

LABOR & EMPLOYMENT PRACTICE GROUP

UNION ORGANIZATION ALERT

2009

Employers be aware and prepare. Organized labor is seeking to increase union membership and “fast track” labor contracts by pushing for passage of the so-called Employee Free Choice Act.

While it appears that the secret ballot election will be retained – be prepared for fast elections and mandatory arbitration, where a government representative will establish initial wages and benefits for a 2 year period in the event the parties cannot agree on a contract within 120 days. Please make sure that your voice is being heard by members of the House and Senate.

The AFL-CIO and affiliated unions are involved in the biggest organized labor campaign ever to obtain passage of the Employee Free Choice Act (EFCA) in Congress this fall. The EFCA would amend the National Labor Relations Act (NLRA) effecting the most dramatic changes to national labor laws in 75 years, virtually all of which favor labor unions and shackle businesses. The EFCA, has three main provisions:

1. It authorizes a “card check” procedure whereby a union can be certified without a secret ballot election if 51% of the unit workers sign authorization cards supporting the union. It now appears that a compromise bill might retain the secret ballot election but, as a concession to labor, require very quick elections and mandatory arbitration.

2. It puts further restraints on businesses with triple back pay to employees who are discriminated against or terminated while involved in union organizing activities or during the time period leading up to a first union contract. It also imposes penalties (up to \$20,000 per incident) on employers, *but not on unions*, that engage in what are determined to be willful or repeated

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unfair labor practices – matters as seemingly innocent as increasing benefits for workers; and

3. **MOST SIGNIFICANTLY**

It takes away the company's and union's rights to agree, or not agree, on the provisions of

a collective bargaining agreement if the first labor contract is not reached within 120 days after bargaining begins. Instead, an arbitrator will establish such matters as wages and benefits for the first contract which will then be in effect for 2 years. A company will no longer be able to say “No” to the demands of a union.

Question: What are the dangers of a “card check” procedure?

Answer: The card check procedure takes away the right of an employer to require that workers vote in a secret ballot election to determine whether they want to be unionized. Under the present bill the union can be certified without an election if only one employee more than half the workforce signs a union authorization card. Employees can be pressured into signing cards in front of co-workers and union organizers rather than voting in a secret ballot election. An employer may well have no idea that a union is trying to organize its workforce until after the union obtains authorization cards from 51% of the workers, and thus would not have an opportunity to present its views on unionization before its business is unionized.

- ▶ *Does the EFCA and the card check provision apply to small businesses?*

Yes. Any business in commerce with two or more workers can be unionized.

- ▶ *How long is a signature on an authorization card valid?*

A signed authorization card is valid for one year. Thus a union has a long time to collect cards that count as “yes” votes for the union.

- ▶ *Has a compromise to remove the card check provision from the bill been reached between labor and Congress?*

Not yet. Recognizing that there has been opposition to the elimination of the secret ballot election, some efforts have been made to reach a compromise position. Senator Arlen Specter has proposed a compromise that deletes the card check recognition in exchange for very quick elections in order to obtain union certification. However, the AFL-CIO has not signed off on this compromise, and union representatives have denied that card check has been dropped.

- ▶ *If the card check provision is dropped from the EFCA, will there still be a reason for businesses to be concerned about this new labor law on union organization?*

Definitely! The supposed “exchange” for dropping the card check procedure will be



to include in the law a provision granting unions the right to force fast elections within 5-10 days after 30% of the workers sign union authorization cards. Currently, union campaigns often run 2 months. This fast track time frame gives a company very little opportunity to get its message to its workers about the downsides of unionization and the company's opposition to having an outside party interfere with its relationships with its employees.

One other possible condition to be included within a compromise bill would be a requirement that employers give union organizers access to workers at the company's place of business – a further intrusion on the rights of management. Another considered compromise provision would bar employers from holding work-time meetings to present management's views on unionization. Card check is not dead yet, but even if there is a compromise by exchanging it for these other provisions, the alternative of forced rushed elections or union access on employer premises during working hours still stacks the deck against employers, takes away a level playing field and disrupts business operations. **Even more importantly, no change to the most dangerous provision of the EFCA – mandatory arbitration for a first binding labor contract – has been proposed.**

Question: *How quickly will bargaining begin and how much time is allowed to bargain over the terms and conditions in the first labor contract?*

Answer: Once a union is newly certified, it may immediately request that bargaining begin. Under the present version of the EFCA the company and the union are required to meet and begin bargaining within 10 days after receiving a written request. If the parties fail to reach an agreement after 90 days, either party may request that the dispute be mediated by the

Federal Mediation and Conciliation Service (FMCS). If the FMCS is not able to bring the union and the company to agreement by mediation within 30 days, then the FMCS must refer the dispute to compulsory arbitration.

Question: *What authority does the arbitration panel have?*

Answer: The arbitration panel decides on the provisions of the first labor contract – wages, payment of healthcare premiums, contributions to pension plans, vacation, sick days, holidays, payment for uniforms or shoes, subcontracting rights, management rights, union security (whether all unit employees must join the union or be fired), discharge rights, seniority rules, job classifications – everything!

There has been some discussion that a compromise bill might change the arbitrator's role to deciding which one of the union's or company's "last best offer" will become adopted for the first labor contract. However, this possibility as a modification is only a matter of discussion at this point. This is the method used in baseball for negotiations between players and owners. But it is difficult to envision how this could work in a business environment, because there are so many more provisions than just wages and benefits in a union contract covering business operations. This binding arbitration provision is viewed by labor as being the most important part of the bill, because nearly half of the negotiations for an initial collective bargaining agreement fail to result in a first labor contract.

Question: *If a company can't afford the terms and conditions that the arbitrator decides will be in the labor contract, can it appeal the decision or just refuse to follow the contract?*



Answer: No. The arbitration decision is final, and the employer would have no right to refuse to obey the terms imposed or lock out the workers. The company and the union will be subject to that contract for two years. Even the workers do not get the right to ratify the contract through a vote. This is particularly dangerous, because the government arbitrator making the final decision may have no specific knowledge about company operations and ability to turn a profit.

Question: *When will the Senate vote on the EFCA bill and what are its chances of passage?*

Answer: The Senate is currently focusing on healthcare legislation, but some predict that the bill could be voted on by the end of the year. The Democrats control the Senate and should have enough votes to pass the legislation and prevent a filibuster. Recently Senator Arlen Specter, who switched from the Republican to the Democratic party, stated that he would support a cloture vote on a modified version of the EFCA which would shut out a filibuster. However, there are still a few Democratic Senators who have misgivings about some of the bill's provisions.

Predictions are that some form of the bill will pass however.

Question: *Will passage of the EFCA increase union membership?*

Answer: In all likelihood, yes. The Teamsters predict that union membership will double. Increased dues to unions from membership growth as a result of the ease of unionizing companies under the EFCA will continue to give unions more funds to use in seeking to escalate union organization of businesses, large and small.

Question: *What actions should a company take to avoid unionization of its workforce and prevent a government arbitrator from making its business decisions?*

Answer: Companies should act promptly to establish a union avoidance plan and inform its workers about the company's view of unionization as well as educating its workers on the tactics unions will utilize in order to impose unionization on a company without even a vote by the workers. Management needs to explain to its employees why a union is not in their best interests nor the best interest of the customers, patients or clients served by their business.

Even if the card check provision is removed from the final bill submitted to Congress, the fast track election compromise provision will give a company only several days to get its message opposing unionization and opposing interference with operations by an outside party to its workers.

Also, the compromise bill may prohibit employers from requiring its workers to attend these meetings.

Question: *What are the components of such a plan?*

Answer: Communication and education are the key components. It is imperative that companies act now to establish a union avoidance plan. Each company needs to let its workers know its position on unionization and the negatives to injecting an outside party – a union – in management-labor relations.

Question: *How should a company approach and educate its employees?*

Answer: Meet with employees and stress the importance of NOT signing a union authorization card. Explain to employees the significance of signing a union card – that this is in effect a vote for the union. Even if a compromise bill passes, signing a union card will lead to a fast election with little time for consideration once 30% of the workers sign cards. Emphasize the company's Union Free Policy.

Question: *How should a business involve its management team and supervisors in this effort?*

Answer:

- Educate the supervisors on the company's Union Free Policy.
- Inform management and supervisors of the provisions and effects of the EFCA.
- Select leaders who will be responsible for communicating the company's position.



Question: *What steps should a company take to insure that its workers are not dissatisfied and susceptible to union organization?*

Answer: A company should perform an analysis of its workforce and seek to identify any problem areas.

- Complete an audit of the workforce (ages, marital status, number of dependents, length of service).
- Evaluate competitiveness of the company's wages and benefits as compared to the marketplace in that industry.
- Identify safety concerns, if any.
- Seek the input of first line supervisors on any issues or concerns employees have raised.

Question: *Should a company seek professional legal advice in developing and implementing a union avoidance plan?*

Answer: There are limitations on what employers can do or say, and it is advisable to obtain professional legal help to advise management on restrictions imposed under the National Labor Relations Act. If the EFCA becomes law, violations of the new restrictions can result in very costly fines and penalties. A professional can also assist in –

- Performing a potential bargaining unit analysis.
- Identifying supervisors, i.e. employees who have the power to hire, fire, etc. Supervisors are ineligible to vote in an election.

- Developing a lawful strategy for addressing employee issues.
- Conducting a yearly survey of employees and interviews to learn concerns and act upon survey.
- Developing and presenting a management training program.

Conclusion

The proposed new labor law will dramatically affect nearly all businesses large and small. The EFCA changes the game plan on how companies become unionized and requires a whole new strategy on the part of employers to deal with the issue of unionization and employee relations. Even if the secret ballot election ends up being retained, employers must understand that the most dangerous and disruptive provision of the EFCA is mandatory, binding arbitration for the first labor contract. This proposed new labor law is considered to be the “lottery ticket” for unions to bring back a substantial percentage of the American workforce into the union fold. Most observers believe that it has an excellent chance of being passed in one form or another. Employers must educate themselves and their workforce to address these changes in order to give both businesses and employees an informed “choice” – something the misnamed Employee Free Choice Act does not do. NOW is the time to prepare in order to avoid unionization later. NOW is the time to contract Congress and the Senate to oppose this Act. NOW is the time to work with your various associations to oppose this Act. If you have any concerns about the EFCA, then please call one of the following attorneys:

What’s New In Greensfelder’s Labor Department

- Chris Bailey and Melanie Renken prevailed in a jury trial in September 2009 in the United States District Court for the Eastern District of Missouri
- Amy Blaisdell was recognized as an “Up and Coming Lawyer” by Missouri Lawyer’s Weekly
- Kathi Chestnut received the Missouri Bar’s Women’s Justice Trial Practitioner’s Award and has been invited to join the Litigation Counsel of America as a Fellow
- Dennis Collins was again recognized as a “Super Lawyer” for Missouri and was also named by Chambers USA as a “Leading Lawyer For Business”
- Mary Beth Ortals was again recognized as a “Super Lawyer” for Missouri and was recognized by St. Louis Magazine as among “St. Louis’ Best Lawyers”

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