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Labor and Employment Legal Update

The Employee Free Choice Act: What You Need to Know Today

The Employee Free Choice Act (EFCA) is a proposed amendment to the federal labor law that governs most private sector employer-union relations. ***The legislation, introduced in both houses of Congress last week*** , will likely cause major debate in the Senate. Republicans and moderate Democrats are being asked to block this bill by business groups and private sector employers. The bill could go into effect within the next 60 days. Although there is a possibility that opponents will successfully filibuster the bill, more than a majority of members in both Houses of Congress and President Obama support this bill. There is talk of possible compromise legislation that may emerge in the coming weeks to avert a stalemate. EFCA represents the most radical change in the National Labor Relations Act (NLRA) since its inception in 1935. Opponents have properly characterized the bill as anticompetitive and have noted that it effectively strips employees of their current right to select a union representative in a fair, secret ballot election.

1. Who Should Care?

Any private sector employer with employees. Currently, only about 7.5 percent of the private workforce is unionized. The impact of EFCA on employers is as follows:

- For any employer that currently operates, in whole or in part, without a union, the nonunion portion of its workforce is susceptible to speedy unionization under EFCA. Unionization generally increases an employer's cost of doing business by about 17 percent. Those industries that traditionally have been difficult to organize (financial services, education, retail) may be particularly susceptible.

- For those employers that operate on a unionized basis, with the rapid increase in unionization and the attendant increase in union dues, the strength of unions will increase and their economic power in negotiations will therefore increase.

2. Why Care About Legislation That Has Not Yet Been Signed into Law?

In 2007, EFCA passed the House and was narrowly defeated in the Senate. Barack Obama is committed to signing the legislation into law and promised his supporters in organized labor that he would work to obtain this legislation. Approval of the bill may come quickly, but there are still things you can do to protect your company.

3. How Do Unions Organize under the Current Law?

The union collects employees' signatures on "authorization cards" that indicate who wishes or desires to be represented by the union. This is often done without the employer's knowledge. A union may present cards signed by a majority of the employees that the union wishes to represent to the employer and request recognition. If the employer refuses, a union generally takes these cards to the National Labor Relations Board (NLRB) and requests an election. To request an election, the union must present signed cards from at least 30 percent of the employees it is seeking to represent. The election, run by the federal government agency, is a secret ballot election. The union must receive votes from a majority of the ballots cast in the election to become the employees' exclusive collective bargaining representative. During the weeks prior to a secret ballot election, an employer can communicate facts about unions to

employees and provide them with information necessary to make an informed and free choice about the union.

If a union wins an election, the NLRB certifies the union as the employees' exclusive representative. The employer must bargain with the union in good faith, but neither party is forced to agree to anything. Both sides use economic weapons (such as strikes and lockouts) to leverage their positions.

If an employer or union violates the law, generally the remedy is to "make whole." No additional financial penalties are assessed.

4. What Changes Would EFCA Make to the Process?

EFCA would make these changes:

- Replace secret ballot elections with card check. An employer would no longer have the ability to refute untruths, incomplete or misleading information, or promises made by the union or others as it does under the current law. The employees would only have the information provided to them by the union.

- Require mediation and arbitration of disputed issues in negotiations for a first contract if the parties do not reach agreement in 90 days. This means that an arbitrator decides what economic and noneconomic terms would apply to your company if you did not reach an agreement with the union.

- Increase penalties against employers for certain violations.

5. Why Does Card Check Make It Easier to Unionize?

EFCA would require the NLRB to certify a union as the exclusive collective bargaining agent of employees upon presentation by the union of signed authorization cards from a majority of the employees sought to be represented. There would be no secret ballot election and no time period leading up to an election when both the employer and union could provide information to employees about unionization.

Often, solicitation of cards occurs without the employer's knowledge. Generally, unions are not held accountable for misrepresentations made to secure signatures on the cards.

6. What Is So Bad About a Card Check System?

The following negatives result from a card check system:

- All employees are not afforded a voice in the process - only those who sign cards. It is possible that, in a group of 100 employees, 51 could decide whether the entire group is represented by a union, even if the other 49 are totally unaware of the organizing effort.

- Employees who sign cards may be making their decisions based on misinformation or misrepresentation of union organizers. Employees only get the union's sales pitch.

- Once a union gets in, it is very difficult to get a union out. Generally, the decertification initiative must come from employees without management involvement and must go through the secret ballot process described above. Employees are limited as to when decertification may be pursued.

- Under EFCA's Mediation and Arbitration System, even if employees wanted to decertify a union, they have to wait at least two years.

7. How Would Mediation and Arbitration Work under the EFCA?

Under EFCA, once the union became certified, if the parties fail to reach an agreement within 90 days, either party can request that the dispute be mediated by the Federal Mediation and Conciliation Service (FMCS). If the parties have not mediated an agreement within 30 days of the request for mediation, the parties proceed to interest arbitration. An arbitrator imposes a binding two-year contract on the employer.

8. What Is So Bad about Having a Mediation and Arbitration System for Resolving First Contracts?

A Mediation and Arbitration System for resolving first contracts results in the following:

- The employer has to entrust an arbitrator, who has no affiliation with or interest in business, to decide economic and noneconomic issues between it and its represented employees, including wages, differentials, hours of work, pensions, health insurance, fringe benefits (vacation, paid leaves) and work rules, and to lock the employer into these terms for a two-year period.

- The time frames are untenable - it generally takes parties more than 120 days to reach a first agreement under the current law because of all the terms and conditions of

employment requiring negotiations.

- Binding arbitration may cause parties to decline to resolve their bargaining differences and remain far apart in their bargaining positions, with the hope that their position prevails in arbitration.

- It may be unconstitutional.

9. What Additional Penalties Would EFCA Impose?

The act significantly increases the financial impact on employers of certain unfair labor practices. The EFCA would require the employer to provide treble back pay and would add a civil penalty of up to $20,000 for most unfair labor practices committed by employers during organizing drives or first contract bargaining. The act imposes no additional penalties on unions that commit unfair labor practices.

Additionally, the act provides that the NLRB ***must*** seek an injunction against an employer upon a showing of reasonable cause that the employer discharged or otherwise discriminated, threatened discharge, or otherwise threatened to discriminate or significantly interfered with employee § 7 rights during an organizing campaign or first contract bargaining. Courts may also grant temporary restraining orders or other injunctive relief.

10. Why Do Companies Need to Address These Issues Now?

Here are the reasons for companies to address these issues right away:

- For nonunion employers, changes made ***after*** a union has begun organizing may violate the NLRA. Nonunion employers can conduct a vulnerability assessment before the start of the organizing activity.

- Currently a nonunion employer might wait to "hear" the signs of a union organizing campaign and still successfully defeat the effort. If EFCA becomes law, by the time an employer hears a campaign, it will likely be too late.

- Without proper training, it is very easy for the employer's managers and supervisors to say or do something that violates the law.

- Employers may wish to become knowledgeable about these issues to make their views on legislation heard by their legislators.

EFCA would significantly raise the stakes for employers. Employers should therefore start to prepare now so that they will be ready should EFCA become law:

- Educate top management regarding EFCA and other potential adverse legislation.

- Consider developing new employee orientation programs that include a union avoidance component.

- Educate employees about card signing and union representation throughout the employment relationship.

- Train supervisors on EFCA and its ramifications, as well as on how to establish good employee relations and effective communication.

- Train supervisors on what they may not say or do regarding employee unionization efforts.

- Analyze the bases for supervisory status and make strategic adjustments to make certain those employees the employer wishes to have classified as supervisors qualify under other proposed legislation.

- Conduct a union vulnerability assessment and make workplace modifications as necessary.

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