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Labor & Employment Bulletin

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 twelve (12) months after the law becomes effective.*

If the Democrats gain control of the White House this November, EFCA will almost certainly become law. The Democratic majority in Congress is firmly behind EFCA. Even if the Republicans maintain control of the White House, the anticipated size of the Democratic majority in Congress may still enable it to push the legislation through. With the election just days away, employers must be ready to act immediately.

Summary of EFCA

The principal features of EFCA include:

1. Certification of Unions Based On Authorization Cards. For the last seventy-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 ten (10) days of the union's demand to bargain. If the parties are unable to reach agreement within ninety (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 thirty (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 (2) 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 which 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.

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. 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 of which the employer does become aware.

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.

As a reminder, this Advisory is being sent to draw your attention to issues and is not to replace legal counseling.

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