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Union Organizing In A New Environment

Law360, New York (January 29, 2009) -- The new administration and the economic crises are poised to bring significant changes to the labor and employment laws governing the American workplace. This is particularly true for the law governing union organizing.

Organized labor has made clear that its top legislative priority in the new administration is to reverse decades of union decline through enactment of the Employee Free Choice Act (EFCA). EFCA has sometimes been called the “Card Check bill.”

EFCA’s best-known feature requires employers to recognize a union as representative of its employees based solely on union cards signed by a majority of its employees, without a chance for employees to vote in a secret ballot election to determine whether or not they want to unionize.

The congressional Democratic caucus supports EFCA and President Obama promised during the campaign that he would sign it. The business community, led in part by the United States Chamber of Commerce, is mounting vigorous opposition to the bill.

It has become an open question in the current political and economic environment whether EFCA will pass Congress and, if so, in precisely what form. What is beyond doubt, however, is that organized labor will continue to press for, and is likely to bring about, some very significant changes to union organizing law, even if changes are made to EFCA before its passage.

Given the substantial likelihood of significant changes being made to the labor law in the near future, employers—especially non-unionized employers who have not seen unions as a threat for many years—must now prepare in new ways to deal with union organizing.

Organized labor has promised that it will significantly ramp up its organizing activities. Reasonable preparations that a non-union employer would be wise to consider making now include, at a minimum: communication with employees about union cards, sound

training of managers and supervisors about unions and labor law, review of current employment policies and close scrutiny of the employer's vulnerability to union organizing.

Features Of The Employee Free Choice Act

Because it remains likely that EFCA in some form will become law in the near term, employers should be familiar with the primary features of the bill.

EFCA focuses on removing "obstacles" to union organizing by changing current labor law's provisions for secret ballot elections, indefinite time for an employer and a union to bargain a contract and its relatively small penalties for unfair labor practices.

EFCA in its present form would significantly change these three provisions to meet labor's concerns.

Card Check Recognition Without Secret Balloting

EFCA in its present form would amend the National Labor Relations Act (NLRA) in three significant respects. The first change would be the abolishment of an employer's right to insist on a "secret ballot" election process by which employees could express their preference whether or not to be represented by a union.

The NLRA currently does not require an employer to recognize a union without a secret ballot election conducted by the National Labor Relations Board (NLRB), which follows a 42-day campaign period.

The campaign period in the NLRA today begins only after a petition is filed by the union and notification given to the employer of the union's attempt to organize.

During the campaign period, both the union and the employer are free to use vigorous persuasion to try to convince employees to adopt their respective positions on unionization. When the election occurs, the NLRB is responsible to ensure that it is free and fair.

The EFCA would change this procedure by requiring an employer to accept unionization of its workforce based only on a "card check" process. The workforce would become unionized if the employer were presented with union "authorization" cards signed by a majority of its employees.

In this form, EFCA would prevent employers from having any chance to speak with employees about unions once the signed cards had been presented. Employees would lose the ability to weigh different sides of the issue and to exercise their free choice with anonymity.

Interest Arbitration Of First Contracts

The second key feature of the EFCA would require binding arbitration for any contract when a workforce first becomes unionized unless the employer and union reach agreement within 120 days of unionization.

This provision might create substantial pressure on collective bargaining and severely limit employers' bargaining strategies and freedom to negotiate.

Furthermore, this might create an incentive for unions to avoid agreement with an employer's proposals, and to inflate their bargaining demands.

Damages And Penalties For Unfair Labor Practices

The third critical change EFCA would make to the NLRA is to create for the first time substantial penalties and multiplication of damages recoverable for labor law violations.

These new penalties and increased damages would apply during any period when unions are attempting to organize and during negotiations for a first contract. Specifically, the bill does the following:

- Increases the penalty for discharging or discriminating against an employee during the relevant period, to provide for back pay plus two times that amount as liquidated damages.
- Creates civil penalties up to \$20,000 for employers who willfully or repeatedly violate employees' rights during this period.
- Requires the NLRB to seek a federal court injunction whenever it believes an employer has committed an unfair labor practice during this period, a possibility that has previously been left to the labor board's discretion.

Ultimately, the EFCA would streamline the process of union organizing and weight the process much more heavily in favor of unions than it has ever been.

Conversely, it would make it more difficult for employers to fight union organization efforts and would also limit employers' bargaining power.

Developing An Action Plan Now

Despite the present uncertainty over EFCA's ultimate form and fate, union-free employers need to consider action that can be taken now to keep their operations union-free, given that some form of substantial change to the labor laws is all but certain. Following are some examples of such possible action steps.

Communicate With Employees About Union Cards And Perhaps More

Because of the significance of card-signing under the current law, and its highly increased significance under the EFCA, employers must educate managers and employees on the effect of signing a union card and their rights as to whether to sign or not.

Employers may also want to consider the most opportune time to communicate with employees about the employer's position on unionization.

The potential for employees to learn only too late about potential effects of unionization will be greatly increased if the current form of EFCA becomes law, eliminating the 42-day campaign period when employers have traditionally delivered such messages in the past.

This may mean that some employers elect to deliver union-free messages to employees as early as the initial hiring and orientation process.

Other employers will prefer to minimize or defer communication that introduces the subject of unions to their workforce; but some early delivery of limited information to employees about the card check process is at least worth considering.

Review Employment Policies

Certain policies, enacted before union organizing occurs, can be effective preventive measures or provide useful tools in the event organizing begins.

Because implementing any policy in response to organizing is likely to be construed as an unfair labor practice, it is critical to review policies and revise or implement new policies before organizational activity is present.

Policies employers should consider, include:

- A policy on visitors in the workplace that can be used to keep unwanted visitors, including union organizers, out of the workplace.
- An open door policy that encourages employees to bring concerns directly to management.
- A dispute resolution policy.
- A no-solicitation policy
- An e-mail policy covering personal and other uses of business e-mail.

Train Managers And Supervisors On Labor Law

Proper management conduct in the labor law arena does not come naturally to most managers.

Labor law authority is nuanced and often counter-intuitive, and it is easy for managers with the best of intentions to overstep and unknowingly commit an unfair labor practice.

Therefore, training of managers and supervisors is very important to the objectives of effective preventive action, and, if necessary, mounting lawful opposition to union organizing.

Ensure That Communication Lines Are Open And That Managers Are Responsive To Employees Issues

Open communication and responsiveness to employee concerns are keys to ensuring that employees don't feel a union is necessary.

Employee feedback on issues and problems that arise is critical to ensure that management views are not insulated from employees' workplace realities. Employees' views on the fairness of problem resolutions have a significant effect on the way employees tend to respond to union organizing.

Conduct Employee Issue And Satisfaction Audits

Dissatisfied employees and festering employment issues are fertile ground for union organizers. Reasonable preventive action includes conducting an objective audit of the workplace for the presence of such issues.

It is especially important to analyze the competitiveness of wages and benefits and the presence of employee health and safety concerns.

Employee dissatisfaction can also reduce productivity, so an audit like this has the additional benefit of helping employers to resolve issues of concern to employees and to increase productivity.

The new administration and Congress, coupled with the new economic environment in which the country finds itself, will have a significant impact on the law of the workplace, and especially the law regarding unionization.

Employers should begin now to consider appropriate labor law training for managers and supervisors, review employment policies and communicate appropriate, effective messages of at least basic labor law information to their employees.

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