Mandatory First Contract Interest Arbitration

By James M. Stone

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The Employee Free Choice Act’s Combination Punch Following Certification

The Employee Free Choice Act ("EFCA") may become law in 2009 in the United States if Barack Obama is elected President and if a few more lawmakers are convinced to support the law. In 2007, EFCA was passed by the House of Representatives only to fail to overcome a filibuster in the Senate. However, the promise of a veto by President George W. Bush made enactment in 2007 only a slim possibility.

Much of the attention on EFCA has been on its card-check provisions. Under EFCA, if a union presents authorization cards signed by the majority of a potential bargaining unit, an employer must recognize the union, without a secret ballot election. Obviously, because employees may sign cards before hearing any arguments against unionization, as well as without receiving assurances against coercion, this approach will make it easier for unions to organize employees. However, such an approach does not gainsay the possibility that, if given the chance to do so in a secret ballot election, those employees would vote against a union.

Interest Arbitration Proposed as Part of EFCA

In addition to the card-check provisions, employers should be aware of another part of EFCA that may prove equally challenging. EFCA allows a company and a union only 90 days to negotiate a first-time collective bargaining agreement. If they are unsuccessful after 90 days, either party can demand mediation. If after 30 days mediation proves unsuccessful, a contract will be imposed on the company and the union by a third-party arbitrator in a process called “interest arbitration.”

Even when both the union and the company negotiate quickly and in good faith, obtaining a first-time contract in 90 days, or even 120, can be very difficult. In a first-time contract, the parties must agree on dozens of provisions. Anywhere between 20 and 100 pages of contractual language may be involved. Nearly all terms and conditions of employment are mandatory topics of bargaining. It takes both parties (especially unions) several weeks even to put together a negotiating committee and formulate initial demands. The union may need information from the company. Thus, very few first-time contracts are negotiated in 120 days.

EFCA calls for the parties, upon demand, to submit their proposals to an arbitrator provided by the Federal Mediation and Conciliation Service ("FMCS"). The arbitrator, not the parties, will decide what will be in the first-time contract, including all economic terms, regarding issues upon which the union and company have not agreed.

Interest arbitration is not widely used in the private sector, although it is often used by some governmental bodies. Occasionally, private companies have agreed voluntarily to interest arbitrations of first-time contracts in neutrality agreements with unions or where a new facility is an outgrowth of an existing unionized facility.

Interest arbitration of first contracts is required in various countries or parts of countries around the world. For instance, Wal-Mart recently had a small unit of employees organized at one of its stores in Quebec, Canada. When the parties were unable to agree to a first-time contract, one was imposed by an arbitrator. In many instances, the arbitrator in the Wal-Mart case sided with the union, favoring its positions over those of the company's. A system similar to interest arbitration existed in Ontario, Canada, in the private sector until the mid-1990's.

Some have criticized the proposed interest arbitration requirement as an improper, perhaps even unconstitutional, intrusion into private business affairs. Others have suggested that employers might resort to various aggressive tactics, such as lockouts, to force a settlement on the union to avoid...
interest arbitration.

However, if the EFCA bill is passed, many employers almost certainly will find interest arbitration unavoidable.

Types of Interest Arbitration

There are essentially two approaches to interest arbitration. The first is a system where both parties submit their best and final offers along with the previously agreed upon language to each other and to the arbitrator. The arbitrator then selects one of the proposals; the arbitration may not create a compromise from the two. This is known as “baseball style” or “winner takes all” arbitration. Many believe this system works as it forces both parties to resolve as many issues as possible before going to the arbitrator in order to reduce the risk of an unfavorable result. The “winner takes all” system also forces the parties to be reasonable in their final offers to improve the chance the arbitrator would pick their proposal. Detractors of this system believe it forecloses the possibility that the arbitrator may craft a compromise that is better than either of the final proposals.

The second type of interest arbitration allows the arbitrator to pick among various proposals on all matters not resolved, even crafting his own compromises. This is referred to “split the baby” arbitration. Proponents of this approach say it encourages creativity by the arbitrator and more compromise. Detractors contend that compromise is discouraged between the parties. If the arbitrator is going to “split the baby” anyway, each party is encouraged to leave issues open for the arbitrator in the hope that the arbitrator chooses a middle position closer to where the party actually wants to be. In other words, this form of arbitration may actually encourage the parties to take aggressive positions.

; In an interest arbitration, both parties typically present evidence supporting their positions. Such evidence takes the form of expert witnesses’ testimony, company and union representatives’ testimony, information documenting bargaining trends and industrial standards, and examples of other first-time contracts. Particularly persuasive are examples of the employer’s other labor agreements, other contracts for similar businesses in the same region and agreements for other companies with employees represented by the same union. Arbitrations may be complex affairs, going on for days and followed by detailed legal briefs.

A High Stakes Affair

Interest arbitration is a high stakes affair and tends to be time-consuming. Jackson Lewis attorney James M. Stone has represented management in many interest arbitrations. On their significance, he says: “The decision of the arbitrator may result in millions of dollars in costs or savings to a company. The decision also will set the basis for terms and conditions of employment and relations between the Company and the Union for years to come. With so much at stake, most companies will go all out to increase their chances to prevail as much as possible.”

Because of their complexity, interest arbitrations often are conducted by attorneys for both unions and companies. “Unions have a great incentive to win at interest arbitration as well,” said Stone. “Winning demonstrates the supposed value that the Union has brought to employees.”

Winning at Interest Arbitration

“Winning”— obtaining a favorable result in interest arbitration — means the company has convinced the arbitrator that the company’s position is more reasonable than the union’s.

A winning strategy should involve the successful use of “comparators.” Other contracts companies of similar size in the same region and industry have negotiated are good comparators. Also important is convincing the arbitrator to use first-time contracts as comparators. Mature or long-standing contracts are poor comparators as they likely involve large, established companies that can afford to give unions more than a small, young company. Establishing the right comparators is critical for an employer in interest arbitration.

A winning strategy also should involve showing that the company’s proposal benefits both the company and the employees. While some arbitrators will look more favorably at a proposal that would ensure the company’s competitiveness, proposals that benefit both the company and the employees tend to win more often.

Arbitrators, on their part, wish to appear reasonable and neutral. Accordingly, they tend to favor proposals that are more mainstream than creative but unusual.

Should arbitrators consider a company’s ability to pay when imposing a first-time contract? This is a subject of debate among arbitrators. Some view ability to pay as an important factor in their decisions. Others lean toward a form of “industrial justice,” view it as the “company’s problem.” They want employees in the same region and industry to be treated “fairly” even if the company may be
weakened as a result. These arbitrators should be avoided, especially by smaller companies.

Company bargaining representatives at the negotiating table must keep in mind that should the parties fail to reach an agreement, interest arbitration is imminent under EFCA. Without a doubt, a party’s position in arbitration that appears contrary to that it took at the negotiating table would be pointed out to the arbitrator to impeach that party’s credibility. Thus, bargaining history is an important concern. The representatives must ensure they take positions at the table that are defensible at arbitration.

Companies can simply present their positions to a neutral arbitrator, but the more effective strategy is to present detailed, persuasive evidence in support of their positions.

A Costly Proposition

If EFCA does become law, companies will need to be even more vigilant in keeping their workplaces union-free. The threat of union recognition based on card-signings alone will put many companies in a state of almost constant union avoidance.

Despite such vigilance, however, some companies will be organized under EFCA. Collective bargaining will follow almost immediately. Except for those companies lucky enough to have both a reasonable union bargaining committee and an ability to negotiate quickly, interest arbitration may loom. Instead of controlling their own destiny, companies may be forced to accept terms dictated by an arbitrator in interest arbitration.

Interest arbitrations may be won, but they also may present employers with a high stakes gamble. Prevailing in interest arbitration will take planning, time, energy and money. Yet winning in interest arbitration may be the goal that most companies must achieve to remain competitive if EFCA passes. Employers that prepare carefully stand the best chance of coming out ahead in arbitrating first contracts.