

LEGAL ADVICE

Seven things you should know about interest arbitration

It is probably safe to say that every labor relations professional, union-side and management-side, has been anxiously looking forward to spring. The reason is that most pundits believe that the election of Barack Obama coupled with the significant Democratic gains in the Senate are harbingers of substantial changes to federal labor law in the form of passage of the Employee Free Choice Act (EFCA).

The EFCA has been proposed in Congress since at least 2005 but has not generated much traction with a Republican president and a Republican-controlled Senate. Most recently, in March 2007, the EFCA overwhelmingly passed in the House but failed to overcome a Republican filibuster in the Senate. It is easy to see then that the probability that the EFCA will become law has increased significantly now that the nation has a Democratic president and a Democratic-controlled Congress.

Reasonable people can, and will, debate the wisdom of the EFCA as federal labor law policy. That is not the purpose of this article. Instead, this article focuses on one concept within the EFCA that could bring about the most extensive change to federal labor law in 60 years.



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While one can find media coverage on the EFCA's provision that permits a "card check" process to be an alternative to secret ballot elections when determining whether employees want union representation, there is another major change within the EFCA that has largely escaped notice. The EFCA mandates interest arbitration for first labor contracts if the union and employer cannot reach a voluntary agreement in the 120 days following the union's request to

bargain. The current law does not require an employer and a union to reach a first contract. Instead, the parties must bargain in good faith with a sincere desire to reach a labor contract. Under the EFCA, however, if an employer and a union cannot agree on an initial labor contract and mandatory mediation has failed, the EFCA provides that the Federal Mediation and Conciliation Service ("FMCS"): "shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service. The arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties."

In other words, if the parties cannot reach an agreement, the government will refer "the dispute" to an arbitrator who will decide what will be included in the parties' labor contract.

There are more questions about the legal implications of this provision than answers. Two examples illustrate the uncertainty facing both employers and unions.

First, the provision states that the FMCS will refer the dispute to an "arbitration board." Right

now, we have no guidance on important questions such as who will be designated as a member of this board, whether the board will be made up of one person or several persons, or whether the member(s) will need specific experience in the employer's industry to be qualified to sit on this board.

Second, the provision states that the arbitration board will "settle the dispute" and "render a decision." What we do not yet know is whether the EFCA intends the word "dispute" to mean the contract as a whole or only the open issues. Will the arbitrator have the authority to reverse the parties' tentative agreements on specific issues in order to fashion an entire labor contract?

What is known at this point is that employers who are unfamiliar with, and uninitiated into, the process of interest arbitration would be well-served to understand the basic concepts. To help you skip up the learning curve, we have generated a list of the top seven things we think you should know about "interest arbitration":

1. Interest arbitration is different from grievance arbitration. Interest arbitration is a legal process whereby some or all contract terms are forced on both parties

when the parties cannot agree. In contrast, grievance arbitration is the legal process by which an arbitrator decides whether a party to the contract violated the mutually agreed upon terms of the contract.

Some labor relations professionals think that one sign of a good labor contract is that both sides are unhappy with it. The thought is that the unhappiness is an indication that both sides compromised on important elements to arrive at an agreement.

Given our experience, we don't think the same will be true when the terms of a labor contract are forced upon the parties. Just as before, both sides will be unhappy with the result but with interest arbitration, the unhappiness will stem from the forcing of the labor contract, not the compromises that were made to get the deal done.

2. The government is the arbitrator in interest arbitration. In the case of the EFCA, the arbitrators will likely be employed by or affiliated with the federal government. In other words, the government is placed in a position where it decides what contract terms are fair and make sense in a given business or operations. The government then

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ORGANIZATIONAL LEADERSHIP

Both leadership and management skills needed for success

Over the past few years, Iain Macfarlane has shared his insight through this publication in the framework of executive coaching. I hope that we will continue to gain shared insight through this column as we focus on organizational leadership.

The perspective and the practices I share through my consulting practice, teaching and e-newsletter come from years of experience and progressive client organizations. While the perspectives have been refined over the years, I owe a debt of gratitude to many mentors, executives and leaders who have shared their counsel along the way.

Together with the editor of this publication, I will strive to cre-



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ate shared insight for all organizational leaders: business owners and department managers, for-profit corporations and nonprofit organizations, current managers and aspiring leaders. To lead from where we are today — there is no time like the present.

I hope to illustrate our points through a variety of formats: sharing perspectives, practice examples and interviews with peers who have learned lessons ahead of the rest of us. Let's begin to peel away the reality and understand the benefit of organizational leadership from the very beginning.

First, understand that management and leadership are both critical to your success. Leader-

ship is not the evolution of management; an afterthought of the former. Look to those whom you have chosen to follow and emulate in your professional practice. They have made the call or shouted the order without hesitation. They have been decisive as needed, but inclusive and open to other ideas as well. As the president often reminds us, we are living through a time and period that we have never experienced before. We manage our work to gain efficiency, but lead and engage others toward a preferred future.

Next, we need leaders who are confident enough to unleash the potential of other leaders. Once again, if we only manage what we know and see, we create only followers. While we need some of this, we need to unleash the potential of others around us. I was talking with a business owner over the past

several weeks who illustrated this point better than I can. He indicated how easy it was for him to make all types of decisions while growing his company through the earliest phases of its life cycle, but from where he was sitting today, he could no longer turn the dials or move the levers as easily to get the results he now anticipated. He needed others around him. He wanted to shape the next level of managers around him so that the vision was shared and they could help him implement the growth plan they envisioned. We get to a point where we realize we can't do it all on our own.

Finally, we need to move beyond developing leaders, to creating organizational leadership. This is not a simple play on words. We need to move beyond the development and reward of individual leaders, to the creation of organizational

leadership. This type of leadership is bigger than any of us. It is something that lives beyond our retirement or tenure. It becomes the very fabric and culture of the organization, and one that continues to respond to the changing needs of our customer base. Good leaders, Dave Ulrich and Norm Smallwood emphasize, come and go, but the organization's leadership must deliver results over the long haul.

So, where are you in your leadership journey? Do you see the value of management and leadership? Are you identifying, developing and unleashing leaders around you? Are you helping to develop leaders discover their natural talents, as well as creating the capacity for organizational legacy and leadership?

We have so much more to discuss. I'll see you next month. n

