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The Employee Free Choice Act: Fundamental Change in Support of Union Organizing Will Require Immediate Employer Action

All indications are that the Employee Free Choice Act (EFCA) will become law in early 2009. This legislation will fundamentally alter the process for union organizing. *EFCA will make it far easier for unions to organize workers, so much so that current estimates suggest the percentage of unionized employees in the private sector will increase from the present 7% to 15% in the first 12 months after the law becomes effective.*

Summary of EFCA

The principal features of EFCA include:

1. **Certification of Unions Based on Authorization Cards.** For the last 70-plus years, employers were not required to recognize a union as the collective bargaining agent of employees unless a majority of the employees voted in favor of union representation in a secret ballot election conducted by the National Labor Relations Board (NLRB). Under EFCA, the NLRB will be required to certify a union as the bargaining agent if a majority of employees sign authorization cards designating the union as the bargaining representative. No election will be necessary or required. Clearly, this will make unionization much easier.

2. **First Contracts.** Once a union is certified, EFCA requires the commencement of bargaining within 10 days of the union's demand to bargain. If the parties are unable to reach agreement within 90 days of the commencement of bargaining, either party may request mediation assistance from the Federal Mediation and Conciliation Service (FMCS). If mediation fails to produce an agreement within 30 days, the matter will be referred to binding arbitration. The arbitrator will then determine the terms of the contract, which will remain in force for two years.

3. **Enhanced Penalties for Unfair Labor Practices During Period of Organizing Efforts and Prior To First Contract.** EFCA provides for increased penalties to be assessed by the NLRB for unfair labor practices that occur while unions are organizing or during the period of negotiations for a first contract.

   (a) Mandatory Injunctions – The NLRB will be required to seek injunctions in federal courts whenever there is reasonable cause to believe that an employer has discharged or discriminated against employees or otherwise interfered with employee rights during an organizing drive or negotiations for a first contract.

   (b) Treble Damages – In addition to back pay awards for any employee subjected to unfair labor practices during this period, the NLRB will also award an amount equal to two times the back pay amount.

   (c) Civil Penalties – EFCA will also add a penalty of up to $20,000 per violation against employers found to have willfully or repeatedly violated employee rights during an organizing drive or the negotiations for a first contract.

As is evident, EFCA is designed to make organizing easier for unions, and to increase the penalties to be imposed on employers for unfair labor practices committed during organization drives and first contract negotiations. Virtually every union is poised to launch increased organizational activity in anticipation of EFCA becoming law.

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Employer Response

Employer and human resource organizations will be active in Congress in opposing, or seeking to moderate, EFCA. Given the political realities, it is not anticipated that EFCA will be defeated. There is some hope, however, that it can be moderated in effect. Our partner, and former NLRB member, Pete Kirsanow, will be one of the point persons in these legislative efforts. Currently, some political strategists are suggesting that all top legislative priorities, which will include EFCA, be packaged in one omnibus bill for passage early in 2009. Such a move may actually slow down the legislative process somewhat. Still, passage would be expected by March 2009. If EFCA is left to stand alone, swifter passage is likely. Of course, Benesch will provide updates as EFCA moves through the legislative process.

"It is imperative that all employers wishing to remain union-free begin now to structure, or restructure, their union-free communication programs."

It is imperative that all employers wishing to remain union-free begin now to structure, or restructure, their union-free communication programs. Under current law, employers always had the period between the filing of a petition and the election to communicate with employees in an attempt to convince the employees that union representation was not in their best interest. Under EFCA, there is no such period. As soon as a union acquires a majority of signatures on authorization cards, the NLRB must certify that union as the bargaining representative. Thus, it will no longer be an option to wait for organizational activity or the filing of an election petition before actively communicating with employees. In the past, unions have sometimes been able to obtain authorization cards from a majority of employees without the employer being aware of any union activity. Under EFCA, that scenario would result in instant unionization. Thus, employers that hope to remain union-free must proactively disseminate their union-free message before organizational activity begins. Preliminary steps should include:

1. **Team Selection** – Each employer should appoint a team dedicated to the design and communication of its union-free ideals. This team should include representatives from executive management, human resources, operations and legal counsel.
2. **Program Structure** – A communication program must be designed which affirmatively educates employees on the effects of EFCA, the benefits of remaining union-free and the steps employees may take to do so. Such plans are not "one size fits all." Every facility has its own personality and dynamic. To maximize effectiveness, each communication program must be developed accordingly. The program must be designed to communicate the union-free message on an ongoing basis and to respond to specific organizational activity as it arises.
3. **Implementation** – The program should be carefully planned and implemented. Because, under EFCA, union organizational activity need never come out from the shadows, the union-free communication program must be perpetual. Regular and consistent communication is imperative. In addition, the program must anticipate specific activity in response to organizational efforts that happen without employer awareness.

Collective Bargaining

Employers should also prepare a collective bargaining strategy to address the possibility that an arbitrator may be involved in the process in as few as four months from the time the union is certified. In the past, substantive negotiations often did not even begin within four months from certification. Employers must begin now to develop strategies to either conclude negotiations within four months or make their best cases to an arbitrator.

Next Steps

Employers must not delay in preparing for EFCA. Unions are currently planning for unprecedented organizational activity. Waiting for EFCA to become law will leave an employer extremely vulnerable to this organizational effort. Benesch's Labor and Employment Practice Group can guide employers of all sizes and in all industries in the structuring and implementation of their union-free efforts in preparation for EFCA becoming law.

For more information, please contact Peter Kirsanow at (216) 363-4481 or pkirsanow@beneschlaw.com.

A Stitch in Time Saves the Bottom Line

Every penny counts in these tough economic times. Carriers, shippers and brokers can all help their respective bottom lines by utilizing certain rules governing the payment of motor carrier freight charges. One of the most fundamental of these rules is the "180-Day Rule." Under the 180-Day Rule, a shipper wishing to contest a motor carrier's freight charges is obligated to do so within 180 days of its receipt of the carrier's invoice. The 180-Day Rule is memorialized in 49 U.S.C. § 13710(a)(3)(B) and states:

> **Initiated by shippers.**—If a shipper seeks to contest the charges originally billed or additional charges subsequently billed, the shipper may request that the Board determine whether the charges billed must be paid. **A shipper must contest the original bill or subsequent bill within 180 days of receipt of the bill in order to have the right to contest such charges.**

(emphasis added). The Surface Transportation Board (STB), which is successor in part to the Interstate Commerce Commission, has issued two opinions that squarely hold that this statute categorically prohibits a shipper from filing any civil action in court to dispute freight charges without first having contested those freight charges within the designated time period.

In *Carolina Traffic Services of Gastonia, Inc. – Petition for Declaratory Order*, STB No. 41689 (May 31, 1996), a freight charge auditing service asked the STB to rule whether or not 49 U.S.C. § 13710(a)(3)(B) requires shippers to contest freight charges within 180 days as a prerequisite for commencing a civil action to obtain restitution of disputed charges. The freight charge auditing service asserted that the 180-Day Rule was merely a precondition to seeking a determination from the STB as to the "reasonableness" of the freight charges.

> *"In our [the STB's] view, the 180-day rule applies to **all** billing errors and billing disputes."*

The STB flatly rejected that assertion and held that the 180-Day Rule applied to any civil action involving freight charges:

> This notification requirement [the 180 day rule] **must be met in order for the carrier or shipper to have a 'right' of action**. This is clear from the language of the statute…. In other words, **providing notice to the other party within the statute's 180-day period is a precondition for pursuing a claim, whether the moving party chooses to pursue that claim initially at the Board or in court**.

Id. at 5 (emphasis added). The STB summarized its conclusion in no uncertain terms by explaining:

> [A] shipper **loses any right to contest charges** (whether before the Board, **in court**, or both) if it does not notify the carrier of its disagreement within 180 days of receiving the disputed bill, as required by section 13710(a)(3)(B). Thus, where a party has forfeited the right to assert a claim, for failure to satisfy the 180-day notification requirement, **the other party is not required to pay that claim**.

Id. at 7 (emphasis added). The STB reaffirmed this decision in *National Association of Freight Transportation Consultants, Inc. – Petition for Declaratory Order*, STB No. 41826 (April 21, 1997). Specifically, the STB reiterated that U.S.C. § 13710(a)(3)(B) categorically bars a shipper from bringing an action to dispute freight charges unless the shipper has formally contested those freight charges within 180 days:

> The plain language of the statute provides that a shipper **must 'contest'** the original bill within 180 days 'in order to have the right to contest such charges.'

Id. at 5 (emphasis added). Furthermore, the STB emphasized that the 180-Day Rule applies to **all** billing errors and billing disputes and is not merely limited to one particular type of freight charge dispute. *Id.* at 4 ("In our view, the 180-day rule applies to **all** billing errors and billing disputes.") (emphasis added).

In other words, the STB makes it abundantly clear that a shipper must "contest" the freight charges during the 180-day period in order to seek any redress in court.

Notwithstanding the foregoing analysis, however, all parties should be aware that at least one court has held that the 180-Day Rule does not apply to bar actions brought in state or federal court relative to freight charges. *Mastercraft Interiors, Ltd. v. ABF Freight Systems, Inc.*, 350 F.Supp.2d 686 (D. Md. 2004). In *Mastercraft*, the court permitted a shipper to pursue recovery of alleged overpayments to a motor carrier notwithstanding the shipper's failure to comply with the 180-Day Rule. The court essentially held that the 180-Day Rule could not be imposed in what

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amounted to an action to enforce a contract under Maryland law. The court specifically rejected the applicability of the STB decisions cited above and noted that no case law supported applicability of the 180-Day Rule.

In short, parties having freight charge disputes are best served by acting promptly. On the one hand, a carrier who receives a claim after the 180-day time period has passed can legitimately reject the claim in good faith. On the other hand, a shipper or broker who disputes freight charges after being invoiced should quickly contest the charges so that it may preserve its rights to sue if necessary. Of course, as the *Mastercraft* decision illustrates, absolute certainty regarding the applicability of the 180-Day Rule is not attainable. Therefore, all parties have a healthy incentive not to procrastinate and, instead, to find a sound business resolution.

For more information, please contact Marc Blubaugh at mblubaugh@beneschlaw.com or (614) 223-9382.

You Can't Escape the Long Arm of the Law: Doing Business Within The Reach of The Foreign Corrupt Practices Act

Have you heard the expression, "you can't escape the long arm of the law"? If you are involved in exports or international transportation and logistics, or conduct business anywhere in the world outside of the U.S., and you are a U.S. business entity (*i.e., corporation, LLC, partnership, etc.*), or employed by such an entity, then you have heard this expression summed up in four distinct words: Foreign Corrupt Practices Act. The Foreign Corrupt Practices Act (FCPA or the Act) is the U.S. government's means of reaching far and wide to enforce U.S. law against U.S. businesses and citizens.

The FCPA began in the late 1970s as a mechanism for setting criminal and civil penalties for illegal and illicit payments made by U.S. businesses and nationals to foreign officials. Since 1977, the FCPA has gone through two growth spurts in 1988 and 1998, resulting in amendments that have added more teeth to the Act and extended that long reach of the law. The FCPA also contains certain accounting requirements that affect companies with registered securities that fall within the jurisdiction of the Securities and Exchange Commission (SEC). In summary, the FCPA is a device by which the U.S. can infuse ethical conduct and behavior into U.S. persons and entities in their business dealings outside of the U.S., and seek to penalize them at home for noncompliance.

The FCPA has had an enormous impact on how U.S. companies do business abroad. Violations of the Act have resulted in companies paying fines of more than $44 million, while individuals have gone to prison for the maximum term of five years. Potential sanctions also include disqualification from U.S. government procurement contracting and denial of export licenses. Furthermore, the Department of Justice (DOJ) or SEC may bring a civil action to enjoin an act or practice whenever it appears the company is in violation of the antibribery provisions.

The FCPA potentially applies to any individual, firm, officer, director, employee or agent of a firm, and any stockholder acting on behalf of a firm, and generally prohibits the payment of bribes to foreign officials to obtain business. Specifically, under the FCPA, it is unlawful to "corruptly [do an act] in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value" to "any foreign official … to assist … in obtaining or retaining business." Thus, the elements of an FCPA offense are to (1) corruptly (2) pay (3) a foreign official (4) to assist in obtaining or retaining business. While the intent of the FCPA is noble – to ensure that above-board business ethics and dealings occur and are encouraged by U.S. entities both home and abroad – the practical application can present alternative difficulties.

No longer can it be said, "when in Rome…." The Act's focus is clearly on deterring U.S. companies and persons from engaging in business conduct that may be a standard practice in a foreign jurisdiction, but runs afoul of U.S. law. While the FCPA does not prohibit U.S. business and personnel from adhering to local customs, practices and conduct, or even from making payments that are not for a corrupt purpose (i.e., "promotional payments" – promoting goods and services, rather, than promoting an unfair commercial advantage), the FCPA is squarely aimed at deterring and preventing local practices or standard operating procedures that facilitate corruption. So, how do you do business outside of the U.S. while ensuring that you are not engaging in business practices outside of the law? The following provides insight as to placing your company and employees in the most advantageous position to do the job without violating the law.

1. Creating a Framework for Conducting Business

The primary factor to remember is that the FCPA is premised in large part on self-regulation. This means your company should create a set of best practices to ensure its representatives, employees and executives are conducting themselves in a manner consistent with compliance with the Act.

In creating best practices and procedures, your company should begin with the basics and implement a Code of Conduct. A Code of Conduct will serve as a guidepost for how to conduct business in a foreign jurisdiction and will reduce the risk of civil or criminal liability. From the Code of Conduct, the company should implement training practices that educate, and certify, all company employees regarding the Code of Conduct. All personnel need to know how to further the company's business activities and operations in a manner that remains ever cognizant of the potential for invoking the FCPA. Knowing the business, creating the Code of Conduct and ensuring that the company's employees, agents and representatives are familiar with and adhere to the Code of Conduct in their business activities demonstrates a proactive attitude about avoiding problems. This can also serve as a mitigating factor should problems arise.

It is also important to designate a specific individual or committee, preferably involving persons in high levels of authority or management within the corporate structure, as a compliance and ethics officer(s)/official(s) who can oversee Code of Conduct training and compliance. This person or committee can also serve as the "point-person" or "primary contact" in the foreign location for the purpose of addressing issues that may arise and invoking the application of the FCPA.

Finally, the company should establish internal programs, audits, monitors and systems for detecting prohibited conduct, and responding to such conduct quickly and succinctly. A system of reporting should also be implemented. All company employees must be made aware of the reporting system, and must be informed that no reprisals or retribution will be made for reporting violations or potential issues. Whether in the form of a hotline or some other anonymous reporting mechanism, your company should be self-regulating and self-reporting to stop illegal conduct.

> *"Violations of the Act have resulted in companies paying fines of more than $44 million, while individuals have gone to prison for the maximum term of five years."*

2. Awareness of Proper Conduct Versus Potential Crime

So, when in Rome, how do you give unto Caesar what is Caesar's? Well, you can, and you cannot. A fine line between crime and custom exists under the FCPA. The Act does not prohibit payments, just illegal ones. Under the FCPA, the sole statutory exception is for payments or gratuities to government officials who perform "routine governmental action." The enumerated examples within the statute are as follows: (1) obtaining business permits (that do not involve influencing or obtaining business), (2) processing governmental papers like a visa, (3) providing police protection or mail delivery or scheduling inspections associated with contract performance or shipment of goods, (4) providing phone, power or water service, loading or unloading cargo or protecting perishable products from deterioration, (5) similar activities that are ordinarily and commonly performed by an official, and (6) the payment or gift or thing of value was lawful under the written laws and regulations of the foreign official's country. These payments that expedite the processing of permits, licenses or other routine action are not prohibited by the FCPA. However, these exceptions do not absolve a U.S. company or its personnel from potential liability if the foreign country or jurisdiction has internal laws that *do* classify such action as illegal. These exceptions are applicable to the FCPA and the U.S. government's reach outside the U.S., as well as within it.

The DOJ has a list of so-called "red flags" that a U.S. company should be aware of when entering into a foreign business relationship. These red flags include, but are not limited to, unusual financial relationships and arrangements, a history of corruption in the country, a refusal to refrain from any act that would cause the U.S. entity to be in violation of the FCPA, unusually high commissions, lack of transparency in accounting records and apparent lack of qualifications or resources. (See e.g., United States Department of Justice Foreign Corrupt Practices Act Lay-Person's Guide, http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html.)

The FCPA remains the big-stick by which the U.S. can enforce its laws. It remains a precarious landscape for U.S. companies that do business abroad as to how to avoid ever-present pitfalls and problems that arise when trying do business. As the world shrinks because of the growth of global trade, capital markets, technology and expanding provisions of services, U.S. companies will have to implement safeguards and measures that minimize, if not negate,

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criminal conduct, and provide mitigating factors and defenses should the power of the FCPA be invoked against them. Trouble can be spotted upon the horizon – and avoided – by being proactive, engaged and diligent. Whether your business requires docking in foreign ports of call, exporting to foreign markets or simply having to meet the customer where he or she lives, business can be done as usual without your company defending itself against a civil or criminal investigation or prosecution.

For more information, please contact James Ervin at jervin@beneschlaw.com or (614) 223-9325.

Overtime Pay Rules for Truck Drivers

Most people in the trucking business are aware that there is a motor carrier exemption to the wage and hour provisions of the Fair Labor Standards Act (FLSA) (*see* Section 13(b)(1) of the FLSA). Under the exemption, drivers, helpers, loaders and mechanics employed by a motor carrier are not entitled to overtime pay. Congress, as part of the technical amendments to the *SAFETEA-LU* highway bill, has now limited the scope of the exemption (see H.R. 1195). In doing so, Congress has complicated the lives of many of the carriers who have been taking advantage of the exemption.

Previously, the determination of whether a carrier is required to pay overtime was determined by the Department of Labor (DOL) and the FLSA. As amended by Congress, the exemption applies to those employees performing functions within the jurisdiction of the Department of Transportation (DOT). It also applies to those employees called upon in the ordinary course of work to perform, either regularly or from time to time, safety-affecting activities usually performed by a motor carrier.
With respect to the exemption, the jurisdictions of the Secretary of Labor and the Secretary of Transportation are mutually exclusive. If the Secretary of Transportation has the authority to regulate a driver's qualifications and maximum hours of service, the FLSA motor carrier exemption applies and the carrier is not required to pay overtime.

Unfortunately, the amendment has created practical problems for some motor carriers. As revised, the motor carrier exemption applies only to operations by "commercial motor vehicles." It no longer applies to operations of "motor vehicles" as those terms are defined in 49 U.S.C. 13102 and 49 CFR 390.5. As described in H.R. 1195, an employee covered by the FLSA, and thus required to be paid overtime, would be an individual (1) employed by a motor carrier, (2) whose work is defined as that of a driver, helper or mechanic affecting the safety of operations of a motor vehicle weighing 10,000 pounds or less, and (3) who performs duties using motor vehicles weighing 10,000 pounds or less. Drivers of vehicles transporting hazardous materials are covered by DOT regardless of the weight of the motor vehicle.

Motor carriers will have to be sure that they know whether their vehicle is a "commercial motor vehicle" subject to the jurisdiction of DOT or a "motor vehicle" subject to jurisdiction of DOL before they can determine which set of regulations applies as far as driver compensation is concerned.

The problem with the new standards is that some motor carriers use both large and small vehicles in their operations. During a workweek, a mechanic could work on "commercial motor vehicles" and "motor vehicles." A driver could drive vehicles subject to DOT rules on some days and DOL rules on others. Under these circumstances, the motor carrier would lose the benefit of the exemption for the employee for the entire week.

In dealing with the new rule, carriers should try to segregate their employees. In this way mechanics and drivers will work "commercial motor vehicles" for an entire week so that the exemption will apply.

For more information, please contact Bob Spira at rspira@beneschlaw.com or (216) 363-4413.

Recent Events

Marc Blubaugh served as chair of the *Claims Liability Workshop* at the **SMC^3 Loss Prevention Conference** in Atlanta, GA, on October 12–13, 2008.

Marc Blubaugh moderated *Practical Perspectives on the Fuel Crisis* at **The Columbus Roundtable of the CSCMP** on October 16, 2008.

Frank Reed presented *Saving Time and Money While Preserving Relationships: The Value of Negotiation and Mediation v. Litigation on Transportation Projects* at the **62nd Annual Ohio Transportation Engineering Conference** in Columbus, OH, on October 28, 2008.

Bob Spira lead the **SMC^3 Fundamentals of Contract Law Seminar** in Philadelphia, PA, on November 12, 2008.

Marc Blubaugh attended the **Transportation Law Institute** in New Orleans, LA, on November 14, 2008.

David Neumann presented *Swords and Shields: How to Wield Transportation Contracts to Your Advantage in Shipper Chapter 11 Bankruptcies* at the **Transportation Law Institute** in New Orleans, LA, on November 14, 2008.

Eric Zalud moderated a panel on *Hot Topics in the Transportation Industry* at the **Transportation Law Institute of the Transportation Lawyers Association** in New Orleans, LA, on November 14, 2008.

Bob Spira attended the **National Industrial Transportation League's 101st Annual Meeting** in Ft. Lauderdale, FL, on November 15–18, 2008.

Eric Zalud chaired, as President, and **Marc Blubaugh** attended, as a Board Member, the **Executive Committee Meeting of the Transportation Lawyers Association** in New Orleans, LA, on November 16, 2008.

Eric Zalud spoke on the topic of *Freight Collection and Factoring Issues, Double Payment and Bankruptcy Issues in the Transportation and Logistics Industry* at the **TransComp Intermodal Expo** in Ft. Lauderdale, FL, sponsored by IANA, NITL and the Transportation Intermediaries Association, on November 17, 2008.

On the Horizon

Eric Zalud will be attending the **Conference of Freight Counsel Meeting** in Savannah, GA, on January 12, 2009.

Eric Zalud, **Marc Blubaugh** and **Bob Spira** will be attending the **Transportation Lawyers Association Chicago Regional Conference** in Chicago, IL, on January 23, 2009.

Eric Zalud will be speaking on *Freight Charge and Freight Damage Issues* at the **Dallas Traffic Club's Meeting** on February 9, 2008 in Dallas, TX.

Eric Zalud will be attending the **Trucking Industry Defense Association's Advanced Course on Casualty Litigation** in Miami, FL, on February 11, 2009.

Eric Zalud will be attending the **National Tank Truck Carriers Winter Board of Directors Meeting** in Marco Island, FL, on February 12–13, 2009.

Peter Kirsanow will be speaking on the *Employers Free Choice Act* at the **National Tank Truck Carriers Winter Board of Directors Meeting** in Marco Island, FL, on February 12, 2009.

Marc Blubaugh and **Eric Zalud** will be attending the **International Warehouse & Logistics Association's Annual Convention & Expo** in St. Petersburg, FL, on March 8–10, 2009.

Marc Blubaugh will be presenting *Cargo Claims—A Short Course* and **Eric Zalud** will be presenting *Freight Intermediary Contracting and Liability* at the **Transportation & Logistics Council/Transportation Loss Prevention & Security Association's 35th Annual Conference** in St. Louis, MO on March 23–25, 2008.

For further information and registration, please contact Megan Thomas, Client Services Manager at mthomas@beneschlaw.com or (216) 363-4639.

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