

[Alerts and Updates]

EFCA Deal May Clear Way for Action in September

July 20, 2009

Efforts to pass the Employee Free Choice Act ("EFCA") have been stalled while Senate Democrats work to obtain the necessary 60 votes for cloture and bring the matter to the Senate floor. The proposed law would amend the National Labor Relations Act to: prohibit secret ballot elections as the method of determining employee support for union representation, mandate binding arbitration if the parties cannot agree to a contract, and greatly enhance penalties on employers who resist the unionization of their employees unlawfully.

Multiple reports in the last few days indicate that Senate Democrats have made a deal that will result in a Senate vote this September, where passage is anticipated. Supporters of the deal—spearheaded by Senators Sherrod Brown (D-Ohio), Tom Carper (D-Del.), Mark Pryor (D-Ark.), Charles Schumer (D-N.Y.) and Arlen Specter (D-Pa.)—hope it overcomes the reservations of moderate Democrats who have expressed opposition to the bill as it is presently constructed.

The proposed deal would replace card-check provisions with an election within five to 10 days from the date of filing a petition. The National Labor Relations Board's internal rules currently require an election within 45 days of the date of the petition. Consequently, under the modified EFCA, an employer may have little time to form an effective counter-campaign if it waits until receiving notice of the petition before taking action. Since the deal proposes to eliminate the 12-day period (under current procedures) during which an employer can contest the appropriateness of a voting unit and the status of supervisors, unprepared employers may have to accept almost any bargaining-unit construct proposed by the union.

Other possible, but unconfirmed, aspects of the deal include a denial to employers of the right to require employees to attend meetings on work time to discuss unionization issues, a requirement that union agents be given full access to the workplace following the filing of a petition, and the right of the union to employees' names and addresses immediately upon the filing of the petition.

The deal would leave in place mandatory arbitration to set the terms of a first contract and enhanced penalties on employers (up to \$20,000 per occurrence and treble back-pay damages) that unlawfully interfere with or discriminate against employees engaged in union organizing activity.

If EFCA passes with the provisions contemplated in the deal, an employer that wishes to have an effective strategy to remain union-free must, at a minimum, consider the following measures:

- Have employee policies, systems and procedures that neutralize employee desires for third-party representation;
- Have employees in units that are the most difficult for unions to organize and that can be proven, within 24 hours of the filing of a union petition, to be the only appropriate units for union representation;
- Designate which employees are supervisors, as defined by the National Labor Relations Act, and be able to prove it;
- Train supervisors with regard to unions, the employer's position on unions, how unions organize, the early signs of union activity, reasons why the workplace should be union-free and how to talk to employees about unions;

- Have an effective and ongoing employee-education program about unions, including the meaning of union authorization cards, the individual and organizational costs of unions and why unions would not be advantageous for employees in that workplace;
- Have a rapid-response program that will launch an effective campaign against unionization from the instant organizing is detected and, if organizing is not detected until the petition is filed, that will have employees ready to vote "No" to a union within five working days.

For Further Information

If you would like more information about EFCA, please see our earlier published alerts on [*The Employee Free Choice Act: Is Your Organization Prepared?*](#) and [*Employee Free Choice Act Moving Forward Ahead of Schedule: Is Your Company Ready?*](#)

If you would like more information regarding ways to prepare your company for the anticipated changes to the National Labor Relations Act and its provisions, please contact any [member](#) of the [Employment, Labor, Benefits and Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.