



LABOR & EMPLOYMENT DEPARTMENT

ALERT

THE EMPLOYEE FREE CHOICE ACT

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While it did not receive the same media attention as the ongoing financial crisis, the misleadingly named Employee Free Choice Act (EFCA) will be a hot-button issue following the recent presidential election, and threatens to have a significant impact on this country's economic well-being. As proposed, EFCA will cause the most drastic overhaul of private sector labor relations since the passage of the National Labor Relations Act (NLRA) in 1935. Ironically, if passed into law, EFCA will severely restrict employees' free choice when it comes to deciding whether they wish to be represented by a union.

EFCA passed by a wide margin in the House of Representatives last year but was derailed in the Senate. President Bush stated that he would veto the bill. Given that the Democrats have solidified their control of the Senate and President-elect Barack Obama supports the bill, it is a virtual certainty that EFCA will be reintroduced in 2009.

EFCA will significantly alter the NLRA in at least three ways. First, EFCA allows for "card-check" certification of unions, meaning that once a union gets a majority of employees to sign authorization cards, it will become their collective bargaining representative. Under current labor law, an employer has the option of voluntarily recognizing a union based on receiving a majority of signed authorization cards, but also has the right to refuse to recognize a union on that basis and

instead, insist on a National Labor Relations Board (NLRB) secret-ballot election to determine if employees wish to be union represented.

The overwhelming majority of employers require unions to go through the NLRB election process. Signed union authorization cards from employees are frequently the result of peer or union pressure and do not accurately reflect employee sentiment, which is best expressed in a secret-ballot election. Also, under EFCA's card-check certification procedures, unless an employer has advance notice – which rarely happens – that cards are being circulated among the work force, it will have no opportunity to communicate its views regarding why a union is not in the employees' best interests.

The second major change under EFCA severely impacts the employer's ability to negotiate a fair collective bargaining agreement. Under current law, the parties are required to bargain in good faith with regard to wages, hours and other terms and conditions of employment. An employer cannot be "forced" to agree to any union proposal. Once an agreement is reached, it is subject to a ratification vote by the employees. Under EFCA, if a contract is not reached within 90 days, either side can request mediation. If, after 30 days of mediation, there is still no contract, an arbitrator is appointed to impose the terms of a binding two-year contract. The arbitrator is not bound by the prior

negotiations, and the employees do not get to ratify the contract. The effect will very likely be that an employer may end up agreeing to most of the union's demands rather than risk having an arbitrator (who knows nothing about its business) decide the contract.

The third major change EFCA makes to existing law is the punitive set of penalties imposed on employers who are found to have violated the NLRA during a union organizing campaign or during contract negotiations. In contrast to the NLRA which provides for remedial penalties, under EFCA if an employer discharges or discriminates against an employee during a union organizing drive or first contract negotiations because that employee engaged in union activities, the employer is required to pay the employee triple back pay. EFCA also provides for fines of up to \$20,000 per violation against employers who willfully or repeatedly commit unfair labor practices during a union organizing drive or first contract negotiations. Finally, EFCA *requires* the NLRB to seek an injunction against employers when there is reasonable cause to believe they have interfered with a union organizing drive or first contract negotiations. These penalties are to be imposed only against employers.

Clearly, if passed, EFCA will reinvigorate the labor movement. The Service Employees International

Union estimates that the ease of unionizing under EFCA would allow it to organize one-million workers a year, as opposed to the 100,000 workers it currently organizes annually.

Nonunion employers and employers where unions represent only a segment of the work force are strongly advised to take certain precautions to prepare themselves in the event EFCA becomes law. Some recommendations for employers include:

1. Use this time to review wage and benefit programs and make sure that no item lags far behind the norm in the area
2. Watch for signs of union organizing and specifically, the soliciting of cards
3. Formulate and prepare to communicate a campaign strategy (i.e. negatives of being in a union and positives of being union free) before the union gets a majority of employees to sign cards

For more information regarding the EFCA and its potential effect on your business, contact a member of Fox Rothschild's Labor & Employment Department. Visit us on the Web at www.foxrothschild.com.

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