Unions Urge Congress to Introduce "Free Choice Act"

Insights
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It seems incredible that, in America of all places, arguments must be mustered to support the idea of a secret-ballot election. Yet that is exactly the situation in the current Congress. Rep. George Miller (D-CA), current chairman of the House Education and Labor Committee, has introduced the oddly-named "Employee Free Choice Act," (EFCA) perhaps better known as the "card check" bill. Its purpose is to eliminate the right of employees to decide via secret ballot whether they wish to be represented by a labor union or not.

Not surprisingly, a coalition of pro-business groups has banded together to oppose the legislation. Hearings have already been held in the House, and a similar bill is being prepared by Sen. Ted Kennedy (D-MA) for introduction in the Senate. The impact of this legislation, if it becomes law, could be enormous.

Background
The employees of some companies are unionized, and in others they are union-free. The difference is that (with very rare exceptions) the unionized employees have chosen their bargaining representative through a federally-supervised, secret-ballot election.

In the vast majority of cases, employees who wish union representation, demonstrate their interest by filing a petition with the National Labor Relations Board, the government agency charged with conducting such elections. The petition must be supported by a showing of interest, generally signatures on an authorization card, by at least 30% of the employees in an appropriate bargaining unit.

After processing the petition, the Board schedules an election, usually within 60 days of the filing of the petition. The election is the same as American elections for political office: there is a ballot, which is marked and cast in secret, and the majority of those voting determine the outcome. Over many decades of conducting such elections, the Board has developed very specific guidelines for how the parties may behave, the mechanics of voting, rules for when and where campaigning may be conducted, and other procedures. All are aimed at protecting what the Board refers to as "laboratory conditions" for conducting a fair election.

But over the years, the percentage of workers in America who choose to join unions has declined steadily. From a peak of approximately 40% in the 1960's, union membership has declined to around

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8% of the private workforce. Naturally, unions are beside themselves at this slide into irrelevance, and are determined to do something about it. Their answer is political: take away employees' right to vote their consciences in secret, and substitute signing a card in front of a union organizer.

Under the unions' preferred method of organizing, if a majority of workers sign a card indicating their support, then a union is immediately authorized as the bargaining representative for all the employees in the unit, whether they signed up or not.

Hypocrisy?

But is this really the method preferred by unions, and their supporters in Congress? Maybe, maybe not. It depends on whose ox is getting gored. For example, what about decertification elections? In that situation, employees who are currently represented by a union decide they no longer wish the union to be their representative. Currently, just like the more common certification elections, these are handled by the NLRB under strict guidelines designed to ensure privacy and fairness. But the EFCA bill being debated would keep those safeguards in place, eliminating secret-ballot elections when unions are trying to get into a business, but keeping them in place when employees are trying to rid themselves of union representation.

Rep. Miller certainly had some kind words for secret ballots for Mexican workers. In Mexico, the law allows for secret ballots, but does not require them. Rep. Miller â€" the same person who is sponsoring the card-check bill â€" wrote to Mexican officials in 2001 urging them to protect secret-ballot elections. In Mr. Miller's words, "[W]e feel that the secret ballot is absolutely necessary in order to ensure workers are not intimidated into voting for a union they may otherwise not choose."

Yet while advocating a system that, in his words, "will help bring real democracy to the Mexican workplace," Miller wants to dismantle that same system in the U.S. because employees are not voting the way unions want them to.

The Board and the courts have certainly made clear their preference for secret-ballot elections. In 1969 the U.S. Supreme Court wrote: "The unreliability of the cards is ... inherent, as we have noted, in the absence of secrecy and the natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees." NLRB v. Gissel quoting NLRB v. Logan Packing Co.

Even the AFL-CIO argued to the NLRB that "other means of decision-making are 'not comparable to the privacy and independence of the voting booth,' and [the secret ballot] election system provides the surest means of avoiding decisions which are 'the result of group pressures and not individual decision[s].'" Chelsea Industries. The difference is, in that case, the AFL-CIO was arguing against an employer's withdrawal of recognition based on an anti-union petition circulated by the employees.

What's Next?

Although hearings have already been held in the House, this legislation is still in its early stages. The full House has not yet voted on it, and a companion bill has not yet been introduced in the Senate, although Sen. Kennedy has vowed to do so.

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Contacting your state legislator (who was elected via secret ballot) and express your views on the bill, seems a good place to start. If secret-ballot elections are good enough for Congress, are urged upon our Mexican neighbors, are supported by unions when their interests are at stake, and have been lauded in Supreme Court decisions, they would seem to be good enough for American workers, especially when an event as significant as potential unionization is the issue.

The U.S. Chamber of Commerce has initiated a "Virtual March on Washington" which is aimed at coordinating an email campaign. You can get more information about this by accessing their website at www.voteforbusiness.com, or by contacting your regular Fisher Phillips lawyer.

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