Act: What's Left of Section 7?

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On June 26, 2007, the United States Senate defeated the Employee Free Choice Act (“EFCA”),² which would have made the most significant changes to labor relations in this country since the passage of the Wagner Act. For now, the Act is dead. However, the union movement and its political supporters, including several Democratic presidential candidates, have vowed to continue to fight for passage of EFCA in some form. Given its perceived importance, at least from the perspective of its adherents, it likely will continue to shape political and policy discourse during the intensifying 2008 presidential and congressional campaign and election cycle. There was, and will continue to be, heated debate and rhetoric surrounding the importance of EFCA to the union movement. However, there has been little discussion or debate about the various unintended and unanticipated legal consequences of the Act on labor law and interested party behavior, especially that of employees in exercising their Section 7 rights. If the next Congress intends to garner sufficient support for passage of EFCA, it will need to draft any proposed legislation to anticipate and address these concerns.

Under the National Labor Relations Act (“NLRA”), private elections are the hallmark of union representation campaigns.³ However, EFCA would mark a fundamental reshaping of traditional labor law by changing the presumption that a secret ballot election is the only method for certification of a union by the National Labor Relations Board (“NLRB” or “Board”). Specifically, it would permit the NLRB to certify a union as the exclusive bargaining representative, and consequently require an employer to recognize and bargain with that union, solely based on authorization cards.⁴ Once the Board certifies a union through this card check process, employers would be forced to negotiate a first contract in a hostile mediation and arbitration environment.⁵

Now, the NLRA provides that an employer has the duty to recognize and bargain with a union if: (1) the Board certifies the union through an election as the bargaining representative; (2) the Board issues a bargaining order compelling the employer to recognize and bargain with the union; or (3) the employer voluntarily recognizes the union as the bargaining

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² S. 1041, 110th Cong. (2007); H.R. 800, 110th Cong. (2007).

³ Until recently, certain unions recognized “that Board elections are the preferred means of establishing whether a union has the support of a majority of the employees in a bargaining unit.” *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717, 719 (2001).

⁴ S. 1041 § 2(a); H.R. 800 § 2(a).

⁵ The Act also would impose enhanced penalties for certain employer unfair labor practices. See S. 1041 § 4(b); H.R. 800 § 4(b).

representative absent an election based on sufficient evidence of union support from a majority of the members of the proposed unit.⁶ The Act does not amend these recognition mechanisms. Thus, even under EFCA, a union conceivably could still seek an election rather than soliciting authorization cards. The Act would, however, provide an easier route to Board certification by permitting a union to file a petition with the NLRB based solely on cards.⁷ Thus, as a practical matter, unions likely will favor certification under the Act's newly Board-supervised certification procedure and its attendant first contract bargaining provisions.

Further, as framed, EFCA seeks to exert greater pressure on employers by speciously presuming that all employers engage in bad faith conduct in opposing the election certification process. In much of the debate about the Act, proponents implicitly rely on the holding and dicta of *NLRB v. Gissel Packing Co.*⁸ In that seminal case, the Supreme Court limned the contours of a Board bargaining order when an employer engages in unfair labor practices. In explaining the various remedies which are available against such a bad actor employer, the Court reviewed the narrow issue of "whether the [authorization] cards are reliable enough to support a bargaining order where a fair election probably could not have been held, or where an election that was held was in fact set aside."⁹ While admitting that cards are "admittedly inferior to the election process,"¹⁰ the Court reluctantly concluded that "where an employer engages in conduct disruptive of the election process, cards may be the most effective – perhaps the only – way of assuring employee choice."¹¹

The *Gissel* Court, however, also recognized that elections would continue to be held in most representation cases, an acknowledgment which EFCA proponents often conveniently ignore. In fact, in *Linden Lumber Division, Summer & Co. v. NLRB*,¹² the Supreme Court later reiterated that "unless an employer has engaged in an unfair labor practice that impairs the electoral process, a union with authorization cards purporting to represent a majority of the employees, which is refused recognition, has the burden of taking the next step in invoking the Board's election procedure."¹³ Recently, in the groundbreaking NLRB case involving the

⁶ 4-33 NATIONAL LABOR RELATIONS ACT: LAW & PRACTICE § 33.01 (MB) (2006).

⁷ The proposed EFCA legislation that was rejected by the 110th Congress provided that: "If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative . . . , the Board shall not direct an election but shall certify the individual or labor organization as the representative." S. 1041 § 2(a); H.R. 800 § 2(a).

⁸ 395 U.S. 575 (1969).

⁹ *Id.* at 601 n.18.

¹⁰ *Id.* at 603.

¹¹ *Id.* at 602.

¹² 419 U.S. 301 (1974).

¹³ *Id.* at 310.

Dana and Metaldyne Corporations,¹⁴ the Board took a historic look at the impact of cards on the representation process, emphasizing that elections are preferred over card check recognition.¹⁵ Specifically, the Board reiterated that “both the Board and courts have long recognized that the freedom of choice guaranteed employees by Section 7 is better realized by a secret election than a card check.”¹⁶

I. Card Check Certification

Assuming for the moment that EFCA would pass as proposed, it is helpful briefly to review what constitutes an authorization card and what kinds of conduct invalidates a card in order to understand how the Act’s card check recognition mechanism would affect existing labor law. The specific elements required of a valid card are a signature, date and intent to be represented.¹⁷ While a union needs to secure valid authorizations from employees to obtain an election or bargaining order under existing law, there is no requirement that an employee sign a Board-certified or other official document as an authorization card. Rather, the card can take a variety of forms, including a petition, a union membership card, a union membership application, a dues checkoff authorization, or a card that states that the union is the employee’s bargaining representative.¹⁸ In the future, unions also may seek to rely on electronic cards. Further, cards are “timely” if an employee signs it during a current organizing campaign.¹⁹ Traditionally, Regional Directors have had a lot of flexibility with respect to cards and the sufficiency of a card showing.²⁰ Historically, that discretion has been exercised with the knowledge that a secret ballot election would eventually resolve certification issues. EFCA casts that overboard.

In reviewing authorization cards, the NLRB “presumes the validity of cards which . . . are unambiguous on their face and where there is no evidence the purpose of the card was deliberately misrepresented to the signer.”²¹ However, under EFCA, as under current law, various conduct will continue to prevent the Board from relying on certain cards. For instance,

¹⁴ *Dana Corp.*, 351 NLRB No. 28 (2007).

¹⁵ In its decision, the Board modified its recognition-bar doctrine and held “that no election bar will be imposed after a card-based recognition unless (1) employees in the bargaining unit receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union, and (2) 45 days pass from the date of notice without the filing of a valid petition.” *Id.* at 1.

¹⁶ *Id.* at 5.

¹⁷ NATIONAL LABOR RELATIONS BOARD, AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES 44-45 (2005).

¹⁸ *See id.* at 42.

¹⁹ *See id.* at 45.

²⁰ 2 NATIONAL LABOR RELATIONS BOARD CASEHANDLING MANUAL §§ 11028.1-2 (2007); *see generally id.* § 11029.

²¹ *Parts Depot, Inc.*, 332 NLRB 670, 726 (2000); *see also* CASEHANDLING MANUAL, *supra* note 20, § 11027.1.

cards which are the product of forgery will continue to be invalidated.²² Typically, when forgery is alleged, the Regional Director will make signature comparisons; however, the pendency of a companion criminal proceeding or investigation into the alleged forgery can constrain a Regional Director's own review.²³ Similarly, improper supervisory involvement may invalidate specific cards.²⁴ Because of the much more limited purpose of an authorization card under EFCA, there will be at least one fewer basis for invalidating such a card. Under existing law, there are occasional disputes about whether a card is valid if it improperly states or ambiguously suggests that it will be used to obtain an election, rather than clearly stating that the employee wants the union to be his or her representative regardless of an election.²⁵ However, because EFCA arguably makes it easier for a union to become Board-certified through a card petition, the union would have no need to solicit cards for an election petition.

Paradoxically, given the heightened importance of authorization cards under EFCA, unions will face greater scrutiny with respect to their methods of securing signatures. In the context of an election campaign, the Board generally permits a union to make various promises to employees largely because the union cannot exert undue influence over employees.²⁶ Even if employees signed authorization cards, they can still decide in the privacy of the voting booth not to support the union. Given the extent to which present law permits unions to rely on inducements to curry favor with employees, unions initially may seek to offer inducements to employees who sign cards. By offering certain benefits, the union can seek to obtain as much support early in a card campaign while exerting additional leverage on holdout employees who initially decline to sign a card.²⁷ After EFCA, however, the authorization card will become substantially more important, and will have the same determinative effect as an election. As a result, the Board and reviewing courts may become more circumspect about union inducements. If a union overreaches by seeking to deceive or improperly cajole an employee into signing a card, the Board may conclude that it violated Section 7 of the NLRA. Consequently, unions should be more wary about seeking to leverage an offer of benefits into a signed authorization card, and must be careful not to encroach on an employee's statutorily-protected rights to choose whether to join a union.

Not surprisingly, EFCA offers no guidance about the method for handling card check issues. Instead, it defers to the NLRB to promulgate "procedures to be used by the Board to establish the validity of signed authorizations designating bargaining representatives."²⁸ Since

²² *Imco Container Co. of Harrisonburg*, 148 NLRB 312, 313-14 (1964).

²³ *Perdue Farms, Inc.*, 328 NLRB 909, 911 (1999); CASEHANDLING MANUAL, *supra* note 20, § 11029.2.

²⁴ *Millard Refrigerated Servs., Inc.*, 345 NLRB No. 95, 3-4 (2005); *Harborside Healthcare, Inc.*, 343 NLRB 906, 911-13 (2004); *Glomac Plastics, Inc.*, 194 NLRB 406, 409 (1971).

²⁵ *Nissan Research & Dev., Inc.*, 296 NLRB 598, 599 (1989).

²⁶ *Smith Co.*, 192 NLRB 1098, 1101 (1971).

²⁷ An employer may not promise or grant benefits to employees in an effort to secure their opposition to a union, *see Guard Publ'g Co.*, 344 NLRB No. 150, 1-2 (2005), which would remain the law under EFCA.

²⁸ S. 1041 § 2(a); H.R. 800 § 2(a).

the election process is more important now than card certification, the NLRB has not provided extensive guidance about the use of authorization cards. However, because EFCA would provide for both card check and election certification, the Board and its General Counsel will need to become more involved in reviewing and determining card validity, and in providing guidance about card questions. For instance, will there be new procedures for review of the card elements or of other procedural or substantive issues? What about an expanding unit, a seasonal unit? Under EFCA, there is a great potential for a card signer to not have a “community of interest” with prior or subsequent signers. Will the Board need to certify the card check and its procedures? Will there be hearings which ask each individual to explain the circumstances surrounding his or her signature? In some instances, specific factual circumstances may even compel a Regional Director to argue that a secret election is preferable to card check certification.²⁹

Significantly, EFCA also fails to address issues involving decertification of a card check certified bargaining unit. Now, the NLRA prevents employees from challenging a union’s majority status within one year of its certification. Notably, however, “the certification-year bar holds that a certified union’s majority status is irrebuttably presumed to continue for one year from the date of certification *after a Board election*.”³⁰ Because that presumption would not apply to card check certification, employees could promptly challenge the union’s majority status through decertification cards.³¹ Predictably, EFCA is silent about what happens next. Is the Board required to conduct an election, or is a card check decertification petition sufficient to defeat card check certification? The Board, in interpreting EFCA, could conclude that, once a union decides to seek card check certification, it is not entitled to a decertification election. Given their strong opposition to elections in the context of supporting EFCA, unions will be hard-pressed to argue that elections somehow should be preferred over cards in the decertification context. If the Board concludes that a decertification election is not necessary, then employees, with the advice of employers, may find it easier to win a decertification campaign. While unions likely will not have intended such a result, this may be one area where employees achieve greater control under EFCA.

If EFCA’s mandatory card check recognition provisions become law, they will have a profound impact on the strategies and behavior of interested parties.

²⁹ In *Armour & Co.*, 13 NLRB 567 (1939), the Board adopted such an approach, concluding that, “under the circumstances of this case,” a secret ballot election was preferable to certification through any other means. *Id.* at 572. After *Armour*, the NLRB only certified unions through the election process “in the interest of investing its certification with more certainty and prestige by basing them on free and secret elections conducted under the Board’s auspices.” *General Box Co.*, 82 NLRB 678, 683 (1949).

³⁰ *Dana Corp.*, 451 NLRB No. 28, at 7.

³¹ Once employees secure decertification cards from a majority of the unit employees, an employer ostensibly could withdraw recognition of the union. *Levitz*, 333 NLRB at 717 (holding that “an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees”). However, since unlawful withdrawal is an unfair labor practice, *Caterair Int’l*, 322 NLRB 64, 65 (1996), and given the uncertainty of EFCA’s application in this context, most employers likely will wait for guidance from the Board before withdrawing recognition or file RM petitions.

Impact on Employees. Employees, especially those who disfavor union representation, face the prospect of being subjected to subtle and explicit union intimidation as the union seeks to go around the NLRB. As a union secures more cards, holdout employees will face increasing pressure to sign a card, and in some cases may be coerced into signing away his or her Section 7 rights. If a union is successful in its bid to represent a specific unit, employees who voiced concern will be, as a practical matter, largely unrepresented, although they can begin a decertification campaign soon after the union's card check certification.

Impact on Unions. In determining how best to take advantage of EFCA's emphasis on card check, unions invariably will revise their organizing strategies. If the Act is adopted, unions will no longer be hamstrung by the various logistical issues involved in a Board election. Rather, as a result of EFCA passage, unions likely will reconsider conventional definitions of an appropriate bargaining unit. Rather than focusing on traditional, single units, union organizers may instead rely on large-scale organizing campaigns focused on craft, rather than production, employees who may not work in one location. As unions seek to take advantage of an arguably easier system of organizing workers, there also likely will be an increase in the frequency of multi-union fights for workers. In many cases, union umbrella organizations such as the AFL-CIO and Change to Win Coalition may rely on internal dispute resolution procedures to resolve such disagreements absent Board involvement. Alternatively, the Board may conclude, as it did under the Wagner Act and before the 1947 Taft-Hartley amendments to the NLRA,³² that an election is the preferred method for resolving such disputes.³³

Unions will begin card campaigns much earlier in an effort to secure a majority of signatures. Because cards would become the primary way for certification under EFCA, and in anticipation of various employer challenges to those card drives, unions likely would invest heavily in training schools to educate members about properly securing cards from a majority of unit employees. Unfortunately, the creativity used in developing tactics to induce card signing does not in any way lead to the fully informed electorate desired by Section 7 and protected by the secret ballot. Unions also may seek to encourage employers to enter into card check agreements outside of EFCA which combine a neutrality agreement and provide for a more generous approach to contract negotiation.

Impact on Employers. Some employers may ignore or not be aware of the impact of EFCA. Depending on the industry, they may well have bargaining units. More sophisticated employers will be assertive in using surveys, feedback systems, and audit teams, as well as management training and development of communication and problem solving systems,

³² Those amendments required the Board to certify a union through an election. *General Box Co.*, 82 NLRB at 683.

³³ *Cudahy Packing Co.*, 13 NLRB 526, 531-32 (1939) ("We believe that since each of two contesting labor organizations has proved substantial adherence among the employees the bargaining relations which result will be more satisfactory from the beginning if the doubt and disagreement of the parties regarding the wishes of the employees is, as far as possible, eliminated. Although in the past we have certified representatives without an election upon a showing of the sort here made, we are persuaded by our experience that the policies of the Act will best be effectuated if the question of representation which has arisen is resolved in an election by secret ballot.").

to highlight the risks and the issues and to provide fast response and quick resolution. And, ongoing “don’t sign the card” campaigns.

II. Mediation and Arbitration

In addition to EFCA’s controversial card check certification provision, the Act would make wholesale revisions to the ways parties negotiate all first contracts, regardless of the method by which a union is certified or recognized.³⁴ If EFCA is adopted as proposed, it would require parties to “meet and commence to bargain collectively” within ten days of receiving a union bargaining demand following certification or recognition.³⁵ If the parties cannot agree on a first contract within 90 days, either party may request mediation with the Federal Mediation and Conciliation Service (“FMCS”).³⁶ Once either party seeks mediation, the FMCS has 30 days to conciliate all of the parties’ contract negotiation disputes. Otherwise, it “shall refer the dispute to an arbitration board.”³⁷ At that point, the arbitration panel has an unspecified period of time to render a decision, which will bind the parties for two years.³⁸

The Act’s alternative dispute procedures face practical hurdles that have largely been eclipsed by concerns about card check certification, but which are equally important to address. The new mediation and arbitration procedures are touted by advocates as an effective way to streamline first contract negotiations. However, several issues will arise at each step of this process to undermine the goal of greater bargaining efficiency, none of which are considered in or appear to be contemplated by the Act itself. As with the Act’s card check certification provision, the prospect of mandatory mediation and arbitration likely will reshape party strategies in some surprising and unanticipated ways.

The union movement and its supporters have cleverly combined the card certification with, in essence, a first contract guarantee. Experience has shown that card signers are not as committed to the union as the union would like to think and, therefore, unions come to the bargaining table with less economic power than is sufficient to negotiate a contract. Employers may bargain hard and in good faith in that situation to the ultimate disadvantage of the union. EFCA resolves that weakness with mandatory mediation and arbitration, and with the power to impose a two-year contract.

Union Bargaining Demand. Under EFCA, a union can only trigger bargaining “following certification or recognition.” As discussed above, a union can be certified or recognized through: (1) Board election certification (less prominent under the Act); (2) Board card check certification (pursuant to the Act); (3) a *Gissel* bargaining order requiring the

³⁴ S. 1041 § 3; H.R. 800 § 3.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

employer to bargain with the employer; or (4) voluntary recognition of the union by the employer.

Taking the last method first, voluntary recognition is the only instance when it is clear that an employer is not challenging union certification or recognition, and that mediation consequently is appropriate and expected. Thus, a union will be able to seek mediation with some predictability. However, given the stringent restrictions placed on employers under EFCA's mediation and arbitration procedures, employers will be exceedingly reluctant to voluntarily recognize a union under any circumstances.

In each of the other situations, the employer could disagree with the Board about its bargaining obligation. However, its ability to challenge any Board certification or order is limited. In *American Federation of Labor v. NLRB*,³⁹ the Supreme Court held that Board certification through an election was not a decision subject to judicial review. Given that, an employer seeking judicial relief in connection with election certification must refuse to bargain, defend an unfair labor practice charge, and then seek judicial review. Similarly, if an employer is subject to a *Gissel* bargaining order, it may pursue a judicial appeal with the appropriate federal circuit court.

In terms of challenging any card check certification, an employer faces substantial uncertainty. As an initial matter, it is not clear that, in fact, card check certification decisions will be subject to judicial review. Union attorneys likely will argue, with some success, that *American Federation of Labor* applies to card check certification, which will force employers to continue to refuse to bargain in an effort to challenge a certification decision. Once an employer refuses to bargain, the union could then file an unfair labor practice charge, and have an ALJ decision and a Board decision, which the employer can eventually appeal with the appropriate federal circuit court.⁴⁰ However, employers cannot anticipate what the NLRB will do in such situations because EFCA simply ignores the Board, and does not address or explain what role it or its Regional Directors may play in the mediation and arbitration process. Everyone is simply left guessing about the extent to which the Board will be able to insert itself into these proceedings in responding to unfair labor practice charges. Assuming the availability of review in federal circuit court, we are about to flood the system with "card check" cases.

The Act also provides no guidance about what effect the filing or appeal of unfair labor practice charges will have on bargaining or the calculation of the 90-day contract negotiation period. Given the Act's silence, employers will need to develop compelling arguments that the 90-day contract negotiation period does not begin until pending judicial challenges to certification are resolved. Until these questions are addressed, employers face uncharted terrain during the early stages of administrative and judicial review of EFCA, not to mention the potential for repeated unfair labor practice charges.

³⁹ 308 U.S. 401 (1940).

⁴⁰ 29 U.S.C. § 160(f).

While employers must speculate about what might happen under EFCA, unions will have the ability to exert substantial control over intransigent employers through a secondary boycott, regardless of the certification method. Often, unions are prohibited from exerting economic pressure on a secondary, or neutral, party to achieve certain objectives. In 2001, however, the NLRB decided *United Food and Commercial Workers*,⁴¹ a groundbreaking decision holding that, once a union is certified, it can use a secondary boycott to pressure an employer in the context of first contract negotiations.⁴² As a result of this decision, unions can threaten to picket, picket, and leaflet secondary parties in an effort to place pressure on the primary employer to favor union-friendly contract provisions. Most significantly, a union can wield its secondary boycott weapon regardless of whether an employer challenges its certification. As a result, unions will be able to use the threat of a secondary boycott to strong arm employers to engage in the Act's mediation and arbitration process, and to extract certain key concessions from the employer during bargaining.

In addition to the legal morass created by EFCA, the Act imposes additional penalties on employers that commit certain unfair labor practices, further complicating their ability to make informed strategic decisions. Under the Act, if an employer commits an unfair labor practice during the period of time between union certification and agreement on a first contract, the Board may award treble backpay damages to affected employees⁴³ and assess a civil penalty of up to \$20,000 for each violation.⁴⁴ These enhanced penalties are not necessary. In response to an unfair labor practice charge, the NLRB already can seek a temporary restraining order and preliminary injunction against an employer under Section 10(j) of the NLRA,⁴⁵ which is a powerful weapon to assert in the face of alleged employer misconduct. Regardless, if adopted, these new punitive provisions will unfairly force an employer to evaluate the additional costs associated with the Act's enhanced penalties in deciding whether to refuse to bargain.

⁴¹ 336 NLRB 421 (2001).

⁴² *Id.* at 423 (“Section 8(b)(4)(B) does not proscribe secondary activity by a union for the purpose of enforcing its certification by the Board as the exclusive collective-bargaining representative of the primary employer’s employees.”). This decision is especially notable because it permits a secondary boycott to enforce certification even if it also has the objective of forcing a secondary employer to cease doing business with the primary employer, which is otherwise prohibited conduct. *Id.* at 429.

⁴³ S. 1041 § 4(b)(1); H.R. 800 § 4(b)(1) (“[I]f the Board finds that an employer has discriminated against an employee in violation of subsection (a)(3) of section 8 while employees of the employer were seeking representation by a labor organization, or during the period after a labor organization was recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract was entered into between the employer and the representative, the Board in such order shall award the employee back pay and, in addition, 2 times that amount as liquidated damages.”).

⁴⁴ S. 1041 § 4(b)(2); H.R. 800 § 4(b)(2) (“Any employer who willfully or repeatedly commits any unfair labor practice within the meaning of subsections (a)(1) or (a)(3) of section 8 while employees of the employer are seeking representation by a labor organization or during the period after a labor organization has been recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract is entered into between the employer and the representative shall, in addition to any make-whole remedy ordered, be subject to a civil penalty of not to exceed \$20,000 for each violation.”).

⁴⁵ 29 U.S.C. § 160(j).

Have we, in fact, created a situation where an employer, to challenge a card certification for any number of legitimate reasons, must go to circuit court, be subject to legal secondary boycotts, multiple unfair labor practice charges, and multiple \$20,000 civil penalties? The alternative is a mandated two-year contract. And who is protecting the rights of the employees?

Compressed Negotiations. Once the parties actually begin negotiations, they will face an unrealistic 120-day deadline to resolve all outstanding first contract issues through informal discussions (90 days) and then FMCS mediation (30 days). In a typical bargaining environment, four months simply is an insufficient amount of time for the parties to engage in good faith discussions among themselves about all of the items that must be covered in a first contract. Given these unrealistic deadlines, the parties likely will seek to reach private agreements among themselves which extend the period of time before either party refers negotiations to the FMCS. Moreover, adding the FMCS as a third-party mediator further complicates the process, and places a significant resource burden on FMCS that it at present cannot handle.

Under the Act's tight deadlines, parties will have an incentive to protect their positions, knowing that the entire contract will be subject to interest arbitration. Early in the process, the union may have a slight incentive to disagree with the employer about key terms, knowing that it can argue its position before the FMCS. However, that tactical edge will likely diminish once the contract negotiations become arbitrable. While EFCA seeks to encourage the parties quickly to resolve their disputes before FMCS refers the matter to arbitration, the Act is strangely silent about the duration of any arbitral proceeding. Thus, once the matter goes before an arbitrator, the employer will have the incentive to use the arbitration proceeding's lack of hard deadlines to its advantage, and will seek to regain any traction it lost during earlier FMCS negotiations.

Arbitration. It is critical to emphasize that EFCA's approach to mandatory arbitration of first contract disputes marks a radical departure from existing law. As interpreted and applied by the NLRB and courts, the NLRA leaves to the parties the difficult work of negotiating and arriving at key terms and conditions of their collective bargaining agreement without government imposition of specific contract provisions.⁴⁶ This deferential approach comports with the NLRA⁴⁷ and traditional common law notions of contract law; namely, that the government will not exert undue pressure over two parties seeking to enter into a private contract. Rather, an employer and union can bargain over and come to an agreement about specific contract provisions through reliance on their respective economic weapons (including, perhaps, secondary boycotts), and by taking into account the overall economic environment

⁴⁶ *H.K. Porter v. NLRB*, 397 U.S. 99, 103-04 (1970).

⁴⁷ 29 U.S.C. § 158(d) (defining collective bargaining "as the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession*" (emphasis added)).

affecting the employer. If adopted, EFCA would reflect the government's clear support of the union in first contract negotiations, rather than merely providing a neutral bargaining framework for both parties, and will encourage employers and employees to mount substantial initial challenges to these provisions.

For instance, enterprising and creative employers and employees may challenge the constitutionality of the Act's bargaining provisions, arguing that requiring an employer to participate in binding arbitration without any clear path for judicial review is unconstitutional. In *Wolff Packing Co. v. Court of Industrial Relations of State of Kansas*,⁴⁸ the Supreme Court struck down a state statute which required compulsory arbitration of disputes between employers and employees in certain industries. In its decision, the Court emphasized the importance of protecting the ability of parties to fashion their own contracts absent state interference:

The system of compulsory arbitration which the Act establishes is intended to compel, and if sustained will compel, the owner and employees to continue the business on terms which are not of their making. It will constrain them not merely to respect the terms if they continue the business, but will constrain them to continue the business on those terms . . . Such a system infringes the liberty of contract and rights of property guaranteed by the due process of law clause of the Fourteenth Amendment.⁴⁹

Admittedly, it is much more difficult to question the constitutionality of economic regulation now than it was when *Wolff Packing* was decided in 1925. At present, the Supreme Court generally upholds economic regulation where it rationally relates to any legitimate government end, which makes it especially difficult to challenge such government acts.⁵⁰ However, even under this deferential standard of review, EFCA advocates will have difficulty defending the Act's constitutionality. Given the inherent uncertainty associated with interest arbitration under EFCA, as well as the degree of power arbitrators and unions will possess within the newly crafted system, there invariably will be a situation where an employer suffers severe economic harm, in the form of a forced first contract, because of an arbitral decision. Moreover, under the Act, employees will be forced to accept terms and conditions of employment that they did not freely choose, after they are deprived of a secret ballot election. Once an arbitral panel imposes an especially egregious first contract on an employer or employees, that harm may in fact be viewed as the product of an unconstitutional statute.

Even if courts uphold the constitutionality of the Act's arbitration provisions, parties and arbitrators are left to guess about what standards should apply in making decisions

⁴⁸ 267 U.S. 552, 569 (1925).

⁴⁹ *Id.*; see also *Wolff Packing Co. v. Court of Indus. Relations of State of Kansas*, 262 U.S. 522, 544 (1923) (“We think the Industrial Court Act, in so far as it permits the fixing of wages in plaintiff in error’s packing house, is in conflict with the Fourteenth Amendment and deprives it of its property and liberty of contract without due process of law.”).

⁵⁰ 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 15.4 (3d ed. 1999).

about first contract terms in an interest arbitration proceeding. Absent formal rulemaking or significant guidance on this issue, arbitrators ostensibly will have the substantial discretion to determine on an *ad hoc* basis how to proceed, which adds unacceptable uncertainty to the collective bargaining process. Will FMCS develop the standards? Based on what? Where will it get the personnel needed and on what timetable? What provisions will be mandatory? Union security? Management rights? Neutrality clauses? Picket line observance? Will the models be “new” contracts or “mature” contracts? Wages? MEBAs? Association contracts? Mandatory vs. non-mandatory subjects? Could employers be further challenged with ongoing secondary boycotts, unfair labor practices, and special penalties?

Under the Act’s skeletal mandatory arbitration procedure, the interests of employees are again neglected, as they are under its card check provision. While proponents of EFCA tout the purported benefits of mediation and mandatory arbitration, they are remarkably silent about the effect of these provisions on employees. Under the NLRA, a ratification clause is not a mandatory subject of bargaining,⁵¹ which permits a union to ensure that its members have a voice in approving the contract that will govern the terms and conditions of their employment. The Act, however, has no provisions which protect worker interests in the context of its dispute resolution procedure. Rather, the Act provides that an arbitration panel will decide all negotiation disputes, “and such decision shall be binding upon the parties for a period of 2 years.”⁵² Thus, no mechanism exists for employee ratification of a first contract. For legislation that relies on the rhetoric of “free choice” to rally supporters, the very elimination of employee choice from the collective bargaining process will be another surprising, albeit ironic, result of EFCA.

III. Note of Discord

Members of the labor movement were upset when management and its supporters reacted so strongly to the Labor Law Reform Bill of 1977. Reaction to this legislation will be even stronger and more emotional.

The idea of removing one of the hallmarks of democracy, a secret ballot election, then substituting a suspect card check followed by the mandatory imposition of a two-year contract, is inconsistent with the history of labor relations in this country as well as our democratic value system.

To impose upon that already suspect system numerous penalties when someone is trying to legally question the card check is unconscionable.

The authors respect the needs of today’s unions and certainly respect the unions, their members, their leaders and their attorneys. Our clients have, in most part, healthy relationships with unions built upon mutual respect and mutual dignity. Communications are maintained at a high level.

⁵¹ *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 345 (1958).

⁵² S. 1041 § 3; H.R. 800 § 3.

However, EFCA is the wrong approach. It exacerbates the adversarial approach set up by the NLRA, and puts a tightly clenched fist on the union side of the scales of justice.

We respect the union movements' involvement in our political system. We also respect the creativity and thoughtfulness of their leadership as we see a variety of neutrality agreements and other techniques for avoiding a Board that they consider hostile. EFCA would be good for the unions, and, candidly, it would be good for the budget of our Labor & Employment Group, but it is ill considered and ill drafted legislation that is not in the country's best interests.

Overreaction and Overreaching: The RESPECT Act

While EFCA will not be revisited by the current Congress, congressional Democrats have been undeterred by its defeat, and continue to seek passage of additional union-friendly legislation. The most significant of these other legislative initiatives is the Re-Empowerment of Skilled and Professional Employees and Construction and Tradeworkers Act ("RESPECT Act"),⁵³ which would substantially narrow the definition of a supervisor under the NLRA. As with EFCA, Congress seeks to make significant changes to existing labor law without concern for its practical effects on interested parties and without consideration of existing Board and judicial precedent.

The NLRA excludes supervisors from its protections of employees.⁵⁴ As a result, supervisors have no Section 7 rights, and thus cannot be included in bargaining units or promote unionization in the workplace.⁵⁵ Given these basic tenets of labor law, it is critical to ensure that the Act's definition of "supervisor" serves the purposes of the Act such that it is neither overinclusive nor underinclusive. Recently, however, congressional Democrats have used their recently regained majority status, as well as their perceived enhanced political power, in an effort to tilt this definition in favor of their union backers.

Under existing law, an employee is considered a statutory supervisor if: (1) he has the authority to engage in one of the 12 supervisory functions detailed in Section 2(11) of the NLRA; (2) the exercise of that authority involves the use of independent judgment; and (3) the employee holds such authority in the interests of the employer.⁵⁶ Despite this seemingly straightforward legal test, the Board has had difficulty applying it given competing political interests, as well as the evolving nature of the American workforce. Most recently, in response to concerns raised by the Supreme Court in *Kentucky River*,⁵⁷ the Board issued three decisions in an effort to clarify the governing legal framework for determining whether a person is a

⁵³ S. 969, 110th Cong. (2007); H.R. 1644, 110th Cong. (2007).

⁵⁴ 29 U.S.C. § 152(3).

⁵⁵ *Id.* § 157.

⁵⁶ *NLRB v. Kentucky River Cmty. Care*, 532 U.S. 706, 713 (2001).

⁵⁷ *See also NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571 (1994).

supervisor.⁵⁸ In explaining its approach, and in an effort to ignore political arguments on either side, the Board emphasized that its “goal [was] faithfully to apply the statute while providing meaningful and predictable standards for the adjudication of future cases and the benefit of the Board’s constituents.”⁵⁹

Specifically, the Board refined definitions for the terms “assign” and “responsibly to direct,” which are two of the 12 supervisory functions outlined in Section 2(11).⁶⁰ Under these *Kentucky River* trilogy cases, the term “assign” refers to “designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.”⁶¹ As stated in these decisions, the term “responsibly to direct” requires that an individual “directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.”⁶² Applying these new definitions to the facts presented by the *Kentucky River* trilogy cases, the Board removed less than 7% of the individuals from one bargaining unit because of their supervisory status and made no changes to the other bargaining units. Importantly, in approaching these cases, the Board recognized that its application of the NLRA must continue to evolve to accommodate the realities of a changing workforce in a way which comports with the text of the Act.

Apparently not satisfied with the Board’s appropriately limited approach, the union movement vowed to change the NLRA’s definition of supervisor. Responding to labor’s ephemeral concerns, congressional Democrats introduced the RESPECT Act. As with EFCA, the Act is brief, consisting of two short pages, yet would make significant revisions to the NLRA’s definition of supervisor by amending it as follows:

The term “supervisor” means any individual having authority, in the interest of the employer **and for a majority of the individual’s worktime**, to hire, transfer, suspend, lay off, recall, promote, discharge, **assign**, reward, or discipline other employees, **or responsibly to direct them**, or to adjust their grievances, or effectively to recommend such action, if in connection with the

⁵⁸ *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006); *Croft Metals, Inc.*, 348 NLRB No. 38 (2006); *Golden Crest Healthcare Ctr.*, 348 NLRB No. 39 (2006) (collectively referred to as “the *Kentucky River* trilogy cases”).

⁵⁹ *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, at 3.

⁶⁰ The *Kentucky River* trilogy cases also refined the definition of “independent judgment;” however, that term is not a target of the RESPECT Act.

⁶¹ *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, at 4.

⁶² *Id.* at 7.

foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.⁶³

The practical effect of the RESPECT Act is overwhelming, and will have a far-reaching impact on the classification of supervisors, especially in the nursing field.

Even though these proposed revisions reflect significant changes to existing law, and the first revision to Section 2(11) since 1947, Congress has made little effort to understand or consider the ramifications of this legislation. As drafted, the RESPECT Act would remove the “assign” and “responsibly to direct” functions from the supervisor legal test. In many instances, however, individuals, often in the nursing field, solely perform one of these functions and should properly be considered supervisors under the plain language of the statute. For instance, nurses often instruct subordinates to work at specific locations or during certain shifts, and to perform various general job duties, even though they do not perform other supervisory functions detailed in Section 2(11). Similarly, nurses often manage others and are subject to discipline when those subordinates make mistakes, even though they do not make assignments or execute other supervisory functions. In both instances, these individuals act as agents for the employer, and are more aligned with its interests than with those of a union. Yet, under the RESPECT Act, such individuals perversely would be viewed as potential adversaries of their principals.

Moreover, the Act would require individuals to spend the majority of their time performing at least one of the specified supervisory functions in order to be considered a supervisor, which is a significant departure from existing law. Now, a person is deemed a supervisor if he or she “spends a regular and substantial portion of his/her work time performing supervisory functions,”⁶⁴ which is a standard that is flexibly applied based on the nature of the job position at issue. While the *Kentucky River* trilogy cases did not change this aspect of the law as applied to supervisors, RESPECT Act supporters seek to sneak this provision past Congress under the guise of responding to those cases. If this aspect of the Act becomes law, the Board will be deluged with issues about whether an individual spends a sufficient amount of time supervising others. More significantly, a substantial number of individuals will be stripped of their supervisor status under longstanding Board precedent and will be pitted against their employers’ interests.

The RESPECT Act reflects an overreaction to the *Kentucky River* trilogy cases, and represents an overreaching of Democratic political power. As with EFCA, the proposed legislation reveals that unions still do not understand that, with or without them, the workforce continues to change by becoming more proficient and efficient. In part, these changes are reflected in the more sophisticated ways that employers use individuals to perform supervisory functions. Union efforts to stall that progress are counterproductive and should be rejected.

⁶³ Compare 29 U.S.C. § 152(11) with S. 969 and H.R. 1644.

⁶⁴ *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, at 9 (citing *Brown & Root, Inc.*, 314 NLRB 19, 21 (1994); *Gaines Elec. Co.*, 309 NLRB 1077, 1078 (1992)).