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Labor & Employment Bulletin

EMPLOYEE FREE CHOICE ACT UPDATE: SENATOR SPECTER BREAKS SILENCE

Senator Specter (R-Pa.) announced yesterday that he will not vote for cloture on the Employee Free Choice Act ("EFCA") noting that this is a bad time, economically, to pass such a measure. In other words, he will not vote to end an expected filibuster on the bill. He did, however, invite a compromise on the legislation to make it easier for unions to organize workers while maintaining the secret ballot election.

Although this is a significant blow to labor's agenda, the battle is far from over. Senator Specter noted that EFCA was the most heavily lobbied bill he has ever seen. EFCA proponents are not going away. There are several compromises that have been floated over the last several weeks (especially keep a sharp eye on "equal access" proposals that would give unions the right to enter an employer's premises to campaign among employees). One or more are likely to become the new focus of lobbying efforts.

Senator Specter has himself proposed changes to the National Labor Relations Act ("Act") that do not include card check but do include provisions that would make it much easier for unions to organize. One such proposal includes "quickie elections", i.e., the National Labor Relations Board would conduct union elections on an expedited basis--anywhere from 10 to 21 days after an election petition has been filed. Obviously, this would make it very difficult for employers to mount an election campaign.

Senator Specter has previously suggested changing the mandatory arbitration provision of EFCA to require parties to begin negotiations within 21 days after a union has been certified. If the parties cannot reach an agreement in 120 days, either party may invoke the services of the Federal Mediation and Conciliation Service and if one party is not negotiating in good faith, the other may obtain an order compelling the offending party to negotiate on a fixed schedule and imposing an award of costs and attorney's fees. During yesterday's remarks, he signaled an apparent willingness to consider mandatory arbitration if the arbitrator was limited to selecting one party or the other's proposals as opposed to being able to write the contract in its entirety.

Since EFCA supporters are likely to change their strategy, employers must also. Organized labor and its supporters will continue to press for mechanisms which minimize employers' ability to communicate benefits of a union free workplace. Employers should continue to prepare for these changes to the Act, including developing employee training and communications programs that are ongoing and not dependent on a significant post-petition campaign period.

We will continue to keep you apprised of the latest developments on EFCA and related employment developments.

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