SUMMARY OF THE PROPOSED EMPLOYEE FREE CHOICE ACT

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According to published media reports, labor leaders, including officials at the AFL-CIO, Change to Win federation, and others, are making passage of the Employee Free Choice Act ("EFCA") their top legislative priority in the new 111th Congress set to begin in January 2009. In its current form, EFCA would modify the National Labor Relations Act ("NLRA") to:

> (1) Require the National Labor Relations Board ("NLRB") certify a union based upon a majority card check (instead of certifying a union only after it receives a majority of employee votes in a secret ballot election);
>
> (2) Allow either party to request mandatory binding arbitration of a first contract if no agreement is reached within about 120 days of certification of the union; and
>
> (3) Increase the penalties imposed on employers who are found to have committed unfair labor practices during a union organizing drive or negotiation of a first contract.

As recently reported, top officials of the Change to Win labor federation are aiming for passage of EFCA in the first 100 days of the new Congress. The bill previously passed in the House Representatives on March 1, 2007, by a vote of 241 to 185. The bill faced a threatened veto by President Bush and, ultimately, stalled in the Senate in June 2007 when supporters were unable to get the 60 votes necessary to close debate and force a vote on passage. Nevertheless, EFCA did receive majority support in the Senate with 51 senators, including then Senator and now President-Elect Obama, voting along party lines in favor of the bill. Supporters of EFCA are understandably optimistic about the bill's prospects for being signed into law during the 111th Congress given the election of President-Elect Obama and the Democratic Party gains in the House and the Senate in the November 2008 election.

EFCA's key features are described in more detail below.

I. Certification Based on Majority Card Check

- EFCA would amend Section 9(c) of the NLRA to require that, where a labor union files a representation petition, the NLRB must certify the union as the exclusive bargaining representative of the employees provided two conditions are met: (1) that the petitioned for bargaining unit is an appropriate unit, and (2) that a majority of employees in that bargaining unit have expressed their preference in writing that the union represent them. This expression of interest is usually demonstrated through signed authorization cards.

- Currently, under the NLRA, an employer need not recognize a union based on signed authorization cards but can, instead, withhold recognition unless and until the union receives a majority of votes cast in a secret ballot election conducted by the NLRB. Under EFCA, an employer would not be authorized to require a secret ballot election

among the bargaining unit employees, if the labor union has requested certification based on a card check.

- Under EFCA, a union would need only to obtain signed authorization cards from 50 percent plus one of the workers in a bargaining unit to be certified by the NLRB. As a result, it is likely that there would be little need for a union to request that the NLRB hold a secret ballot election among all eligible employees in the petitioned for unit.

- There are several unanswered questions regarding EFCA. EFCA, for example, is silent on what will be deemed to constitute a valid authorization card or what standard will be applied in determining the validity of signed cards presented by a union to ensure they are not the result of coercion. Nor is it clear how long an authorization card would be deemed valid, or whether an employee may revoke an authorization card after signing it. Instead, EFCA provides that the NLRB is to develop guidelines and procedures for resolving these issues.

II. Mandatory First Contract Mediation and Interest Arbitration

- Following certification based on a majority card check, EFCA would require that negotiations between the employer and the union begin within 10 days after the union's bargaining demand. If the employer and union do not reach an agreement within 90 days, either party may refer the negotiation to the Federal Mediation and Conciliation Service ("FMCS") for mediation.

- If the parties are unable to reach an agreement with the assistance of a federal mediator within 30 days after notice to the union is provided, any remaining open issues may be submitted to mandatory interest arbitration by an arbitration board to be established by the FMCS. The arbitration board's "decision" would establish the initial terms of the first contract between the employer and the union.

- EFCA places few, if any, restrictions on the authority of the arbitration board to set initial terms and conditions. As such, the arbitration board is free to impose on the parties initial contract terms that the arbitration board determine appropriate instead of being limited to choosing between the employer and the union's respective final bargaining proposals. EFCA also does not provide a remedy for what happens in the event the interest arbitration award results in the loss of jobs or the failure of the employer's business.

- EFCA's mandatory interest arbitration provision would cover a broad range of often contentious collective bargaining topics, including:

  - Employees' initial wage rates and any built-in pay increases;

  - Selection of employee benefit plans, including plan design, employee deductibles, and employee contribution levels;

- Employer participation in a multi-employer union pension plan, which could trigger employer withdrawal liability if the employer later sought to leave the plan;

- Whether employees retain the right to honor the picket lines of other unions during the term of the contract;

- Whether the union contract would be imposed upon any successor following a sale or merger; and

- The employer's ability to use outside contractors in addition or in place of bargaining unit employees.

- The initial terms set by the arbitration board would not be subject to a ratification vote by bargaining unit employees. Instead, the terms would be immediately binding on both the employer and the union for up to two years, or until the parties agree on a new contract, whichever occurs first. During this initial two-year period, employees would not be able to challenge the union's majority status by filing a petition for a decertification election with the NLRB.

III. EFCA Increases Penalties on Employer due to Unfair Labor Practices Committed During an Organizing Drive or First Contract Negotiation.

- EFCA also would amend the NLRA by increasing the penalties on employers who are found to have committed unfair labor practices during a "union organizing drives" and/or a first contract negotiation.

- EFCA's enhanced monetary penalties and injunctive remedies are imposed only against employers.

- Under EFCA, civil fines of up to $20,000 per violation would be imposed against employers who are found to have willfully or repeatedly committed unfair labor practices during a union organizing drive or negotiation of a first contract.

- In cases where an employer is found to have discharged or suspended an employee for engaging in protected activity under the NLRA during a union organizing drive or first contract negotiation, treble back pay damages also would be imposed.

- EFCA would also amend Section 10(l) of the NLRA to require that the NLRB seek injunctive relief in federal court if it finds reasonable cause to believe that an employer discharged or otherwise discriminated against an employee, or threatened to do the same, or engaged in other conduct that significantly interfered with employee rights during an organizing drive or first contract negotiation.