

Labor Law

Key Remedial Elements of the Employee Free Choice Act That May Be Implemented Without Legislation

Contributed by Richard Hankins and Seth Borden, McKenna, Long & Aldridge

The Employee Free Choice Act ("EFCA"), a controversial bill that organized labor has asserted is its top legislative priority, has garnered a great deal of attention since labor-friendly Democrats achieved majorities in both houses of Congress in 2006. It would amend the National Labor Relations Act (the "NLRA" or the "Act"), [29 U.S.C. § 151](#) *et seq.*, to make it easier for unions to organize employees, to require interest arbitration of first contracts after 120 days, and to strengthen penalties for certain unfair labor practices. EFCA was first introduced in the 108th Congress on November 21, 2003 and has been re-introduced in each Congressional session since. Despite the Democratic Caucus' filibuster-proof majority during much of 2009, the measure has still failed to reach the Senate floor during the current, 111th Congress. But, as the United States Senate considers President Obama's appointees to the National Labor Relations Board (the "NLRB" or the "Board"), new consideration is being given to the notion that a labor-friendly Board might attempt to implement some elements of EFCA under the existing statutory scheme.

Section 3(a) of the NLRA, [29 U.S.C. § 153\(a\)](#), provides for a five-member Board with broad authority to interpret and enforce the Act. Because the Board is primarily responsible for developing and applying national labor policy, courts typically accord its statutory interpretations considerable deference. Board Members are appointed to staggered five-year terms by the President with the advice and consent of the Senate. By tradition, two seats are reserved for Democrats and two for Republicans, with the Chair coming from the President's political party. It is therefore not unusual for dramatic shifts in labor policy to occur when there is a change in administrations, and there is no question that if the Board so desired, it could implement measures designed to amplify NLRA remedies against employers as contemplated by EFCA.

Injunctions in Unfair Labor Practice Cases

Whenever a union charges that an employer has violated the NLRA during the course of an organizing drive or while negotiating a first contract, EFCA would make the Board's investigation of such charge a priority over all other NLRB cases and require the Board to seek immediate injunctive relief from the federal courts in any case it does not summarily dismiss.

Currently, [Section 10\(l\)](#) of the NLRA requires the Board to give investigative priority only to charges alleging that a union has engaged in an unlawful secondary boycott. Nevertheless, [Section 10\(j\)](#) of the Act allows the NLRB the discretion to pursue a similar injunction against employers or unions for other alleged unfair labor practices. The Board may seek preliminary injunctive relief in federal court where the Board believes evidence of a violation is strong; and, that the Board's ultimate order might be ineffective to remedy unfair labor practices. Thus, even in the absence of legislative amendment, the Board could certainly increase the number of cases in which it exercises its "discretion" to seek injunctive relief. In 2002, then General Counsel Arthur Rosenfeld issued [Memorandum GC 02-07](#) clarifying that NLRB "regional offices should consider the propriety of interim injunctive relief in every case." More recently, in 2007, current General Counsel Ronald Meisburg issued [Memorandum GC 07-08](#), which specifically set forth "additional remedies that should regularly be considered in cases where unfair labor practices occur during first contract bargaining." In the Memorandum, the General Counsel directed the regional offices to submit all "first contract" cases to the NLRB Division of Advice and specifically to include a recommendation regarding Section 10(j) injunctive relief.

Around the same time, in the case *Kentov v. Point Blank Body Armor*,¹ the NLRB used the 10(j) injunction to deal with the type of violations during organizing EFCA is purported to address. In that case, 175 employees went on strike to protest the company's firing of three employees involved in the organizing. The employer fired all 175 striking workers. The NLRB obtained a Section 10(j) preliminary injunction reinstating the fired workers. Soon thereafter, the organizing effort culminated in the recognition of the union.

There is no reason to think that a labor-friendly Board would not further require pursuit of preliminary injunctive relief under a broader set of circumstances, specifically including organizing and first contract cases.

Civil Penalties

In cases where an employer is found to "willfully or repeatedly commit" unfair labor practices during an organizing drive or first contract negotiations, in addition to traditional make-whole remedies, EFCA would authorize the imposition of additional civil penalties in the amount of \$20,000 for each violation. In determining the amount of a civil fine, EFCA would require the Board to "consider the gravity of the unfair labor practice and the impact of the unfair labor practice on the charging party, on other persons seeking to exercise rights guaranteed by this Act, or on the public interest."

Currently, the NLRA does not provide for liquidated damages, fines or civil penalties for violations of the Act. However, where a party refuses to comply with a circuit court's enforcement of an NLRB order, the NLRB's Contempt Litigation and Compliance Branch can seek civil penalties, criminal sanctions and extraordinary injunctive relief from the courts. NLRB contempt cases have historically been relatively rare, and are often not reported. But such cases typically seek

prospective fines or penalties against parties who repeatedly ignore Board orders. A re-focused NLRB could choose to increase its usage of this tool and accomplish much of what EFCA seeks to impose.

For example, in *NLRB v. Local 3, International Brotherhood of Electrical Workers*,² the Court of Appeals for the Second Circuit awarded civil contempt damages against the respondent upon the NLRB's petition. In response to the respondent's repeated misconduct in the face of prior adverse judgments and consent decrees, the court adopted the special master's levy of civil fines in the amount of \$33,500, award of attorneys' fees, and grant of costs and fees. In this particular case, this was a ruling against a labor union that had violated the NLRA. Still it shows the full range of remedial power *currently* available to the Board to punish parties who repeatedly violate the law. But this authority could certainly be exercised in additional cases against employers.

Gissel Bargaining Orders

In addition to the remedies that the express language of the NLRA and accompanying regulations currently provide, case law developed by the NLRB and federal courts authorizes a number of rather serious additional consequences that a non-compliant employer can face. Most significantly, where an employer's unlawful actions have undermined a union's majority and made a fair election unlikely, the Board may order the employer to recognize and bargain with the union even where there has been no secret ballot election—or where the union has lost an election. This authority was upheld in the U.S. Supreme Court's 1969 decision in *NLRB v. Gissel Packing Co.*³

The September 21, 2006, case of *Evergreen America Corp.*,⁴ illustrates perfectly the Board's use of the *Gissel* bargaining order. The Board found that the union had possessed signed cards from 62 of 115 bargaining unit employees, yet lost the election. In response to the union's objections, the Board held that the employer had engaged in unlawful activity that undermined the employees' free choice. For example:

- Approximately 27 employees received threats of job loss and plant closure;
- 13 employees were unlawfully instructed not to attend union meetings, not to read the union's literature and to throw the material away;
- nine employees were unlawfully interrogated;
- seven employees were subjected to the impression that their union activities were under surveillance;
- on 23 occasions, managers made express or implied promises to remedy solicited grievances;
- the company granted unprecedented and excessive across-the-board wage increases to bargaining unit employees; and

—managementmade workplace changes designed to undermine union support, including liberalizing the promotion and attendance policies and improving other benefits.

The Board took the serious action of ordering the employer to recognize the union on the basis of the signed authorization cards, noting:

"[S]imply requiring the respondent to refrain from unlawful conduct will neither eradicate the lingering effect of the violations it committed nor deter their recurrence. Rather, we find that the employees' representational desires, expressed through authorization cards, would be better protected by a bargaining order than by traditional or special remedies that the respondent asserts were not considered by the judge. Accordingly, because we conclude that it is unlikely that a fair rerun election can be held because of the lasting effects of the respondent's violations, we affirm the judge's finding that a *Gissel* bargaining order is appropriate."

The Board will likely broaden the range of cases in which it will pursue *Gissel* bargaining orders. During the last administration, current NLRB Chairwoman Wilma Liebman issued numerous dissents arguing for the propriety of *Gissel* bargaining orders, see, *Abramson, LLC*,⁵ *Hialeah Hospital*,⁶ *Guard Publishing Co. d/b/a The Register-Guard*.⁷ In one case, *First Legal Support Services, LLC*,⁸ then Member Liebman argued that the Board should have overruled precedent and issued a *Gissel* order regardless of whether the Union ever had majority support. One of the nominees who would join the new majority bloc, if confirmed or appointed, is Craig Becker, former associate General Counsel to the AFL-CIO and SEIU. Mr. Becker has similarly advocated for a drastic expansion of the *Gissel* doctrine, writing in his notable 1993 Minnesota Law Review article, "Democracy in the Workplace: Union Representation Elections and Federal Labor Law," 77 Minn. L. Rev. 495 (1993): "Arguably, the direction of labor law reform should lie in transforming the *Gissel* exception into the general rule."

First Contract Remedies

Finally, to the extent that "initial contract" negotiations are an express focus of EFCA's mandatory interest arbitration and remedial provisions, the Board might also expand current law which already provides mechanisms for dealing with bad-faith bargaining by employers in those situations.

As mentioned above, in a series of GC Memoranda issued to regional offices, NLRB General Counsel Ronald Meisburg has provided clear instructions to agency officials to pursue injunctions and special remedies in "first contract" bargaining cases. See Memorandum GC 06-05 (April 19, 2006); Memorandum GC 07-08 (May 29, 2007); Memorandum GC 08-08 (May 15, 2008); and Memorandum GC 08-09 (July 1, 2008).

The specific remedies authorized by the General Counsel in these Memoranda include:

- extensions of the certification period (which would prohibit decertification elections) by 6 to 12 months;
- requiring bargaining on a prescribed or compressed schedule;
- requiring periodic reports to the NLRB on the status of negotiations;
- ordering reimbursement of bargaining costs; multi-facility postings; and union access to employer bulletin boards.

Current NLRB Chairwoman Wilma Liebman has argued in case dissents that the Board must be more vigilant in "first contract" cases, such as *Garden Ridge Management, Inc.*:⁹

Because this case involves a new bargaining relationship and negotiations for a first contract, the Board should "exercise special care in monitoring the . . . bargaining process and closely scrutinize behavior which 'reflects a cast of mind against reaching agreement.'"

In that case, then Member Liebman argued that the employer should not have been allowed to withdraw recognition from the union, even though the employees presented the employer with a petition after a year, because of the employer's failure to meet and negotiate often enough during that time. In April 2008 testimony before the Senate Health, Education, Labor & Pensions Subcommittee, Chairwoman Liebman questioned whether the current initiatives of the NLRB General Counsel and the Federal Mediation and Conciliation Service (FMCS) were adequate to protect employee choice during the negotiation of an initial collective bargaining agreement.

Of course, EFCA proponents have argued that the extraordinary remedies discussed in this article are rarely sought by the NLRB. To date, this has largely been true. However, the NLRB has historically suffered from very tight budgetary constraints. Moreover, many would have argued that the politicization of the Board has led the agency to proceed less aggressively during Republican administrations. Those circumstances are now undergoing significant change, with increased funding from the Obama administration, and soon possibly a Board majority more sympathetic to organized labor. This new majority bloc will undoubtedly pursue expansions of all of the remedial options described above – regardless of whether or not EFCA is ultimately passed into law.

1

Case No. 02-61716-CV, Docket Entry [No. 56](#) (SD Fla. Jan. 30, 2003).

2

Case No. 04-5912ag (2nd Cir., Dec. 12, 2006).

3

395 U.S. 575 (1969).

4

[348 NLRB 12](#) (2006).

5

[345 NLRB 171](#) (2005).

6

[343 NLRB 391](#) (2004).

7

[344 NLRB 1142](#) (2005).

8

[342 NLRB 350](#) (2004).

9

[347 NLRB 13](#) (2006).

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