A Timely Analysis of Legal Developments

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In This Issue:

November 2008

With the election results in, the Employee Free Choice Act looks likely to be enacted, in one form or another, in 2009. Employers need to begin now to prepare. That process starts with understanding the dangers of the law, but it also entails in-depth management analysis of employment practices and strategies as well as immediate auditing of the risk of potential unionization.

Obama Presidential Election Victory Could Lead To Dramatic Increase in Unionization of Employers in the U.S.

By Gavin S. Appleby, John M. Skonberg and James M. L. Ferber

The historic election of Senator Barack Obama as the next President of the United States, coupled with the Democratic Party increasing its majority in both the U.S. Senate and House of Representatives, greatly increases the chances of passage of legislation making it much easier for unions to organize employers in the U.S.

Organized labor has publicly stated that its top priority in the 111th Congress, which begins in January 2009, is passage of the Employee Free Choice Act (EFCA). President-elect Obama was an original co-sponsor of the bill when it was introduced in 2007 but the bill stalled in the Senate under threat of a filibuster or a veto by President Bush. When he accepted the endorsement of the Service Employees International Union during the campaign, President-elect Obama vowed that, if elected, he would pass the EFCA, stating, "We will pass the Employee Free Choice Act. We may have to wait for the next President to sign it, but we will get this thing done." President-elect Obama has also pledged to assist organized labor by ushering in a union-friendly administration.

The EFCA, if enacted in its current form, would result in the most sweeping changes to the National Labor Relations Act (NLRA) since the original Wagner Act was passed in 1935. It would amend the NLRA to: (1) require the National Labor Relations Board (NLRB) to certify a labor union as the exclusive bargaining representative of employees through union authorization cards signed by employees, without the benefit of a government-supervised, secret-ballot election; (2) require mandatory interest arbitration if an employer and a newly certified union are unable to reach a first contract within a relatively short period of time; and (3) expand the NLRB's remedial power for employer unfair labor practices during union organizing campaigns and during bargaining, including the authority to award civil penalties.

One cannot appreciate the magnitude of the changes that the EFCA would make to the NLRA without an understanding of the NLRA as it exists today, and as it has existed for over seven decades. The two central purposes of the NLRA are: (1) to ensure that employees in the private sector can engage in concerted activity, particularly through

labor organizations, with respect to their wages, hours and working conditions, or to refrain from engaging in such activity; and (2) to regulate the processes by which employers and unions can negotiate collective bargaining agreements. The NLRA is facially neutral concerning whether employees should or should not be represented by labor organizations. In essence, the NLRA protects the right of employees to make those decisions without coercion by either employers or unions. With respect to the negotiation of collective bargaining agreements, the NLRA is similarly neutral concerning the content of such contracts, and it is even neutral as to whether the parties will be successful in negotiations. Rather, the NLRA simply prescribes procedures to ensure the fair negotiation of labor contracts.

Secret Ballot Elections and Card Check

One of the centerpieces of the NLRA is its secret ballot election process. Over the course of approximately 73 years, the NLRB and the federal courts have developed an elaborate process, overseen by the NLRB, in which employees have the opportunity to cast an informed vote in a secret ballot election that determines a union's representation status. The process begins with the filing of a petition with the local NLRB regional office. During the period between the filing of the petition and the election, both the employer and the union have an opportunity to present their views to the voters, much like a political campaign. Certain conduct by an employer during the campaign is prohibited, such as making promises of benefits or threats of harm; implying that selection of the union in the election would be futile; surveilling organizing activity or creating the impression of such surveillance; conducting campaign meetings within 24 hours of the election; and campaigning in the polling area. The election itself is supervised by an NLRB agent. In order to prevail in the election, a union must receive a majority of the votes cast.

The EFCA would materially change the NLRA by requiring the NLRB to certify a union upon finding that a majority of employees has signed authorization cards designating the union as their bargaining representative, thus eliminating secret ballot elections. Card-check certification would hinder, not promote, employee free choice by depriving employees of their long-established right to a secret ballot election. In many cases, it would also deprive an employer of an opportunity to present its view to its employees on whether unionization is appropriate for that workplace.

Mandatory, First Contract Interest Arbitration

Another centerpiece of the NLRA is that it is neutral concerning the content of collective bargaining agreements. It merely requires that the parties engage in good faith bargaining in an effort to reach agreement on a contract, and it leaves it up to the participants to craft their own agreements. The EFCA would considerably change this process by forcing the parties to expedite the bargaining over an initial contract and, if agreement cannot be reached, a government-appointed arbitration board would determine the terms of the contract. Thus, the EFCA would: (1) require an employer and the newly certified or recognized union to commence bargaining within ten days of the employer's receipt of a written request for bargaining from the union; (2) give either party the right, 90 days after bargaining commences, to engage the Federal Mediation & Conciliation Service (FMCS); (3) require FMCS to refer the dispute to an arbitration board, if it is unable to bring the parties to agreement within 30 days; and (4) require the arbitration board to render a decision settling the dispute that is binding upon the parties for a period of two years. Such a mandatory, first contract interest arbitration provision would undermine, not promote, collective bargaining by taking out of the parties' hands, and giving to government-appointed arbitrators, the power to dictate both the economic and non-economic terms and conditions of employment.

The Future of the EFCA

The elections have just been held, and the new Congress has not yet convened. In fact, a few key Senate races remain uncertain. So, at this juncture, it is not certain what form the EFCA will take. With a union-friendly Obama Administration, a union-friendly Congress, and the likely appointment of a majority of pro-union members to the NLRB, employers cannot be complacent and rely upon a five-decade decline in unionization in the U.S. Similar legislation in the Canadian province of Quebec has resulted in 40% of the workforce being unionized.

We urge employers to work immediately to develop a long-term strategy to avoid the potential problems of the EFCA. That means focusing on union avoidance at both a higher level and a lower level. At the higher level, key issues involve leadership style, the need for employee empowerment, incentive pay systems, and the use of fair policies and practices. At the lower level, managers need to effectively communicate with employees, manage consistently and appropriately, and create relationships. Lower level managers also need to recognize the signs of union activity.

We also urge employers to begin NOW to evaluate and reduce the level of union risk. That means training, analyzing and auditing data. Littler has in place innovative and effective training programs to help employers in that regard. Audits can also been done that will enable employers to understand the risk and modify practices that, if not adjusted, will lead to likely union activity (and, if the EFCA passes, likely unionization).

For a more detailed analysis of the EFCA, please see the Littler Report *The Employee Free Choice Act: A Critical Analysis*. To learn more about how employers can position themselves to decrease the possibility of unionization of their workforce, contact your Littler attorney or one of the authors of this article.

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