

September VSHRM Update Proposed Legislation.¹

See the links on the members only section of the VSHRM website later this week and consider writing our Michigan U.S. Senators on your concerns over EFCA.
(Stabenow and Levin) <http://www2.shrm.org/government/writecongress.asp>

*Those who have worked in the public sector and who are familiar with Michigan's Act 312 binding interest arbitration for police and fire fighters are well aware that this approach to determining CBAs can be a real budget buster. Binding arbitration takes control of labor costs out of the hands of employers and puts it the hands of FMCS appointees. Do you want government wise-men and wise-women taking over control of your employer's labor costs and being able to set many of the terms of a first labor contract?*²

The Employee Free Choice Act (H.R. 1409, S. 560). The much-publicized Employee Free Choice Act ("EFCA") was reintroduced in Congress March 10, 2009. Among other things, the legislation in its current form would amend the NLRA to require the National Labor Relations Board ("NLRB") to certify a union as the representative of employees if a majority of employees signs union authorization cards. By doing away with an employer's right to demand a secret ballot election, the EFCA would inevitably increase unionization across the country by making it easier for employees to organize. The EFCA would also allow parties unable to reach a first contract after 90-days of collective bargaining to refer the dispute to the Federal Mediation and Conciliation Service. If, after 30-days, the dispute is unresolved, the EFCA would require the dispute to be referred to binding arbitration. In addition, the EFCA would increase the penalties for labor law violations by employers.

The EFCA hit a roadblock on March 24, 2009, when Senator Arlen Specter (D-Pa.), who voted to allow debate on the bill in 2007, announced that he would not support the bill in its current form. Stakeholders had been considering Specter as a potential 60th vote to break an anticipated Senate filibuster. Specter stated that the main reason for his opposition was the elimination of the secret ballot, which he considers "the cornerstone of how contests are decided in a democratic society." Although the bill would allow employees to choose between card check and secret ballot elections, opponents to the EFCA argue that unions would always seek card checks.

¹ Thanks go to Masud, Patterson for significant portions of this update.

² Italicized comments are those of the Legislative Board Member. However, National SHRM has taken an official stance against EFCA, including its provisions for loss of secret ballot elections and binding arbitration.

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Furthermore, Specter announced that the recession made it a particularly bad time to enact the EFCA. Shortly thereafter, Senator Dianne Feinstein (D-Calif.) and Senator Blanche Lincoln (D-Ark.) also announced that they would not support the EFCA in its current form.

In July 2009, Democrats reportedly agreed to drop the card-check provision of the controversial EFCA from the bill. Even though the card-check provision may have been the most debated element of the EFCA, there still are other provisions that are strongly opposed by the business community, especially the mandatory arbitration provision. By dropping the EFCA's card-check provision, Democrats are hoping to have the 60 votes required to end a filibuster and ensure the bill's passage.

Paycheck Fairness Act of 2009 (H.R. 12, S. 182). Passed the House of Representatives by a vote of 256-163 on January 9, 2009, and is currently pending in the Senate. The Paycheck Fairness Act of 2009 would amend the Equal Pay Act to revise remedies for enforcement of, and exceptions to prohibitions against sex discrimination in the payment of wages. In addition, the Paycheck Fairness Act of 2009 would change the burden of proof in gender based pay claims requiring the employer to affirmatively demonstrate that any pay differential is not based on sex. Employers who cannot meet this burden would face unlimited compensatory and punitive damages. In addition, the EEOC would be required to collect employer payroll information based on sex, race, and national origin thereby targeting its enforcement activities. The bill also would change rules on class actions automatically including employees in such claims unless they specifically opt out.

Arbitration Fairness Act of 2009 (H.R. 1020). This bill introduced in the House on February 12, 2009, would significantly restrict the ability of employers to arbitrate employment disputes. The Act would amend the Federal Arbitration Act to invalidate all predispute arbitration agreements that require the arbitration of any employer, consumer, or franchise dispute, or conflict arising under any statute intended to protect civil rights. This Act would not apply to arbitration provisions contained in collective bargaining agreements. A similar bill was introduced in the Senate (S. 931) The Senate bill, however, contains an additional provision that would expressly overturn the recent U.S. Supreme Court decision in *14 Penn Plaza L.L.C. v. Pyett*,

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Anti-Card Check Legislation Introduced (H.R. 1176, S. 478). On February 25, 2009, a group comprised of both House and Senate Republicans introduced the **Secret Ballot Protection Act** to Congress to counteract the EFCA. This legislation is similar to legislation that was introduced in the 108th, 109th and 110th Congress. This legislation would amend the NLRA to make it an unfair labor practice for an employer to recognize a union that has not been selected by a majority of the employees through a secret ballot election. It has 101 co-sponsors in the House and 16 co-sponsors in the U.S. Senate.

Alert Laid off Employees in a Reasonable Time Act (H.R. 2077). The “Alert Laid off Employees in a Reasonable Time (ALERT) Act” which was introduced on April 23, 2009, would amend the Worker Adjustment and Retraining Notification (WARN) Act in two ways. It would (1) expand the definition of “mass layoff” under the WARN Act to include an employment loss at more than one of the employer’s worksites and (2) increase the penalty for WARN Act violations from back pay to double back pay for each day of violation.

Common Sense English Act (H.R. 1588). This Act was introduced into the House of Representatives on March 18, 2009. This legislation would amend Title VII to provide that it shall not be an unlawful employment practice for an employer to require employees to speak English while engaged in work.