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Employers Take Up Union Tactics With Threat Of EFCA

By **Christine Caulfield**

Law360, New York (August 18, 2008) -- Fearful of the passage of the controversial Employee Free Choice Act next year, some employers are adopting the arbitration and grievance procedures typically found in collective bargaining agreements to keep one step ahead and fend off unions. But this pre-emptive strategy, while well intended for those wishing to keep workers happy and union-free, is not the wisest, lawyers say.

Companies wanting to remain non-unionized are well-advised to take proactive steps, but embracing union-friendly practices to reduce the threat of unionization — a tactic that dates back 80 years in the United States — is counter-intuitive, according to labor attorneys.

"Some companies have gone to the lengths of implementing grievance and arbitration procedures in their non-unionized work force, but it's certainly not the advice that I've given clients," said attorney Scott Faust, of McDermott Will & Emery LLP. "I say, if you're going to implement attributes of a union contract without having a union you might as well have a union."

Grievance procedures and employee-input mechanisms were successful in keeping unions out of industries such as auto manufacturing, electronics and chemical processing in the 1920s, said Michael Hayes, associate professor at the University of Baltimore School of Law.

But then the Great Depression hit in 1929 and the balance shifted toward the labor union movement with the right of workers to organize enshrined in the National Labor Relations Act of 1935.

The first modern wave of arbitration procedure policies in non-union settings occurred in the 1990s as a response to the Civil Rights Act of 1991, which for the first time allowed Title VII discrimination claims to be brought to trial. The U.S. Supreme Court, in its 1991

Gilmer decision, paved the way for arbitration of such discrimination claims in union-free workplaces, and employers saw them largely as a way to avoid litigation, Hayes said.

Adoption of grievance and arbitration procedures declined at the beginning of this decade, Hayes said, as more employers began to regard third-party arbitrators as more "pro-employee" than many courts and as new procedural protections, such as pre-hearing discovery, made the process more costly.

"Now, in the past couple of years, adoption of grievance and arbitration policies has started to increase again, and in many cases the rationale appears to be as a means of resisting unionization in the face of card-check campaigns and the possible enactment of the EFCA," Hayes said. So everything old is new again, he added.

If enacted next year, the EFCA would amend the NLRA by doing away with secret ballot elections and replacing them with a card-check procedure that would require unions only to obtain signed authorization cards by a majority of employees in order to organize.

The passage of the legislation is expected to hinge on who takes the White House next year. Republican presidential nominee Sen. John McCain (R-Ariz.) is fiercely opposed to the measure, while the Democrat's presumptive nominee, Sen. Barack Obama (D – Ill.) — an original co-sponsor of the bill — has promised to sign off on it if elected.

Bob Battista, an attorney in Littler Mendelson PC's labor management relations group and former chairman of the National Labor Relations Board, said the EFCA would have the most dramatic impact on federal labor law since the NLRA was introduced.

The proposed law would disrupt the balance of power in the work force in favor of organized labor by not only eliminating the secret ballot but providing for mandatory binding arbitration between an employer and a newly certified union in the event of a standoff on contract negotiations, he said.

But Battista, who has urged employers to take "immediate action" to oppose the bill by lobbying trade organizations, promoting public awareness and writing to politicians, said that adopting certain workplace policies just to fend off unionization was not the answer.

"If an employer is considering grievance and arbitration procedures, it ought to be because it makes operational sense. It should not be to influence any employee's decision on whether or not to organize. If employers are opposed to the EFCA they should let their senators and congressmen know it is bad law and make their feelings heard," Battista said.

Dave Mandel, a labor attorney with Ropes & Gray LLP, agreed that taking precautionary steps in anticipation of the EFCA was an ill-advised strategy.

"It is by no means clear the act will pass, or when it will pass, or, if it does, how much it will resemble proposals that are currently pending in Congress," Mandel said."Taking action based on speculation is not generally prudent."

Employers ought to take proactive steps to resist unionization by reviewing employment policies and ensuring that compensation and benefits packages are competitive, whether or not the EFCA passes, but this should be done in the spirit of an ongoing objective to remain union-free, Mandel said.

"If those ongoing reviews increase compensation, modify leave policies, create some type of grievance procedure, whatever, by all means go ahead and do it, but I would think that it was ill-advised for any employer to go ahead and take a step that it would not do, if it knew for certain the act would not be adopted," he said. "There will be plenty of time if the act is passed to recalibrate the cost-benefit analysis."

While adopting arbitration practices might strip a union of its winning arguments to sway employees to organize, the cost of such a pre-emptive strike is having arbitration, Mandel said.

"It does not make sense to me to say we wouldn't want to be unionized and have to adopt an arbitration procedure, so let's adopt an arbitration procedure," he said.

Embracing quasi-collective bargaining agreements to stave off unionization is an expensive exercise that doesn't even guarantee employees will not be lured into organizing, Faust said.

"You can spend a lot of time and money and cede your own management prerogatives to a third-party arbitrator and still end up with a union," he said. "My advice is not to go down that direction but to focus on good communication with employees and good management."

"I've had a number of clients who have successfully avoided unionization by saying to employees, 'This is a well-managed workplace.' And they win elections because employees recognize that is the case," he added.

Unions can always argue that unilateral arbitration is unfair in the absence of a union representative, said professor Arthur Leonard of New York Law School. Leonard also said arbitration was not the smartest union-avoidance tactic to pursue.

"An arbitration hearing can vary in its degree of formality. In a non-union workplace, an employee may be allowed to bring a fellow worker into a grievance hearing, but if they want a lawyer it is out of their pocket," Leonard said.

Many large corporations already provide arbitration proceedings but their enforceability has been challenged in some courts, he said, and unions seeking to organize non-union

industries could easily make the argument that employer-sponsored grievance procedures are a poor substitute for the arbitration provisions envisaged by the EFCA.

Leonard agreed that prudent employers should survey the landscape of their work force to see what basic employee grumblings a union could capitalize on.

"Putting in arbitration procedures is a different question, but employers should try to be proactive to make their workplaces more employee-friendly," he said.

In that sense, said professor Steve Wilborn of the University of Nebraska Law School, the threat of the EFCA passing has already had the desired effect.

"It's always been true that the threat of unionization often increases the kinds of conditions and salaries that employers are willing to pay," said Wilborn, who wasn't surprised to hear that some employers were trying to head off unions by adopting union-friendly policies.

"It's commonly understood that unions both have a direct effect on the wages and benefits of employees as well as an indirect effect when representation is threatened," he added.

But nobody said that was such a terrible thing, said Faust, one of many opponents of the EFCA.

"If you want to say that the threat of this legislation causes an employer to become a better manager, to become more fair, to treat employees better, I guess that's right," Faust said. "There's a saying that an employer gets the union they deserve."