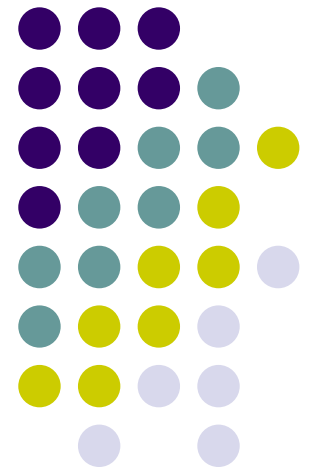


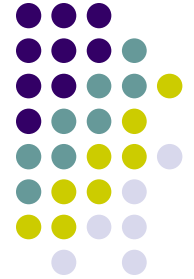
# ADVOCACY 2009

## Albany Area Chamber of Commerce

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C. Jason Willcox  
G. Robert Ryan, Jr.  
Moore, Clarke, DuVall & Rodgers, P.C.  
Albany, Georgia  
June 17, 2009



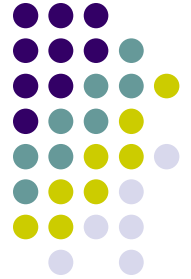


# Agenda

- Employee Free Choice Act
- Healthy Families Act
- Overview of Recent Acts, pending legislation, and things to come

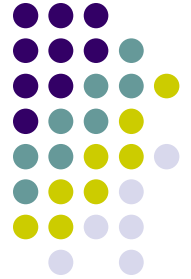


# Employee Free Choice Act (EFCA)



- What is EFCA and why should I care?
- Isn't free choice a good thing?
- Myth v. Reality

# Employee Free Choice Act (EFCA)



- EFCA has been introduced in 2003, 2005 and 2007.
- In 2007, EFCA passed the House but failed in the U.S. Senate
- Re-introduced March 10, 2009
- H.R. 1409 introduced by Rep. George Miller (D-CA)
- S. 560 introduced by Sen. Ted Kennedy (D-MA)

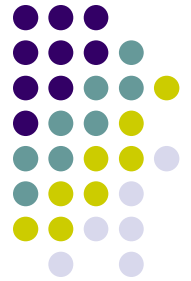
# Employee Free Choice Act



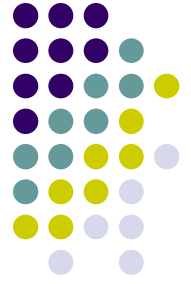
- What does it do?
- Three primary provisions: ‘card check’; binding arbitration; and increased penalties



# Employee Free Choice Act



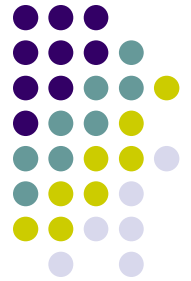
- “Card Check”
- Current law allows for secret ballot elections to ensure privacy of an employee’s decision regarding unionization
- Currently: Once a union receives 30% of signed authorization cards, employer can request a secret ballot election
- If the union receives majority of votes through secret ballot election, it is certified



# Employee Free Choice Act

- Card Check proposal amends the National Labor Relations Act:
- “If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations . . .  
.  
the Board shall not direct an election but shall certify the individual or labor organization as the representative....

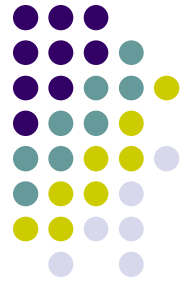
# Employee Free Choice Act



- Once union organizers convince a majority (50% plus 1) to sign authorizations, all workers would be prohibited from having a secret ballot election
- Employers and employees opposed to organization would not have the opportunity to request a secret ballot election, and might not even know that an organizing campaign is underway until too late

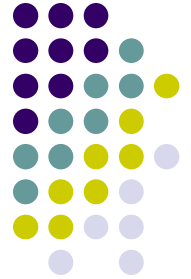


# Employee Free Choice Act



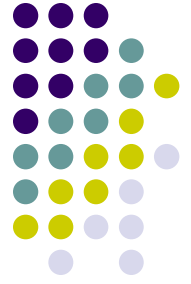
- Mediation provisions
  - Requires bargaining to begin within 10 days of certification
  - After 90 days, federal mediation may be requested by either party
  - The dispute would be referred to the Federal Mediation and Conciliation Service (FMCS)

# Employee Free Choice Act



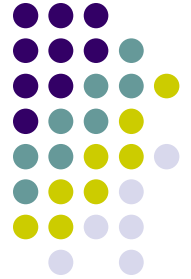
- Arbitration Provisions
  - Should the parties not agree on a resolution through FMCS, after an additional 30 days (120 days total) the federal mediator shall refer the dispute for binding arbitration

# Employee Free Choice Act



- Arbitration
  - Once the dispute is referred to arbitration, the arbitration panel shall render a decision which shall be binding upon the parties for 2 years.
- This provision essentially provides the federal arbitrator authority to decide: wages, schedules, promotions, and terms and conditions of employment!

# Employee Free Choice Act



- Penalty provisions
  - Enhanced penalties,
    - only against employers,
    - no new penalties for union organizers

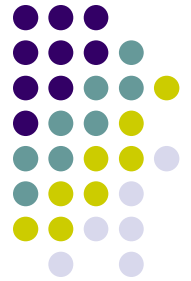


# Employee Free Choice Act



- For unlawful discrimination against an employee, provides for back pay plus liquidated damages of two times that amount
- Civil penalty of \$20,000 for each violation that constitutes an unfair labor practice

# Alternatives to the Employee Free Choice Act



- Alternative Legislation:
- H.R. 1176 and S. 478 (Republican sponsored)
- Would protect right to secret ballot

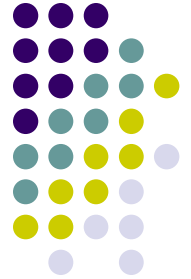


# Alternatives to the Employee Free Choice Act



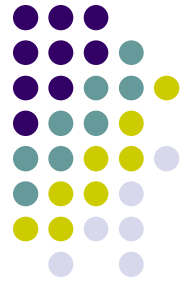
- H.R. 1355 National Labor Relations Modernization Act (Democrat sponsored)
  - Maintains binding arbitration rules but allows for greater time to reach voluntary agreement;
  - provides for same penalties as EFCA;
  - only applies to employers with 20 or more employees;
  - does not include EFCA's 'card check' provisions;
  - mandates equal access for employees for labor organizations before elections

# Healthy Families Act



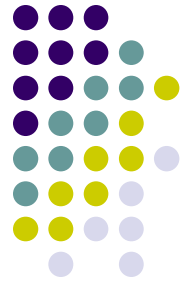


# Healthy Families Act of 2009



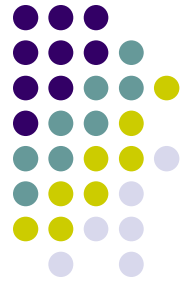
- Legislative History
  - Originally introduced in 108<sup>th</sup> Congress (2004) with 66 co-sponsors (died in committee)
  - Has been reintroduced in House and Senate in each Congress since 2004
  - Introduced in 110<sup>th</sup> Congress (2007) as S.910. Then-Senator Obama was a cosponsor

# Healthy Families Act of 2009



- Introduced in 111<sup>th</sup> Congress on May 18, 2009 as HR 2460
- Sponsor is Rep. Rosa DeLauro, D-CT
- 105 Co-sponsors (as of June 16, 2009)
- Rep. Bishop is not currently a co-sponsor
- Expected to be introduced in the Senate by Sen. Edward Kennedy, D-MA

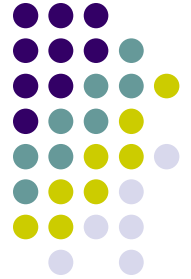
# Healthy Families Act of 2009



- HR 2460 is currently in the House Education and Labor Committee



# Healthy Families Act of 2009



- Legislative Purpose
  - To allow Americans to earn paid sick time so that they can address their own health needs and the health needs of their families.

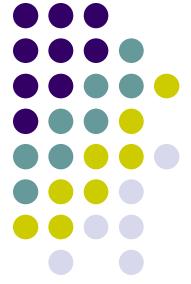


# Healthy Families Act of 2009



- What does it do?
  - Applies to employers with 15 or more employees
  - Requires employers to provide up to (7) paid sick days per year

# Healthy Families Act of 2009



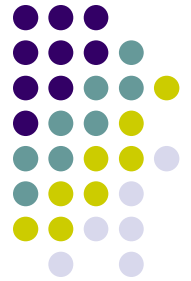
- Sec. 5: An employer shall permit each employee employed by the employer to earn not less than 1 hour of paid sick time for every 30 hours worked, to be used as described in subsection (b).
- An employer shall not be required to permit an employee to earn more than 56 hours of paid sick time in a calendar year (7 days)

# Healthy Families Act of 2009



- **Sec. 5(b): Uses**
  - Paid sick time under this section may be used only by an employee for any of the following:
    - (1) An absence resulting from a physical or mental illness, injury, or medical condition of the employee
    - (2) An absence resulting from obtaining professional medical diagnosis or care, or preventive medicine, for the employee

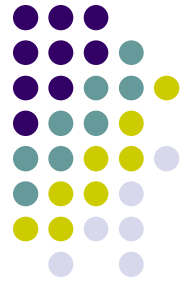
# Healthy Families of Act of 2009



- Sec. 5(b): Uses (cont)
  - (3) An absence for the purpose of caring for a child, parent, a spouse, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship who:
    - (A) has any of the conditions or needs for diagnosis or care described in paragraph (1) or (2) and
    - (B) in the case of someone who is not a child, is otherwise in need of care

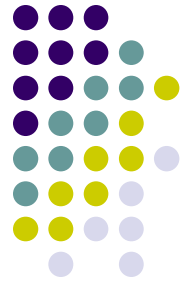


# Healthy Families Act of 2009



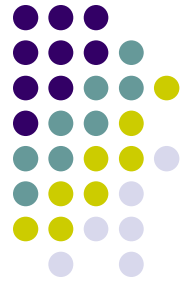
- Sec. 5(b): Uses (cont)
  - (4) An absence resulting from domestic violence, sexual assault, or stalking, if the time is to:
    - (A) seek medical attention for the employee or the employee's child, parent, or spouse, or an individual related to the employee described in paragraph (3), to recover from physical or psychological injury or disability caused by domestic violence, sexual assault, or stalking
    - (B) obtain or assist a related person described in paragraph (3) in obtaining services from a victim services organization

# Healthy Families Act of 2009



- Sec. 5(b): Uses (cont)
  - (4)(C): obtain or assist a related person described in paragraph (3) in obtaining psychological or other counseling
  - (4)(D): seek relocation
  - (4)(E): take legal action, including preparing for or participating in any civil or criminal legal proceeding related to or resulting from domestic violence, sexual assault or stalking

# Healthy Families Act of 2009



- Sec. 5(d): Procedures
  - Oral or written request
    - Including expected duration
    - 7 days notice if leave is foreseeable
    - Otherwise, as soon as practicable

# Healthy Families Act of 2009



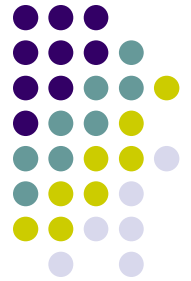
- Sec. 5(d): Procedures
  - Certification
    - Employer may require medical certification if the period of leave covers more than 3 consecutive workdays
    - Employee has 30 days to provide certification (from the first day of leave). Employer is not allowed to delay commencement of leave on the basis that employer has not received medical certification

# Healthy Families Act of 2009



- HIPAA and medical privacy issues
  - Sec. 5(d)(2)(D)(ii):
    - If an employer possesses health information about an employee or an employee's child, parent, spouse, or other individual . . . Such information shall:
      - Be maintained in a separate form and in a separate file from other personnel information
      - Be treated as confidential medical information
      - Not be disclosed except to the affected employee or with the permission of the affected employee
      - YOU WILL BE REQUIRED TO KEEP YET ANOTHER SEPARATE FILE FROM ANY OTHER FILES ON

# Healthy Families Act of 2009



- Sec. 6: Posting
  - Each employer shall post and keep posted a notice, to be prepared or approved in accordance with the regulations to be issued under Sec. 13
  - Shall be posted in conspicuous places on the premises of the employer or in employee handbooks
  - Any employer who willfully violates the posting requirement shall be subject to civil fine not to exceed \$100 for each separate offense

# Healthy Families Act of 2009



- Sec. 7: Prohibited Acts
  - Employers shall not:
    - Interfere with, restrain or deny the exercise of, or the attempt to exercise, any right provided under this Act, including:
      - Discharging or discriminating against (including retaliation) any individual, including a job applicant, for exercising or attempting to exercise rights
      - Using the taking of paid sick time under Act as a negative factor in hiring, promotion, or discipline
      - Counting the paid sick time under a no-fault attendance policy or any other absence control policy

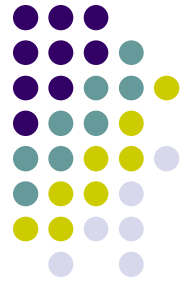


# Healthy Families Act of 2009

- Sec. 7: Prohibited Acts
  - Employer shall not discharge or in any other manner discriminate against any individual, including a job applicant, for opposing any practice made unlawful by this Act
  - It shall be unlawful to discharge or in any other manner discriminate against any individual, including a job applicant, because such person has:
    - Filed an action under or related to the Act; has given or is about to give any information in connection with any inquiry under the Act; or has testified or is about to testify in any inquiry or proceeding relating to any right

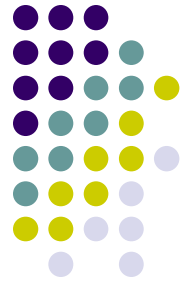


# Healthy Families Act of 2009



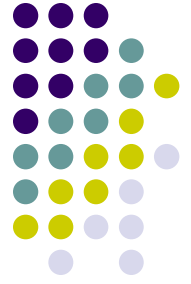
- Sec. 8: Enforcement
  - Secretary of Labor has enforcement powers, including investigative and subpoena powers
  - Right of Action
    - Provides private right of action to employees or other individuals
    - Any employer who violates Section 7 shall be liable to any employee or individual affected for:
      - Wages, salary, benefits or other compensation denied or lost by reason of the violation

# Healthy Families Act of 2009



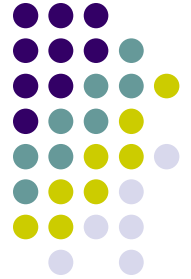
- Sec. 8: Enforcement (cont)
  - (Liability of employer)
    - In a case where wages, salary, benefits or other compensation have not been lost, any actual monetary losses up to a sum equal to 56 hours of wages or salary for the employee or individual
    - Interest
    - An additional amount as liquidated damages
    - Equitable relief, including employment, reinstatement and promotion

# Healthy Families Act of 2009



- Sec. 8: Enforcement
  - (Liability of employer)
    - Section 8(a)(3)(C): The court shall . . . in addition to any judgment awarded to the plaintiff . . . allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant

# Healthy Families Act of 2009



- Sec. 8: Enforcement
  - Statute of limitation: 2 years from the last event constituting the alleged violation (Ledbetter anyone??)
  - In the case of a willful violation, 3 years

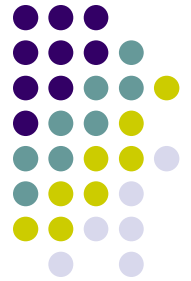
# Healthy Families Acts of 2009



- Sec. 8: Enforcement
  - (8)(e): A State's receipt or use of Federal financial assistance for any program or activity of a State shall constitute a waiver of sovereign immunity . . . to a suit brought by an employee of that program or activity under this Act



# Healthy Families Act of 2009



- Sec. 11: Effect on existing employment benefits
  - Nothing the Act shall be construed to diminish the obligation of any employer to comply with any contract, collective bargaining agreement, or employee benefit program which provides greater paid sick leave than the rights established under the Act
  - The rights established under the Act shall not be diminished by any contract, collective bargaining agreement, or employee benefit program



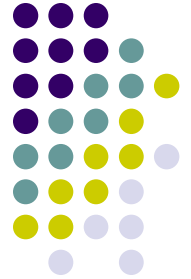
# Healthy Families Act of 2009



- Sec. 4: Definitions

- Child: biological, foster, adopted, stepchild, legal ward, or child of a person standing *in loco parentis*; under 18 or 18 and over with a mental or physical disability
- Employee: An employee as defined in section 3(e) of the FLSA (29 USC 203(e): “Employee means any individual employed by an employer” (with certain exceptions).
- Covered Employer: Any person engaged in commerce or in any industry or activity affecting commerce who employs 15 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year
- Spouse: has the meaning given such term by the marriage laws of the State in which the employee resides

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