Employment Edge 89th Edition - Major Changes to the Labor Law Are On Their Way – All Employers (Union and Non-Union) Need to Be Ready

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The Employee Free Choice Act (EFCA), also known as the "Card Check bill" and discussed in the media in terms of its effect on worker secret ballots, has been the number one legislative priority of unions in this election year. The bill focuses on making it easier to remove "obstacles" to union organizing, such as an employer's right to insist on a secret ballot election. Many Democrats in Congress and President-Elect Obama have expressed support for the EFCA, so it is considered very likely that it will become law early in 2009. If it does, it will be the most significant change to the federal labor law in forty years or more. Both union and non-union employers need to be prepared for the likely enactment of this law, which will make it much easier for a workplace to become "unionized" and is likely to lead to a tremendous increase in union organizing activity.

If EFCA becomes law, employers who wish to remain non-union or to otherwise preserve their voice in labor relations matters will need to deeply re-examine their fundamental strategies, policies, and communications. This article explains the basic features of EFCA and offers some tips for changes to personnel policies and practices that will help employers stay union-free without violating the EFCA or other labor laws.

I. THE EMPLOYEE FREE CHOICE ACT

A. Features of the Act

1. Card Check Recognition Without Secret Balloting

The EFCA would amend the National Labor Relations Act (NLRA) in three significant respects. For employers, the most troublesome provision and the one receiving a lot of campaign attention is the abolishment of the right to a "secret ballot" election process by which employees decide whether or not to be represented by a union. Currently, the NLRA does not require an employer to recognize a union unless and until the union receives majority support from employees in a secret ballot election. This election is conducted by the National Labor Relations Board (NLRB) following a 42-day campaign period. The campaign period is commenced after a petition by the union and notification to the employer of the union's attempt to organize. During the campaign period, both the union and the employer can attempt to persuade

employees of their positions on unionization. When the election occurs, the NLRB conducts it, to ensure that it is free and fair.

The EFCA seeks to change this procedure by eliminating an employer's right to a secret ballot election before requiring the employer to accept unionization of its workforce. The Act would require employers to recognize a union upon being presented with "authorization" cards signed by a majority of its employees, presumably indicating they desire union representation.

The bill's elimination of an employer's right to a secret ballot election is problematic for several reasons:

- An employer may not be aware that organizing activity is occurring, eliminating its ability to educate employees and respond to union arguments;
- Employees will lose the ability to hear both sides of the argument; and
- Employees lose their ability to vote anonymously, creating a likelihood of coercion and retaliation when organizers know precisely which employees are supporting the union and which are not.

2. Interest Arbitration of First Contracts

The second important feature of the EFCA is that it would add provisions to the NLRA that would create substantial inhibitions on employers' collective bargaining for the all-important first contract after employees first unionize. The bill allows either party to request mediation if agreement on an initial collective bargaining agreement is not reached within 90 days, and mandates binding arbitration if an agreement is not reached within 30 days of that request. An arbitration board's decision would be binding on the parties for two years unless they mutually agreed to an amendment. This change to the law would severely limit employers' bargaining strategies and freedom to negotiate. The provision might lead unions to inflate their demands, knowing that an arbitration board might well split the difference between the employer's and the union's positions.

3. Damages & Penalties for Unfair Labor Practices

Finally, the EFCA creates for the first time substantial penalties for labor violations. These would apply during any period when unions are attempting to organize and during negotiations of 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 that 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.

B. RESPECT Act

In addition to the EFCA, Organized Labor has been pushing a piece of pro-labor legislation through Congress aimed at undoing the definition of a "supervisor" that the NLRB relied on in its Kentucky River cases. If passed, the Re-Empowerment of Skilled and Professional Employees and Construction Trade Workers (RESPECT) Act would dramatically constrict the definition of "supervisor" contained in the NLRA to include substantially fewer workers than was generally thought to be the case even before the Kentucky River trilogy was decided. The RESPECT Act would change the definition of a supervisor to require that an employee spend more than 50% of his or her time engaged in supervisory functions other than assigning and directing work. The current definition of "supervisor" turns on supervisory authority, and does not require any such threshold percentage of time. The proposed definition in the RESPECT Act would turn potentially millions of supervisors into employees subject to union organizing and the protections of the NLRA.

II. DEVELOPING AN ACTION PLAN TO PREVENT UNIONIZATION

Union-free employers need to consider action that can be taken now to keep their operations union-free, given the nature of the changes that are likely to come with enactment of the EFCA. Following are some examples of such possible action steps.

A. 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.

B. 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 employee's workplace realities. Employees' views on the fairness of problem resolutions have a significant effect on the way employees tend to respond to union organizing.

C. 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.

D. 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.

E. Review Job Descriptions from a Labor Law Perspective

Job descriptions can play an important role in the context of union organizing. First, it is always important to have identified in advance of organizing activity who is considered a supervisor in the labor law context and who is not. This will become even more important if the RESPECT Act becomes law. Employers need to make sure that employees involved in management of the company do not end up in the union where they will be prevented from speaking on behalf of management.

In addition, job descriptions are important because the success of union organizing depends on majority support from the employees within a particular "bargaining unit." This unit is usually defined by the union that is seeking to organize the workers, but it may be modified later depending on the commonality of interest within the proposed unit. Where jobs differ considerably from one another, it may be very helpful to an employer to have job descriptions that make that clear, so as to minimize the chance that employees will be grouped together in over-inclusive units. Conversely, it may be to an employer's advantage for a bargaining unit to be as broad and diverse as possible, because of the potential to dilute the effect of union

support among a limited employee group.

F. Communicate with Employees about Union Cards and the Company's Position on Unions and Free Choice

Because of the significance of card-signing under the EFCA, employers must educate employees on the effect of signing a union card and their rights as to whether to sign or not. It is also important for an employer to communicate lawful messages about its rights and positions on unionization. The potential for employees to learn only too late about possible effects of unionization is greatly increased under the EFCA. This means that employers now must be out in front with their messages to employees about this issue.

G. Contact Your Senators and Representatives

The EFCA is not the law yet. Contact your senators and representatives and let them hear your perspective. Click here for contact information.

H. Conclusion

Organizing activity could be going on in your workplace now, and cards signed by employees today will be effective union tools once the EFCA becomes law. The likely passage of EFCA means that employers should begin taking steps now to modify their labor relations strategies and communications with respect to unions. If you have any questions about the EFCA or strategies for preventing or responding to union activity, please contact Mark Mathison or another member of Gray Plant Mooty's Employment and Labor Law Practice Group.