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## Summary

This report provides an overview of the Employee Free Choice Act (S. 1925/H.R. 3619), a measure that would amend the National Labor Relations Act ("NLRA") to allow union certification without an election, provide a process for the bargaining of an initial agreement, and prescribe new penalties for certain unfair labor practices. The report reviews the current process for selecting a bargaining representative under the NLRA, and discusses the role of the Federal Mediation and Conciliation Service in resolving bargaining disputes under that act. This report will be updated in response to relevant legislative activity.

The Employee Free Choice Act would amend the National Labor Relations Act ("NLRA") to allow union certification without an election, provide a process for the bargaining of an initial agreement, and prescribe new penalties for certain unfair labor practices. Introduced in the Senate as S. 1925 by Senator Edward M. Kennedy and in the House of Representatives as H.R. 3619 by Representative George Miller, the act has received strong support from the labor community. Labor officials reportedly plan to make the act a "top priority issue for the winner of the next presidential election."[1]

This report will review the current process for selecting a bargaining representative under the NLRA, and discuss how the Employee Free Choice Act would alter that process. In addition, the report will discuss the other changes proposed by the act. Some of these changes have been suggested in the past. Legislation that would have established a process for the bargaining of an initial agreement has been introduced in every Congress since the 105th Congress.[2]

[1] See *Bonior Calls For Labor Law Reform to Fix Problems in Organizing Drives*, Daily Lab. Rep. (BNA), Mar. 11, 2004, at AA-2 (quoting AFL-CIO President John J. Sweeney).

[2] See Fair Labor Organizing Act, S. 2389, 105th Cong. (1998); Right to Organize Act, S. 654, 106th Cong. (1999); Right to Organize Act of 2001, S. 1102, 107th Cong. (2001).

## Union Certification Without Election

Section 2 of the Employee Free Choice Act would amend the NLRA to allow an individual or labor organization to be certified as the exclusive representative of a bargaining unit without an election.[3] The act would require the National Labor Relations Board ("the Board") to conduct an investigation whenever a petition is 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 bargaining unit wish to be represented by an individual or labor organization for the purpose of collective bargaining.[4] If the Board found that a majority of employees in the unit signed authorizations designating the individual or labor organization as their bargaining representative, it would certify such individual or labor organization as the representative.

Currently, a labor organization usually becomes the exclusive representative for a bargaining unit following an election. Under existing law, the Board conducts an investigation following the filing of a petition that alleges that a substantial number of employees wish to be represented for collective bargaining and that the employer declines to recognize their representative as the exclusive representative for the bargaining unit.[5] To constitute a "substantial number of employees," at least 30 percent of the employees must indicate support for representation.[6] The Board shall conduct a hearing if it has reasonable cause to believe that a question of representation affecting commerce exists.[7] Based on the record of such a hearing, the Board shall direct an election by secret ballot and shall certify the results if a question of representation exists.[8]

Although a labor organization that has obtained signed authorizations from a majority of employees in a bargaining unit may request to be recognized voluntarily by an employer as the exclusive representative of employees in the unit, few employers engage in such voluntary recognition.[9] In *NLRB v. Gissel Packing Co.*, the U.S. Supreme Court confirmed that signed authorization cards from a majority of employees could give rise to bargaining obligations under section 8(a)(5) of the NLRA.[10] Section 8(a)(5) indicates that it shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees subject to the provisions of section

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[3] S. 1925, 108th Cong. § 2 (2003).

[4] *Id*.

[5] 29 U.S.C. § 159(c)(1).

[6] See 29 C.F.R. § 101.18(a).

[7] But see 29 U.S.C. § 159(c)(4) (allowing hearings to be waived by stipulation for the purpose of a consent election).

[8] See 29 U.S.C. § 159(c)(3) ("No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held."). In addition, an election will be denied for a bargaining unit where such unit is already covered by a valid collective bargaining agreement. The so-called "contract bar" to an election operates when there is a written bargaining agreement that has been properly signed by the parties, is binding on the parties, and is of a definite duration.

[9] See Stephen I. Schlossberg and Judith A. Scott, Organizing and the Law 173 (1991).

[10] 395 U.S. 575 (1969).

9(a) of the NLRA.[11] Section 9(a) provides that representatives "designated or selected for the purposes of collective bargaining by a majority of the employees" in an appropriate bargaining unit "shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining."[12] Because section 9(a) refers to exclusive representatives "designated or selected" by a majority of employees without specifying how the representatives must be chosen, it was understood that the showing of majority support through signed authorization cards could give rise to a duty to bargain.

However, the *Gissel* Court also noted that an employer is not obligated to accept the authorization cards as proof of majority status, and could insist on an election.[13] Moreover, the Court maintained that an employer is not required to justify his insistence on an election by making his own investigation of employee sentiment or by providing affirmative reasons for doubting the majority status.[14] In a subsequent case, *Linden Lumber v. NLRB*, the Court further concluded that a union with authorization cards purporting to represent a majority of the employees, which is denied recognition by the employer, has the burden of invoking the Board's election procedure.[15]

Labor organizations contend that employers decline voluntary recognition based on authorization cards because they want to discourage support for representation in the period before an election is held.[16] During this period, it is believed that employers often hire anti-union consultants, terminate pro-union employees, and conduct captive-audience meetings where employees are exposed to the employer's views against representation.[17] Proponents of the Employee Free Choice Act maintain that certification based on a majority of signed authorizations would eliminate this misconduct. However, those who oppose this kind of certification express concern for a union's possible use of coercive and intimidating tactics to obtain signatures.[18] They also fear the increased possibility of forged signatures on authorization cards.[19]

## Role of the Federal Mediation and Conciliation Service

Section 3 of the Employee Free Choice Act would amend the NLRA to allow for the involvement of the Federal Mediation and Conciliation Service ("FMCS") during the

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[11] 29 U.S.C. § 158(a)(5).

[12] 29 U.S.C. § 159(a).

[13] *Gissel*, 395 U.S. at 609.

[14] *Id.*

[15] 419 U.S. 301 (1974).

[16] See Steven Greenhouse, *Unions, Bruised in Direct Battles With Companies, Try a Roundabout Tactic*, N.Y. Times, March 10, 1997, at B7.

[17] See *Witnesses at House Hearing Discuss Merits of Elections Versus Card-Check Recognition*, Daily Lab. Rep. (BNA), Apr. 23, 2004, at A-7.

[18] *Id.* Legislation that would make it an unfair labor practice for an employer to recognize or bargain with a labor organization that has not been selected through an election has been introduced. See H.R. 4343, 108th Cong. (2004).

[19] *Id.*

negotiation of the initial agreement following certification or recognition of a labor organization.[20] If, after 90 days of bargaining or such additional period as the parties may agree upon, the parties have failed to reach an agreement, either party could notify the FMCS and request mediation. If, after 30 days from the date mediation is requested or such additional period agreed upon by the parties, the FMCS is unable to bring the parties to agreement, the FMCS would refer the dispute to an arbitration board that would render a binding decision.

Under existing law, the FMCS may provide mediation and conciliation services upon its own motion or upon the request of one or more of the parties to the dispute whenever "in its judgment such dispute threatens to cause a substantial interruption of commerce."[21] Where state or other conciliation services are available to the parties, the FMCS is directed to "avoid attempting to mediate disputes which would have only a minor effect on interstate commerce."[22] Existing law does not distinguish between initial agreements and other agreements negotiated by the parties. Moreover, the NLRA does not provide for the use of binding arbitration to resolve disputes.

Proponents of the Employee Free Choice Act argue that legislation is needed to promote the prompt negotiation of initial collective bargaining agreements.[23] It is believed that in 32 percent of all cases, the employer and the union fail to reach agreement within the first two years following an election.[24] However, some observe that the availability of binding arbitration under the act would likely discourage support for the legislation from the business community. Under the act, employers would be faced with the possibility of having to accept unfavorable terms and conditions by the arbitration board. Under existing law, the employer does not have to accept such terms and conditions. The employer may decline unfavorable proposals with the hope that the union may change its position to avert a strike. If binding arbitration is required, the employer would lose that bargaining leverage.

## Penalties Under the NLRA

Section 4(b) of the Employee Free Choice Act would amend the NLRA to impose new or increased penalties for certain unfair labor practices.[25] If the Board found that an employer discriminated against an employee with respect to his hiring, tenure, or any term or condition of employment to encourage or discourage membership in a labor organization either while employees of the employer were seeking representation by a labor organization or during the period after a labor organization was recognized as a unit's exclusive representative, but before the first collective bargaining agreement was

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[20] S. 1925, 108th Cong. § 3 (2003).

[21] 29 U.S.C. § 173(b).

[22] *Id.*

[23] See *Witnesses at House Hearing Discuss Merits of Elections Versus Card-Check Recognition, supra* note 17.

[24] *Id.*

[25] S. 1925, 108th Cong. § 4(b) (2003).

executed, the Board would award employee back pay and 2 times that amount as liquidated damages.

Section 4(b) would also provide for a civil penalty for certain willful and repeated unfair labor practices. Any employer who willfully and repeatedly

> (a) interfered with, restrained, or coerced an employee in the exercise of his right to organize, or
> (b) discriminated against an employee with respect to his hiring, tenure, or any term or condition of employment to encourage or discourage membership in a labor organization

either while employees of the employer were seeking representation by a labor organization or during the period after a labor organization was recognized as a unit's exclusive representative, but before the first collective bargaining agreement was executed, would be subject to a civil penalty not to exceed $20,000 for each violation. The exact amount of the penalty would be determined by the Board based on the gravity of the unfair labor practice and its impact on the charging party, on others seeking to exercise rights guaranteed by the NLRA, or on the public interest.[26]

Under existing law, the Board may order any person committing an unfair labor practice to cease and desist from such misconduct.[27] The Board may also take such affirmative action, including reinstatement with back pay, as will effectuate the policies of the NLRA.[28] Section 12 of the NLRA provides that any person who willfully resists, prevents, impedes, or interferes with any member of the Board or any of its agents or agencies in the performance of their duties under the act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.[29] However, no specific penalty currently exists for the kind of willful and repeated misconduct described in section 4(b) of the Employee Free Choice Act.

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[26] *Id.*

[27] 29 U.S.C. 160(c).

[28] *Id.*

[29] 29 U.S.C. § 162.