Implications of potential EFCA or PRO Act-type legislation for U.S. employers

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In 2008, the then elected Democratic President, Barack Obama, put forward a dramatic amendment to the Wagner model of labor relations in the United States titled the *Employee Free Choice Act* (EFCA or the Act). Comment or editorial opinion regarding the title of the Act aside, the proposed legislation was not passed due in large part to the Republicans in the Senate blocking its passage.

Despite the numerous fears and concerns expressed by employers in the U.S. at that time, two major changes proposed in the draft Act caused the most controversy and debate. The first major issue related to the replacement of the vote to determine majority status for union certification by a "card check system". In this system, where a trade union files an application for certification (or petition) with a sufficient number (normally a simple majority) of union cards signed by those employees contained in the proposed and accepted bargaining unit, the trade union will be certified as the exclusive bargaining representative of all the employees (not only the members of the trade union). The bargaining unit without any other process, including a vote, contemplates this. The second major issue relates to the concept of "first contract arbitration", whereby one of the parties to the bargaining process (usually the trade union) may request from the appropriate legal authority the appointment of a first contract arbitrator. If appointed, this arbitrator has the right to fix the unsettled terms and conditions of the collective bargaining agreement unilaterally, without any further right of vote by the affected employees in the bargaining unit. Existing legislation in some Canadian provinces on this point also provides:

- The threshold that the requesting party must demonstrate before the appropriate authority (labor board) will appoint a first contract arbitrator; and
- Guidance as to where the arbitrator may look for comparisons (such as competitors' collective agreements or recent wage trends) that are reasonable and applicable to the arguments presented by the parties to the arbitration process in question.

Both of these Canadian legislative elements were missing from the proposed Act in 2008, which easily allowed those on the management-side to highlight the obvious weaknesses of the proposed Act.

Today, the United States has a Democratic President in the White House and the Democrats control both the Senate and the House. Therefore, the emergence of legislation similar to, or even identical to the EFCA or other more recent 2020 legislative proposals, is realistic. Faced with this political landscape, there is now a real possibility of the introduction of EFCA-type legislation. American employers and those attorneys who practice management-side labor law in the USA should pay particular attention to what follows.

It is not the purpose of this piece to review the Canadian experiences with the card check system (which exists in only some of our jurisdictions) and with first contract arbitration. Rather, it is our purpose to ask American employers to focus on the possible road ahead and offer additional arguments by which they may highlight the inconsistencies of language in the USA-type EFCA and how this language runs contrary to principles that American trade unions have supported for over 60 years.

Both Canada and the U.S. have an almost identical system of unionization and collective bargaining. We remain the only two countries in the world where the principle of exclusive representation by one certified representative, the trade union, remains. Once certified, the trade union has the exclusive right to represent all the employees in the bargaining unit and to negotiate on their behalf. While there are some labor law differences between our countries – such as in relation to the collection of union dues, the right to strike during the currency of a collective bargaining agreement and the mandatory presence of grievance and arbitration procedures in a collective bargaining agreement – this exclusive right of representation remains the cornerstone in our two jurisdictions.

Second, it is important to understand that historically, both American and Canadian trade unions have supported the workings and findings of the International Labour Organization (ILO). This union support includes the acceptance and signing of the ILO Conventions, even if American governments have not formally signed or adopted such conventions. Although these are not binding on companies, they do require the federal governments that sign them to ensure that applicable legislation adheres to the principles contained in these Conventions. For our purposes, the two critical Conventions are Conventions Nos. 87 and 98, respectively entitled Freedom of Association and Protection of the Right to Organise (No. 87) (1948) and Right to Organise and Collective Bargaining (No. 98) (1949). Over the years, these Conventions have been the subject of many decisions that have had a significant impact on how the freedom of association and the right to organize have been interpreted. While Canada signed Convention No. 87 in 1948 and Convention No. 98 in 2018, the U.S. has not signed either one. Still, the decisions rendered by the ILO's Committee of Experts, which interprets and applies the Conventions are useful to know and understand as they may at least have some persuasive effect in demonstrating how any proposed amendment relating to the card check system or first contract arbitration in a proposed EFCA type legislation would be interpreted in the U.S. In addition, both American and Canadian trade unions have historically cited ILO principles and decisions to support their positions in union-management opposing views.

Card check system and first contract arbitration conclusions

The Committee of Experts has rendered a number of interesting decisions regarding the ILO Conventions. However, when summarizing the decisions specifically regarding the card check system and first contract arbitration, two significant conclusions may be drawn.

The first relates to the proper procedure for the selection of the exclusive bargaining representative of the employees – the trade union. In the matter of the Government of Greece[1], the Committee of Experts commented on what the correct procedure for choosing the trade union is, by stating:

> When national legislation provides for a compulsory procedure for recognizing unions as exclusive bargaining agents [representing all workers and not just their members] certain safeguards should be attached, such as: (a) the certification to be made by an independent body; (b) **the representative organization to be chosen by a majority vote of the employees in the unit concerned** ; (c) the right of an organization which in a previous trade union election failed to secure a sufficiently large number of votes, to request a new election after a stipulated period; (**ILO 1994a**, paras 240-241)

These statements have been subsequently reiterated and followed in a number of decisions and policy documents issued by ILO over the last couple of decades, further cementing their authoritative value[2].

This demonstrates that, according to the ILO, a voting system (rather than a card check system), is the correct mechanism for the selection of the exclusive bargaining representative. Consequently, the present procedure under the Wagner Act is preferred rather than the card check model (such as EFCA) that would presumably be endorsed in any proposed legislation in the United States.

The second conclusion drawn from various ILO Committee of Experts decisions relates to the implementation of first contract arbitration. There are several decisions relating to what is included within the concept of free collective bargaining. Authors on this point have summarized what is meant by free collective bargaining in the following manner:

> It is acceptable for conciliation and mediation to be imposed by law in the framework of the process of collective bargaining, provided that reasonable time limits are established. **However, the imposition of compulsory arbitration in cases where the parties do not reach agreement is generally contrary to the principle of voluntary collective bargaining** and is only admissible: [*i.e.*, in cases of essential services, administration of the State, **clear deadlock** and national crisis]. (B. Gernigon, A. Odero and H. Guido, "ILO Principles concerning collective bargaining" (2000), 139 Intern'l Lab. Rev. 33, at pp. 51-52)

Accordingly, although trade unions understandably support first contract arbitration, this concept is contrary to the general principles of this ILO Convention dealing with free collective bargaining and is only acceptable under certain limited circumstances. For example, in a circumstance where protracted and fruitless negotiations have ended in a stalemate (clear deadlock), which makes it impossible to unblock the impasse to allow for the free negotiation of a first collective agreement, first contract arbitration will be invoked[3]. In addition, this concept of "clear deadlock" has been ignored in both the 2008 and 2020 proposed changes in the U.S.

Further, the 2020 proposed legislation does even more by providing that the request for first contract arbitration can be made where the expiry of unrealistic deadlines to achieve a collective agreement have occurred without the settlement of the collective agreement. These are examples of how the 2020 proposed legislation simply ignores the very rules that trade unions have been asking for over the last many years – accepting, signing and adhering to, at least, ILO Conventions 87 and 98.

Certain provincial and/or federal statutes in Canada and limited jurisdictions in the U.S. contain provisions in favor of the card check system and/or first contract arbitration. Nevertheless, one should ask what effect could the ILO Conventions and their decisions have if these concepts are made part of any new American labor legislation? Administrative tribunals and courts in Canada have already dealt with this issue directly, as it pertains to the Canadian labor scene.

These adjudicative bodies, including the Supreme Court of Canada[4], have found that the ILO Conventions and, more generally, international law, are both useful and helpful when used to interpret Canadian labour law. Therefore, it is more than conceivable that employers in the U.S. should be able to cite the ILO Conventions and how they have been interpreted, to claim that both card check and first contract arbitration have been deemed contrary to the basic tenets of these Conventions except in limited circumstances in the case of first contract arbitration. If contested before American courts, and if American courts would even entertain these types of arguments, employers should refer to the Canadian law experience to show that the present American model is consistent with the Conventions and the case law decided thereunder.

The PRO Act

Before leaving these issues, we have taken the liberty to review a more recent attempt in the U.S. to change the provisions regarding votes and initial collective bargaining, entitled the “Protecting the Right to Organize Act of 2019” (the PRO Act).

In this regard, attention is first drawn to Section 2 (d) *UNFAIR LABOR PRACTICES,* subsection (4) (K), which would add paragraph (3) and subparagraphs (A) through (C)to Section 8 of the *National Labor Relations Act* (29 U.S.C. 158). This amendment provides that the Federal Mediation and Conciliation Service (the Service) may refer a dispute to a tripartite arbitration panel established in accordance with the regulations prescribed by the Service.

This referral by the Service to an arbitration board is achieved by the trade unions simply waiting out short delays set out in the PRO Act, such as, a 90-day period to complete direct negotiations to reach a collective bargaining agreement. These arbitrary and unfairly short delays ignore the labor relations reality regarding how long an initial collective bargaining agreement will take to negotiate.

In addition, the PRO Act sets out a series of incomplete factors to be used by the arbitration board in determining the contents of the imposed collective bargaining agreement (Section 3 (C) (9 (i)-(v)) such as, the wages and other benefits other employers in the same business provide their employees. However, this factor ignores any geographic limitation on the use of such comparisons. Most importantly, the PRO Act also ignores that the entire concept of first contract (or initial contract) arbitration is

contrary to the principles established, and the case law decided under the ILO Convention dealing with free collective bargaining except in very limited circumstances. Accordingly, these principles adopted under the PRO Act are contrary not only to the reality of how labor relations work but also to the ILO principles that trade unions, even in the U.S., have vigorously tried to get successive U.S. Governments to adopt.

Secondly, attention is drawn to Section 2 (e) *REPRESENTATIVES AND ELECTIONS* Section 9 of the *National Labor Relations Act* (29 U.S.C. 159) in subsection (c) (A) (1) which deals with the issue of the vote at the time of certification. In the PRO Act, a vote is permitted solely where the Board finds, upon the record of the hearing held, that a question of representation exists. Only where such a question exists will the Board direct an election by secret ballot to certify the results of the vote. This procedure is clearly not a system of an automatic election, which is a marked departure from the existing rules in the U.S. under the present statute, but is also contrary to the proper procedure for the selection of the exclusive bargaining representative of the employees, as set forth by the ILO Convention No. 87.

Whether the PRO Act becomes the basis, or the starting point, for the new Administration, it remains clear that the two changes discussed immediately above and contained in the PRO Act are contrary to the guiding principles of the two ILO Conventions and its case law.

Conclusions

We suggest employers and management-side attorneys must pay careful attention to any proposed legislation that may be introduced in 2021 and beyond. We further suggest that messages in line with the thoughts expressed above should be delivered to your elected representatives. This is crucial in their understanding of both the issues raised by these types of legislative changes as well as how such changes are contrary to the very ILO principles that trade unions in the United States have attempted to persuade the Government in Washington to adopt and sign over the last many years.

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[1] Observation (CEACR) - adopted 2003, published 92nd ILC session (2004) - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) - Greece (Ratification: 1962)

[2] (a) **Report in which the committee requests to be kept informed of development - Report No 357, June 2010 - Case No 2683 (United States of America)** at paragraph 588

(b) ILO, General Survey on the Fundamental Conventions Concerning Rights at Work, 2012

(c) ILO, Collective Bargaining – A Policy Guide, 2015

[3] Observation (CEACR) - adopted 2010, published 100th ILC session (2011) - Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Portugal (Ratification: 1964)

[4] (a) **Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia** 2007 SCC 27 at paragraphs 76 -77

(b) **Reference Re Public Service Employee Relations Act (Alberta)** 1987 1 S.C.R. 313 at paragraphs 68 and 72

(c) **Saskatchewan Federation of Labour v. Saskatchewan** 2015 SCC 4 at paragraph 67

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