Dinsmore&Shohl LLP
ATTORNEYS

Employee Free Choice Act Becoming Law

What Congress rejected, the NLRB simply mandated

Mark A. Carter

August 3, 2011

As seen in the *Charleston Daily Mail*.

In 2010, organized labor condemned the bipartisan vote in the United States Senate that killed the Employee Free Choice Act. Employees, prematurely, celebrated the fact that their right to a secret ballot in elections determining union representation was secure. EFCA, or the "card check" bill, would have eliminated the sacred right of employees to participate in their union elections by secret ballot.

It would have substantially increased penalties on employers (but not unions) for violating the National Labor Relations Act. It would have obtained other "wish list" items for unions that no Congress ever intended, as re-emphasized with their vote. Those who believed the card check bill was gone are now realizing that was naive. Where the current administration has failed to persuade Congress to adopt its legislative agenda, time and again, it has waived its regulatory wand and enacted the failed "legislation" as "regulation." Magically, it becomes the law of the land.

Since the rejection of the Employee Free Choice Act, the administration, largely through the National Labor Relations Board, has brought the legislation the Congress killed back to life. Consider these recent regulatory initiatives of the NLRB:

- Expanded use of mail and Internet balloting in union elections.

Why? Because these ballots are not cast in secret. Union officials could monitor the voting, accomplishing the primary objective of EFCA — a vote outside the secret ballot booth and under the watchful eye of the candidate;

- A dramatic increase in financial penalties against employers.

While the NLRB has awarded simple interest on money judgments for 75 years, the NLRB now imposes daily compounding interest. This is the difference between a loan from Uncle Bob and your VISA bill;

- "Ambush elections" are being pursued, shortening the period of electioneering in a union campaign from 42 to 10 days, with the net result that employees know as little as possible about what they are voting for or against;
- New regulations from the U.S. Department of Labor so onerously increase reporting requirements on management lawyers and consultants that many will cease serving employers at all, depriving them of critical advice on how to comply with the law and not violate it;
- Universal posting obligations imposed on ALL employers explaining how employees can organize a union.

These notices would have to be posted by every employer in every worksite that is under the NLRB's jurisdiction (which includes virtually all private-sector employers) forever;

- And, of course, we saw in the Boeing complaint that if an employer with a unionized facility wants to expand its business to another facility, the NLRB may shut the new facility down unless it is union.

Remember, the Boeing plant in North Charleston, S.C., was unionized until the employees there decertified the union. After they decertified, the NLRB said they could not do work that their former brothers and sisters did. Sometimes sibling rivalry costs you your job. The bottom line is that under the current administration, the 6.9 percent of private-sector workers who belong to a labor union are experiencing virtually all of the benefits of the Employee Free Choice Act, and more.

Generally these benefits are coming at the expense of the 93.1 percent of Americans who are not members. This is not the kind of math that political strategists like. They are concerned the majority will feel abused and mistreated. At a time when unemployment rates are over 9 percent and rising, the administration should be concerned about casting aside the votes of our representatives in Congress and implementing measures that radically tilt the level playing field Congress sought to preserve. The administration should also be concerned about the 93.1 percent of us it is tilting the playing field against.