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## "The EFCA's Destruction of Workplace Democracy"

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**The EFCA's Destruction Of Workplace Democracy**

September 10, 2008 - While voters have come to expect a certain amount of “spin” from politicians when it comes to naming legislation, the Employee Free Choice Act (EFCA) takes the “name game” to a whole new level.

If enacted, the EFCA will add provisions to the National Labor Relations Act that do exactly the opposite of what the name implies — it will threaten free choice in the selection of a union and, once selected, in the terms of any resulting labor contract.

If it becomes law, the EFCA will bring three changes:

It will dramatically increase the likelihood that nonunion companies will be unionized by circumventing secret ballot elections.

It will place the decision of what terms go into a collective bargaining agreement into the hands of a government-appointed arbitrator unless the parties reach an agreement within 90 days.

And it will increase the statutory penalties for unfair labor practices.

The first change will restrict employee choice by permitting forced unionization without the opportunity to vote in a secret-ballot election. The second change will upset a decades-long history of the parties deciding what a union contract, not a third party, says. The third change will hamper employer free speech by imposing penalties for technical violations of the law — violations that do not deprive employees of pay, benefits, or their jobs.

For these reasons, the EFCA should be rejected.

Secret-Ballot Elections Will Be Eliminated

To understand the tectonic shift that will rumble through the labor law field if the EFCA becomes law, it is important to understand how current law works.

Organizing efforts currently center around the union authorization card. Usually a piece of paper the size of an index card, it requires an employee to provide, potentially in the presence of the organizer or co-workers, his or her name, signature, home address and telephone number. The card usually contains, at minimum, a recital that the employee desires the union soliciting the card to represent the employee for purposes of collective bargaining.

Today, a union that wants to organize a group of employees has two choices.

First, it can convince 30 percent of an employee group to sign authorization cards and then petition the government to conduct an election. A union election is much like a political election in that voters — the employees of the company — check a box on a paper ballot in a private voting booth to indicate whether or not they want a union and then deposit their ballot in a sealed ballot box. The entire process is conducted under the supervision of a federal government agent.

The second choice is to convince a majority of the employees in an organization to sign an authorization card. The union can then ask the employer to recognize the union, but the employer can decline. If the employer declines, the union is entitled to use the secret-ballot process described above.

No matter what choice the union makes, employees have an opportunity to vote in a secret-ballot, democratic, government-supervised election.

The EFCA calls for a dramatic departure from the process described above, which has been the law of the land for decades. The EFCA permits a union to deprive employees of the right to vote in a secret ballot election. Under the EFCA, once a union obtains authorization cards from a majority of an employee group, a process not conducted in private, the employer will be required to recognize and bargain with the union for that employee group.

Moreover, rather than a government-supervised and controlled election, under the EFCA, one of the interested parties — the union — will control the key documents — the authorization cards — and how they are collected. Opportunities for abuse will abound in such a system. It also will marginalize the important role the National Labor Relations Board has historically played in the unionization process.

Why would unions, organizations that pride themselves as being purveyors of workplace democracy, advocate such an anti-democratic approach to organizing? No one can say for certain (except, of course, the unions and others pushing the bill forward), but clamoring for the EFCA has increased as the union-represented percentage of the private sector work force has declined. Today, less than 8 percent of the private sector work force is unionized.

While the EFCA leaves in place the secret-ballot process, the ability of a union to bypass it and demand recognition based on obtaining a majority of authorization cards essentially nullifies the process. The declining rate of private-sector membership makes it clear that unions fully intend to avoid the secret-

ballot election in the future.

Sacrificing employee choice and true democracy in the name of increased union membership is simply not the answer to declining union membership.

Binding Interest Arbitration Will Define Employment Conditions

As if the aforementioned changes were not bad enough, the EFCA compounds them with another, equally egregious change.

Today, after employees select a union, the law requires the union and the employer to bargain in good faith to reach an agreement on the terms of the contract. Only the parties can decide what goes into a union contract.

Under the EFCA, unions will be able to refer negotiations on their first contract to binding interest arbitration after 90 days. If a contract still cannot be reached in the 30 days following the initial referral, an arbitration panel will be appointed by the government to decide the terms of the contract. That decision is binding for two years unless the parties both agree to amend it.

As with the EFCA provisions bypassing the secret-ballot process, this EFCA provision decreases the "free choice" that employers and employees have to create a contract regulating the terms of employment.

Instead, the EFCA places the power to make critical employment decisions in the hands of a third party.

Moreover, it can sometimes take many months to hammer out a contract, making the 90-day period provided by the EFCA unreasonable. This time line will fundamentally alter the bargaining relationship and will likely result in arbitrators deciding the terms of many agreements.

Finally, employers should expect their expenses to increase as the arbitration process can be costly.

Penalties For Unfair Labor Practices Will Increase

The final significant impact the EFCA will have on employers involves the increase in penalties for unfair labor practices.

Currently, remedies for unfair labor practices — that is, violations of the NLRA — are fashioned on a case-by-case basis. The NLRB has the right to impose injunctive-type relief, such as notice posting and cease-and-desist orders. Depending on the violation, the NLRB also can award back pay and interest.

The EFCA proposes to add to the NLRB's repertoire in two significant ways.

First, it adds a liquidated damages provision that multiplies any back pay award by two if an employer discriminates against an employee for union organizing or other union-related activity before the first collective bargaining agreement.

Second, it subjects employers to civil penalties up to $20,000 per unfair labor practice if committed "willfully or repeatedly" during union organizing or other union-related activity before the first collective bargaining agreement.

Certainly, employers who violate the law should be subject to penalty. However, the penalty should be rational and clear. These penalties are neither. For example, there is no definition of "willful" or "repeated." Is twice enough to establish a "repeated" violation? If a supervisor makes a statement that the NLRB later determines was an unlawful threat, does the fact that the supervisor didn't intend for it to be interpreted as a threat make it not "willful?"

The lack of clarity regarding these penalties will impede employers' right, protected under the current statute, to free speech during union-organizing efforts.

Another good example is an employee handbook. Many employers have adopted one to inform their employees about employment policies and other terms and conditions of employment. Under current law, if an employee handbook contains, for example, an invalid solicitation and distribution policy, the employer must revise the handbook and post a notice saying it will not maintain the policy.

Under the "willful or repeated" standard, however, it is unclear whether or not a few incorrect words will be met with a $20,000 civil penalty as well. For example, does the maintenance of the handbook over a period of time in which union organizing activity is ongoing qualify as "willful or repeated"? And which part of the handbook is the violation? Each policy? Each paragraph? Each sentence? Each word?

The lack of clarity in these terms unfairly exposes employers to potentially significant liability for violations of the law that were unintended, minor or didn't result in lost wages or benefits to employees.

What Does The EFCA Mean for Employers?

Fortunately for employers, the EFCA means very little under the current Congress. The act was passed in the House but stalled in the Senate after failing to reach the 60 votes needed to cut off debate. The tally, which was 51-48, was strongly divided along party lines. Even if the act had passed in the Senate, the Bush administration made a statement in February 2007 that it would veto the bill.

Employers, however, are not in the clear. The EFCA will most certainly be reintroduced in January 2009 with the next Congress. Sens. Barack Obama. D-Ill., and Joseph Biden, D-Del., are co-sponsors of the legislation. Moreover, Sen. Ted Kennedy, D-Mass., has predicted that the EFCA will be the first bill Barack Obama signs into law should he win the election in November.

Ultimately, the fate of the EFCA lies in the hands of a new Congress and the 2008 presidential election. Should the EFCA be signed into law, there can be no doubt that union-organizing activity will increase. That increased activity will almost certainly generate more organized employees. Employers are well-advised to prepare for these possibilities.

Some steps employers can take now include:

- Prepare to educate employees about the changed significance of signing union authorization cards.

- Develop and implement strategic and tactical plans to ensure that employees have sufficient information about the company's view of unionization.

- Train (or retrain) supervisors to lawfully identify union-organizing activity and respond appropriately within applicable legal restrictions.

- Review employment policies to ensure that they meet current NLRB law so as to avoid potentially significant civil penalties.

- Closely monitor and record wages, benefits and other terms and conditions of employment generally applicable in their industry and geographic area in preparation for binding interest arbitration in the event employees sign union authorization cards.

This list is just the tip of an iceberg of changes employers wanting to remain union-free will need to address. Many employers may decide to act more aggressively by, for example, beginning the education process now for certain groups of employees.

Because each situation will be unique, employers are well-advised to seek out experienced labor law counsel on the EFCA and the changes it portends for the employer community.