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THE EMPLOYEE FREE CHOICE ACT: BAD FOR UNION CONTRACTORS TOO

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The Employee Free Choice Act (EFCA) was passed by the U.S. House of Representatives by a wide margin on March 1, 2007. The legislation ultimately died in the Senate that year. Now that Barack Obama has been elected President of the United States, and the Democratic Party has made substantial gains in congressional representation, the EFCA stands a good chance of enactment. President Obama was an initial sponsor of the legislation in the Senate the last time around, the Democratic Party is close to a filibuster-proof majority in the Senate, and it is organized labor's top legislative priority.

The EFCA will apply to the construction industry just as it does to all other industries that are subject to the National Labor Relations Act (NLRA). Most building trade unions are enthusiastic supporters of the EFCA, believing that it is a tool to expand union representation and organize much of the open shop segment of the market. They see it as increasing dues income, reducing open shop competition, and giving the unions more bargaining power and leverage. They may also believe that the increased numbers of employees covered by collective bargaining agreements will serve to increase contributions to multi-employer pension plans, helping to improve the funding status of many of those plans that are now underfunded.

Many union signatory contractors also believe the EFCA will be good for them and their segment of the industry by reducing open shop competition and providing additional funding for underfunded multi-employer pension plans. However, there are several reasons why the EFCA is *not* unmitigated good news for today's union signatory contractors. This paper will discuss at least some of those reasons and the negative consequences that the EFCA might create for the union construction industry.

PROVISIONS OF THE BILL

The comments that follow describe the version of the EFCA that passed the House of Representatives in 2007. It is of course possible, even likely, that any bill that is enacted will have been amended on its way to final passage, but for purposes of this paper, the focus will be on the version that passed the House in 2007.

The EFCA as passed by the House in 2007 has three basic functions: (1) to "streamline" the certification process for unions to become the representatives of units of employees; (2) to "facilitate" the negotiation of initial collective bargaining agreements after a union becomes the certified representative; and (3) to provide for enhanced remedies for employees and penalties to

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employers for unfair labor practices and "interference" committed by employers during organizing and initial bargaining activities.

Streamlined Certification

The EFCA amends Section 9(c) of the NLRA by adding a new provision *requiring* the National Labor Relations Board (Board) to *certify*, a union as the bargaining representative of employees in an appropriate unit, *without conducting an election*, if the Board finds that a *majority* of the employees in the unit signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative.[2]

The EFCA also contains a new provision calling for the Board to adopt "procedures to…determine the validity" of authorizations submitted in support of such petitions.

"**Facilitating" Initial Bargaining Agreements**

The EFCA also places artificial and unrealistic time constraints on bargaining an initial collective bargaining agreement after a union is certified, and provides for arbitration to settle the terms of the initial agreement if the parties do not agree to one quickly enough. It does so by specifying that:

1. **bargaining** must begin no later than ***ten days*** after the newly certified union requests bargaining;

2. if no agreement is reached ***ninety days*** after the onset of bargaining, the parties must contact the Federal Mediation and Conciliation Service (FMCS) and begin **mediation** for the new agreement;

3. if no agreement is reached ***thirty days*** after mediation is initiated, FMCS "***shall*** refer the dispute to an **arbitration board** established in accordance with such regulations as may be prescribed by" FMCS. The arbitration panel shall issue a decision on terms of a binding contract to last ***two years***.

The EFCA permits the parties to extend the thirty and ninety day time limits, and to modify the length of any agreement to be decided by an arbitrator, by mutual agreement.

Enhanced Remedies and New Penalties

The EFCA modifies the rules for processing charges alleging that employers have violated the NLRA in certain respects during union organizing campaigns or during bargaining for initial

[2] The bill states, in relevant part: "*[W]henever a petition shall have been filed* by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wish to be represented by an individual or labor organization for such purposes, the Board shall investigate the petition. *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 and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, *the Board shall not direct an election* but shall certify the individual or labor organization as the representative." (Emphasis added.)

collective bargaining agreements. The EFCA requires certain allegations to be investigated on a priority basis, meaning within 72 hours after filing of the allegations. This applies to allegations that an employer has:

1. engaged in unlawful interference with an organizing campaign and/or
2. terminated an employee for (a) engaging in organizing activity or (b) participating in bargaining for an initial collective bargaining agreement.

The EFCA also *requires* that the Board's regional directors seek injunctions in federal court to order employers to cease such alleged illegal activity, and reinstate such terminated employees, even *before* a final determination has been made that any unlawful acts have occurred. The effect of this provision is that employers will need to *defend* themselves on the merits of these claims *twice*—an expensive proposition for any employer.

The EFCA also provides for *triple* back pay for employees found to have been terminated for engaging in organizing or initial contract bargaining activity, and also imposes new "civil penalties" of up to *$20,000 per violation* for employers found to have willfully and repeatedly engaged in interference with organizing efforts or to have terminated employees for engaging in organizing or initial bargaining activity.

IMPACT ON THE UNION CONSTRUCTION INDUSTRY

The union movement, including the building trade unions, generally supports the EFCA. Unions believe that the EFCA will make union organizing easier and, in general, employers agree with that assessment. Unions desperately need to reverse the 25-year trend of generally decreasing union representation in the United States[3] and believe that the EFCA will provide a big boost to their ranks.

Construction industry unions in particular believe that if streamlined organizing is successful in their industry, it may provide the new blood that the industry needs to replace the growing number of retirees. Many also hope that swelling the ranks of the building trades will help solve some of the funding problems plaguing multi-employer funds, particularly pensions.

Superficially, this view would appear to be correct. **However, deeper analysis suggests that there may be little positive impact on unions in construction or union-signatory contractors.** In fact, it is reasonable to believe that the EFCA will:

1. lead to an increase in conversion from 8(f) to 9(a) status;
2. increase the number and nature of jurisdictional disputes;
3. damage the structure of multi-employer bargaining as it has existed for many years; and
4. possibly exacerbate pension funding woes.

[3] Percentages have declined steadily for 25 years, although there have been a couple of years when absolute numbers of members actually went up. The Bureau of Labor Statistics has reported that union membership in 2008 actually increased by approximately 428,000 persons.

Conversion from 8(f) to 9(a)

Under current law, **section 9(a)** of the NLRA requires an employer to recognize and bargain with a union that has been selected by a majority of that employer's employees in an appropriate bargaining unit. If a union can demonstrate majority support through signed union authorization cards, a petition, or poll, it can demand recognition by the employer. The employer then can grant voluntary recognition based on a contemporaneous showing of majority support or demand a secret-ballot election supervised by the Board.

An employer generally commits an unfair labor practice by recognizing a union as the bargaining agent of the employer's employees if the union has *not* demonstrated that it has majority support. However, **section 8(f)** of the NLRA carves out an exception for the construction industry allowing "an employer engaged primarily in the building and construction industry" to enter in to a labor agreement with a union without *any* showing of employee support. Such agreements are typically called "8(f) agreements" or "pre-hire agreements," because they are often signed before the construction contractor has even hired any employees to work under the agreement.

The difference between a 9(a) and an 8(f) relationship is significant for various reasons. Most importantly:

1. In a 9(a) relationship, the union and employer have a duty to bargain with each other in good faith and attempt to reach agreement covering wages, hours, and terms and conditions of employment. When the agreement expires, the employer has a continuing obligation to recognize and bargain with the union, unless and until the union is shown to have lost majority support. In an 8(f) relationship, however, the employer has no duty to recognize the union once the agreement expires and is properly terminated. Either party may terminate the relationship, and the employer is free to operate on an open-shop basis or to recognize a rival union.
2. An 8(f) agreement does not bar a petition for representation by a rival union, while a 9(a) agreement does.

The vast majority of collective bargaining agreements to which AGC members are bound are 8(f) agreements. Both union contractors and unions throughout the industry have historically benefited from the ease, convenience, and flexibility of 8(f) relationships**. The flexibility permitted by those 8(f) relationships may be in danger if the EFCA is enacted.** Building trade unions with 8(f) agreements—particularly where they are concerned that a contractor may try to "go open shop" or where another union is trying to take over their jurisdiction – are likely to use the new card-check process to convert their relationships to 9(a) in order to solidify their bargaining-agent status. Likewise, a rival union seeking to take work from a union with an 8(f) relationship could use the card-check process to expand jurisdiction. While opportunities for conversion exist under current law, the EFCA would make conversion much easier to achieve.

<u>The Effect on Bargaining of Conversion During the Term of an 8(f) Agreement</u>

In cases where a union uses the EFCA card-check procedure to convert union contractors from 8(f) to 9(a) status during the term of an 8(f) agreement, there may be little or no *immediate*

impact. The Board's 2007 decision in the ***DST Insulation*** case[4] provides that signatory 8(f) contractors that become 9(a) contractors during the term of an existing 8(f) agreement will generally be bound to the terms of that existing 8(f) agreement until its expiration.

Accordingly, unless *DST Insulation* is overruled or determined inapplicable after the passage of the EFCA, the number of people covered, and on whose behalf fund contributions will be made, will not change due to mid-term conversion from 8(f) to 9(a). If the decision *is* overruled or determined inapplicable, then the union could demand bargaining for an "initial" [i.e., initial 9(a)] agreement under the EFCA-established procedures, including arbitration. It is unclear from the text of the current bill whether the bargaining schedule, mediation and arbitration provisions apply in a conversion case, but the text certainly could be interpreted that way.

To the extent that such a contractor may have wanted to repudiate the 8(f) relationship upon the expiration of the agreement and become open shop, mid-term conversion to 9(a) status will prevent that from happening.[5]

The Effect on Bargaining of Conversion Following Expiration of an 8(f) Agreement

The effect of conversion is less clear in any case in which an employer first repudiates an 8(f) relationship at the conclusion of an 8(f) agreement and the union then takes steps to establish a 9(a) relationship. Once the 8(f) relationship is repudiated, the employer has no duty to bargain with the union. If the same union with which the employer had the 8(f) relationship then presents evidence of majority status to the Board, the Board will certify the union as the 9(a) representative of the employees.

As mentioned above, one of many unanswered questions is whether the bargaining that will take place in this circumstance will be considered bargaining for an *initial* collective bargaining agreement or not. The Board may decide that, since the employer previously had at least one 8(f) agreement with that union, this bargaining is *not* for an initial agreement. If the Board does so, then bargaining to agreement or impasse as provided under present law will be permitted, and the EFCA's accelerated bargaining schedule and arbitration will not be required.

However, bargaining in these circumstances *could* be considered bargaining for an initial collective bargaining agreement since the union is newly certified and there is no collective bargaining agreement in effect at the time, which means the *DST Insulation* case would not apply. In that event, the EFCA's initial agreement procedures would apply, calling for an accelerated bargaining timetable followed by mediation and arbitration if no agreement is reached. **The prospect of arbitration means that a government-appointed third party could determine the wages, hours, and terms and conditions of employment. The prospect of arbitration could also result in less than good-faith bargaining, as unions might be less willing to compromise during negotiations if they hope to get exactly what they want from the arbitrator.**

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[4] *Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers, Local No. 84 (DST Insulation)*, 351 NLRB No. 3 (2007).

[5] While unions are currently permitted to use the election machinery of the NLRA forestall such repudiation , instances of them having done so are rare. Perhaps this is because many 8(f) contractors have been reluctant to try to "go open shop" for fear of incurring multi-employer pension plan withdrawal liability.

Organizing Open Shop Contractors

The EFCA would make it easier for unions to organize employers in the construction industry. Salting may even go back underground with unions ramping up the use of "covert" salts instead of the "overt" salting that has been used more often to harass employers than to organize them. **However, even if organizing of open shop contractors is seen as desirable by unions and union-signatory contractors, it is possible (even likely) that, because of the arbitration provisions, the ultimate impact of the EFCA on multi-employer area agreements and pension funds will be far different than expected, and far from desirable.**

The Effect on Area Agreements

Since open shop contractors that are organized through the EFCA card-check process will not have chosen to be union contractors, they are not likely to agree to accept the area agreement when such is proposed by the union. Such employers will likely insist on bargaining for their own terms and conditions, and the unions will be obligated to bargain with them rather than employ the "take it or leave it" approach generally utilized by unions accustomed to employers that have no bargaining leverage.

Because of the EFCA's mandatory mediation and arbitration procedures, the unions will not be able to strike to enforce their demands and/or to force the employers into the area agreements. Once the issues are submitted to arbitration, the resulting agreements may be very different from the terms of the multi-employer area agreements. Unions and employers must remember that *everything* in a collective bargaining agreement would be subject to arbitration, and possible variance from the area agreement, under the EFCA.

First, consider the **expiration date** of the arbitrated agreement—the EFCA *requires* that, unless the parties agree otherwise, any collective bargaining agreement ordered by an arbitrator will last two years. It will be virtually impossible for an arbitrated collective bargaining agreement to expire at the same time as the traditional and existing area agreement.

Many other terms may also be different. One obvious example of a term that may be different concerns **retirement plans**. If the employer already provides a retirement vehicle for its employees, whether a pension or a 401(k) plan, the employer may insist on keeping its current plan. It is certainly not a foregone conclusion that an arbitrator would order the employer to adopt the multi-employer plan in the area agreement in preference to the employer's existing plan, especially if the multi-employer plan is severely under-funded. In fact, it is reasonable to expect that an arbitrator would *not* force an unwilling employer into such a plan in which the employer faces the prospect of substantial withdrawal liability at some future date. This means that the *funding status* of existing multi-employer pension plans may not improve due to the EFCA, but *may get worse* as union-signatory contractors perform covered work without contributing to the multi-employer pension plan.

Another example is a **hiring hall provision**. If the employer has a well-established personnel function, hiring its own employees and using pre-employment screening methods such as essential functions testing or other applicant procedures, an arbitrator may very well not order the employer to accept the union as its hiring agent over the employer's objections.

Other provisions that could be different include, e.g.:

- Saturday as a make-up day at straight time;
- overtime only over 40 hours in a week as opposed to 8 hours in a day;
- shift differentials;
- traditional exceptions to the no-strike clause such as the right to strike over non-payment of wages and fringes.

There are many other potential examples. **The simple fact is that there is a significant possibility that the mandatory arbitration provisions of the EFCA could serve to undermine the uniformity of area agreements in the construction industry that has been the hallmark of construction industry bargaining for many years**. It is entirely possible that the industry will be faced with the prospect of union-signatory employers that will have labor cost advantages over traditionally union-signatory contractors. If employers cannot eliminate wage and benefit competition amongst each other through uniform agreements as they have done historically, there is significantly less value to being a union contractor.

The Effect on Craft Jurisdiction & Pension Plans

As touched on above, another opportunity for mischief that is latent in the EFCA is the possibility that a union may seek to organize employees in non-traditional construction industry bargaining units. Some building trade unions have notably been seeking to expand their jurisdiction beyond traditional craft lines. Many open shop employers also routinely train and assign employees to perform the work of more than one craft, and a union with expanded jurisdiction as a goal may seek to organize such multi-craft employees into a **multi-craft construction unit**.

The card-check procedure of the EFCA could be utilized to sign up employees in such a multi-craft unit. Multi-craft units are not inherently inappropriate, and the Board may have no choice but to certify a union as the representative of such a unit when evidence of majority status is presented to the Board.

The impact of such multi-craft units on the industry and on **pension plans** could be as disruptive as the non-standard collective bargaining agreement terms that may result from arbitration as discussed above. If a union organizes employees in a multi-craft unit, contributions to that union's pension fund would increase due to the contributions for hours worked by employees of what had previously been separate crafts, all of whose hours were used to fund discrete craft pension funds. The impact on the multi-craft unit's pension fund might be positive but would come at a cost to the funds of all the other crafts that would see hours that formerly resulted in contributions to their funds going instead to the multi-craft union's fund.

Additionally, **jurisdictional disputes** would undoubtedly increase if any multi-craft bargaining units were formed. The Board's jurisdictional dispute procedures may be of little use in the event that the Board is required, as the EFCA provides, to certify a multi-craft unit in a geographic area where the previous separate crafts still maintain their separate agreements with other employers or employer associations.

Other Open Questions

There are many other questions that pose problems for currently union-signatory contractors. Answers to many of these questions will have to wait for amendments to the bill, for the Board to issue guidelines and procedures as directed by the EFCA, for the FMCS to issue regulations as directed by the EFCA, or in case-by-case litigation before the Board after enactment (which could take years to resolve). Among these questions are:

- What might the different terms ordered by an arbitrator do in light of so-called "most favored nation" clauses?
- What qualifications will arbitrators be required to have to be eligible for selection? Will they need to be knowledgeable about ERISA? About pension funding? Will they even need to be knowledgeable about construction?
- Will an arbitrator be able to put arbitration in the agreement as the basis for resolving the next agreement? Under current law, this cannot happen, but will the EFCA change that so that employers and unions could be arbitrating forever?
- Will an arbitrator be able to include permissive subjects of bargaining, such as industry promotion fund clauses, in collective bargaining agreements?

CONCLUSION

Open shop contractors are generally opposed to the EFCA because it enables unions to organize more easily, without the reliability of a Board-supervised secret ballot. They oppose not only the organizing provisions but also the mandatory arbitration provisions that would allow third parties to determine the terms and conditions of employment, including wages and benefits, of their employees.

Many union-signatory contractors today support the EFCA because they want to reduce open shop competition, but this may be short-sighted on their part. Union-signatory contractors see reducing open shop competition as a plus, but even that may not be unmitigated good news—after all, open shop competition may be the only reason that union demands have been moderated at all over the past several years, and once the unions believe they are completely "back in the driver's seat" as they were a few decades ago, any semblance of cooperation with employers on their part may cease.

There certainly is reason to expect that the EFCA would lead to more contractors becoming union-signatory. However, as discussed above, the card-check provisions of the EFCA could threaten union contractors' 8(f) status, restricting their flexibility. Furthermore, the mandatory arbitration procedures of the EFCA may create chaos in the union segment of the industry. For any union, contractor, or contractor association that seeks stability in construction industry bargaining relationships, the EFCA, may simply be the latest example of the "law of unintended consequences" that should make its supporters think carefully before asking for something, because they "just might get it."