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Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

EFCA Is Not Going Away — Employers Get Ready

Law360, New York (October 14, 2009) -- The Employee Free Choice Act has been widely reported on since it passed the House of Representatives by a wide margin in 2007 but stalled in the Senate when then President Bush stated that he would veto the bill.

After the Democrats solidified their control of the Senate and President Obama noted his support of the bill, it was predicted that EFCA would be reintroduced in 2009 and quickly become law.

In fact, what happened was that at least a half-dozen Senators friendly to labor opposed the card-check provision of EFCA and once again, the proposed legislation stagnated and remains so while legislators tackle more pressing issues such as the financial crisis and health care.

By way of background, EFCA as originally proposed has three main components. 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 it also has the right to refuse to recognize the union on that basis and instead insist on a National Labor Relations Board secret-ballot election to determine if employees wish to be union represented.

Under EFCA’s card-certification procedures, since an employer rarely has advance notice of cards being circulated, it will not have the opportunity to communicate its views regarding why a union is not in the employees’ best interests.

Also, union representatives and pro-union employees may exert significant pressure on employees to sign cards.

The second major change under EFCA is that if the union is certified and 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.

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 and once an agreement is reached, it is subject to a ratification vote by the employees.

EFCA as proposed will likely have the negative effect of forcing an employer to agree to many of the union's demands rather than risk having an arbitrator (who knows nothing about its business) decide the contract.

As the third major change, EFCA would make existing law more punitive for employers that are found to have violated the National Labor Relation Act during a union-organizing campaign or contract negotiations.

In contrast to the NLRA, which provides for remedial penalties, under EFCA if an employer discharges or discriminates against an employee, 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 that willfully or repeatedly commit unfair labor practices.

As previously noted, it appears that the card-check provision will be dropped from EFCA.

According to The New York Times (July 16, 2009), the revised bill will instead require shorter unionization campaigns and faster NLRB elections to determine if employees wish to be represented by a union.

Under these expected revisions, union elections would have to be held within five to 10 days after cards are signed by 30 percent of employees indicating that they would like to be represented by a union. (The cards are not binding on the employees once there is a union vote.)

Presently, it is not uncommon for it to take up to two months for the NLRB to schedule a union election. This additional time allows an employer to communicate to its employees why it feels unionization is not in their best interests.

There are several other features under consideration as additions to EFCA, including compelling employers to allow greater access by union organizers to company property and barring employers from requiring workers to attend anti-union sessions, which labor supporters dub "captive audience meetings." (The New York Times, July 16, 2009).

It would appear that the arbitration and punitive penalty provisions are still on the table.

In a speech to the AFL-CIO convention on Sept. 15, 2009, Democratic Pennsylvania Sen. Arlen Specter predicted a compromise version of the bill would be passed this year that would call for faster NLRB elections, binding arbitration if agreement could not be reached on a first contract and accessibility to the work place for union organizers.

Given the likely passage of EFCA, non-union employers and employers, where unions represent only a segment of their work force, are strongly advised to take certain precautions to prepare for what inevitably will lead to increased union-organizing efforts.

Some recommendations for employers include conducting a review of wage and benefit programs to ensure that no item lags far behind the norm in the area; training supervisors to be alert for indications of union organizing (specifically, the soliciting of cards) and addressing such activity in a way that does not violate the NLRA; and formulating and preparing to communicate a campaign strategy (i.e., negatives of being in a union and positives of being union free).

--By Marvin L. Weinberg, Fox Rothschild LLP

Marvin Weinberg, a former NLRB attorney, is a partner with Fox Rothschild in the firm's Philadelphia office.

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