Hidden Ramifications of the Employee Free Choice Act

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To those who proclaim the Employee Free Choice Act dead, I'm here to tell you that it is anything but that.

Several weeks ago, in a swirl of hyperbole, Sen. Arlen Specter, a Pennsylvania Republican at the time (he has since switched to the Democratic Party), pronounced that he alone would drive a stake into the heart of the bill. He proceeded to say the right words about the act itself, but he actually said much more--I'll explain that in a moment.

Specter announced that he would not vote with the pro-union forces to end debate on the measure, which signaled that there would not be enough votes in the Senate to overcome a filibuster by the Republicans. But that was far from the end of the game.

At that point, Specter was merely stating the obvious about the bill's future. Sens. Mark Pryor and Blanche Lincoln, Democrats from Arkansas, had already announced that they would not support the bill. Other Democrats, blue dog and not, were wavering. It was clear to all who monitor such things that the votes in the Senate would not support the unions' prime legislative initiative, whose very name is a masterstroke of misdirection.

President Barack Obama's talk of the Employee Free Choice Act continues to energize labor unions and terrify businesses across the country. Unfortunately, many Americans don't understand the fundamental principles that this legislation embodies. Political action groups and labor unions have executed a brilliant publicity campaign that has misled the general population about the legislation. Here is a recap:

The Employee Free Choice Act is actually very simple. Its three main tenets are: 1) abolition of a secret-ballot election; 2) compulsory binding arbitration for first contracts after 120 days of bargaining; and 3) punitive fines for violations of the National Labor Relations Act by employers. These elements strip not only a business of its rights, but the workers of theirs as well. The tried-

and-true characteristics of labor and employment law would be completely turned on their head, in other words.

Labor has complained for years that the system is broken. But is it? In 2008, unions won 66.8 percent of representation elections by the National Labor Relations Board, according to a recent report by the Bureau of National Affairs. Unions gain first contracts 34 percent of the time, according to a congressional report prepared in support of the Employee Free Choice Act. Unions argue that this ratio is far too low.

I happen to have considerable experience in the negotiation of labor contracts, specifically first contracts. And here is the explanation for the 1-to-3 ratio: Most first contracts fail because unions come to the bargaining table with demands that are excessive and that refuse to allow the business the flexibility it needs to satisfy its customers.

Responsible businesses, knowing that these demands are anti-competitive and will diminish--if not eliminate--their ability to make a profit, refuse to concede to them. Those that capitulate find that their business suffers when the economic cycle turns against them, or some profound business event occurs, such as an increase in competition that they cannot meet because they have lost their flexibility. In the worst cases, the business itself vanishes. If this sounds familiar, it should. The woes of the auto industry are the best examples of this scenario.

Now it seems that the Employee Free Choice Act as it originally looked will no longer rear its ugly head above the Capitol dome. But another threat arises.

Sen. Specter's remarks made it clear that the unions do not need--and never needed--the Employee Free Choice Act. All they need is change in election procedures at the National Labor Relations Board. This would accomplish their long-sought objective of making it easier for them to win elections. Specter's comments reinforce my view that this is certain to happen.

In the remarks following the death sentence for the bill, Specter outlined a 12-point manifesto of change for existing labor procedures. This list will all but insure a significant increase in wins for labor in union elections. In fact, his reform manifesto goes even further than the Employee Free Choice Act on several fronts.

It does preserve the secret ballot, but on such a tight time frame that business will not have a chance to get its message to the employees who at that point have already signed cards and have not had a full vetting of the facts surrounding the union experience.

This is particularly true when the employer would be mandated, under Specter's proposal, to provide equal access to unions on its private property. This measure alone is a significant affront to private property rights. It accomplishes a prime object of the labor movement: to overturn a decision by the U.S. Supreme Court in Lechmere, Inc. v. National Labor Relations Board, 502 U.S. 527 1992. In that case, Justice Clarence Thomas, speaking for the majority, strongly put forth the principle that private property rights trump those of union organizers who seek to gain access to employees in their workplace.

Specter's manifesto does differentiate itself from the Employee Free Choice Act in this respect. But in several of its other points, Specter's plan would overturn 60 years of labor precedent. It's also unclear how certain aspects of Specter's manifesto will be interpreted.

The plan is not clear, for example, about what would happen under a first-contract situation. The manifesto does call for mediation after 120 days, as opposed to the Employee Free Choice Act's requirement for mandatory binding arbitration. But mediation by the Federal Mediation and Conciliation Service has always been available to employers. Also, Specter's plan mirrors the Employee Free Choice Act in saying that any employer deemed to have stepped outside the labyrinth of rules about what employers can say and do during union campaigns will be subject to civil fines of $20,000 per occurrence. Such employers also face a trebling of damages if they're found to have terminated an employee in part or in whole because of union activity. These are terrifying prospects.

So to the business community: Do not breathe a sigh of relief. There is nothing to celebrate. The labor-reform train left the station a long time ago, well before the current president was in the White House. You only need to look at the Employee Free Choice Act campaign on the Hill--along with the easy passage there of other pro-labor, anti-business legislative initiatives-- to realize that this train has already arrived. It threatens to remain a permanent fixture in Washington.

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