

Employee Free Choice Act Moving Forward Ahead of Schedule: Is Your Company Ready?

March 13, 2009

After weeks of pro-labor efforts to boost popular and congressional support for the passage of the historic Employee Free Choice Act ("EFCA"), EFCA was introduced in the U.S. House of Representatives (H.R. 1409) and Senate (S. 560) on March 10, 2009, months ahead of when was previously expected. The bills were introduced in the same form that had passed the House last year, but which stalled in the Senate by a Republican filibuster. If passed, EFCA will result in the most sweeping changes to the National Labor Relations Act ("NLRA") since its passage more than 70 years ago. These changes – all of which are exceedingly labor-friendly – will make it easier for unions to organize, obtain an initial contract and obtain stiff penalties against employers for alleged campaign and bargaining infractions. Is your organization ready for the substantial organizing and fiscal challenges EFCA may present for it?

What Does EFCA Provide?

EFCA has three key components, each of which substantially departs from existing law in complete favor of organized labor:

- First, EFCA will require employers to recognize unions as the representative of their employees on the sole basis of signed authorization cards obtained from employees by union organizers. No longer will employees who frequently sign authorization cards under pressure from union organizers have the opportunity to vote against union representation in a secret ballot election—there is no mechanism for employees to ask for an election. Since authorization cards are typically solicited without the employer's knowledge, there is likely to be no "campaign" period before an employee is asked to decide whether they want a union. Currently, election campaigns provide the opportunity for employees to acquire information from both sides on the issues, ask questions, challenge representations made by the union and gain information to evaluate the union's "pitch." It is important to note that EFCA provides no similar card-check rights for employees who want to decertify an incumbent union.
- Second, EFCA will mandate interest arbitration of the terms of a first contract covering a period of two years if the parties do not reach agreement within 120 days of the commencement of the negotiation process. Federal arbitrators will be given the power to decide what private businesses can and cannot afford to pay workers in wages and provide to them in benefits as well as what work rules make sense for their daily operations. Interest arbitration applies even if the union engages in bad-faith bargaining in order to get there.
- Third, EFCA will impose treble damages on employers who are found to have terminated employees in connection with organizing drives or first contract negotiations, and impose penalties of up to \$20,000 per violation of the NLRA. It also authorizes federal courts to issue injunctions to stop or reverse an employer's business decisions (e.g., mergers, layoffs, transfers of operations, facility closures, etc.) if it believes they are motivated in part by such union-related activity. What may not be surprising is that no penalties are included for union intimidation in the organizing or bargaining processes.

What Is the Current Political Climate for EFCA's Passage?

Duane Morris' Government Affairs LLC, our firm's affiliated governmental consulting entity, is monitoring the political climate for EFCA's passage on a daily basis. Although some Democratic Party supporters of EFCA have expressed concern about its ramifications for the business community, particularly in the current economic recession, EFCA is widely expected to pass either in its current form or in a version very close to it. President Obama was a co-sponsor of EFCA when he was a senator, and he has continued to be a supporter of organized labor as a whole and EFCA in particular. In a White House interview last month addressing the economic stimulus package, President Obama reiterated his support for EFCA and discussed the business community's contention that EFCA would increase the costs of doing business at a time when it can be least afforded, stating: "I don't buy the argument that providing workers with collective-bargaining rights somehow weakens the economy or worsens the business environment. If you've got workers who have decent pay and benefits, they're also customers for businesses." And just last week, Obama told the AFL-CIO's Executive Council at its annual meeting that "as we confront this [economic] crisis . . . and pass the Employee Free Choice Act, I want you to know that you will always have a seat at the table." The congressional leadership has suggested the Senate will address the EFCA in late April of this year.

What Can Employers Do to Protect Their Workplace?

Employers may want to contact their congressional representatives to explain how their businesses may be negatively impacted by EFCA. They may also be wondering what they could be doing now to protect their employees and workplace. In our [December 3, 2008 Alert](#), we laid out a 10-step approach to EFCA, which employers may wish to consider when analyzing their potential to be the target of a union-organizing effort. Employers may also want to ensure that they

implement best practices, conduct supervisory and employee training and have a rapid response team and organizing campaign in place.

About Duane Morris

[Duane Morris' EFCA Task Force](#) has prepared a detailed Employer's Guide to [EFCA](#) to assist employers with preparing their workforces for the impact of EFCA. Duane Morris will also be addressing EFCA and providing its suggestions for meeting EFCA's challenges in its upcoming Workplace Law and Practice Seminar Series, to be held at the following times and locations across the country.

May 5, 2009: Philadelphia

May 12, 2009: Chicago

May 14, 2009: Washington, D.C.

May 19, 2009: San Francisco

May 20, 2009: San Diego

May 21, 2009: New York City

About Duane Morris Government Affairs LLC

Duane Morris Government Affairs LLC, a wholly-owned subsidiary of the firm, lobbies Congress on this and similar bills on behalf of their clients.

For Further Information

If you have any questions regarding the EFCA or Duane Morris' seminar series, or would like a free copy of our proprietary Employer's Guide to EFCA, please contact any [member](#) of the [EFCA Taskforce](#), any [member](#) of the [Employment & Immigration Practice Group](#), [Duane Morris Government Affairs LLC](#) or the attorney in the firm with whom you are regularly in contact.