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## The Employee Free Choice Act – What’s an Employer to Do?

The labor movement’s top legislative priority, the Employee Free Choice Act (EFCA), proposes the most sweeping set of amendments to the National Labor Relations Act (NLRA) since passage of the Taft-Hartley amendments in 1947 and, possibly, in the NLRA’s 75-year history. If passed, EFCA will dramatically alter the landscape of labor-management relations in favor of unions seeking to organize nonunion employers.

The EFCA proposes significant departures from three long-standing NLRA principles. First, the EFCA will either virtually eliminate secret-ballot elections, the primary method by which employees express their preference on the issue of unionization, and allow labor organizations to unionize workforces simply by directly soliciting and obtaining signatures from a majority of the employees in an appropriate bargaining unit, or condense the period from a union’s filing of a representation petition to the election to five to 10 days. Second, the EFCA will force employers into “interest arbitration” for the first collective bargaining agreement if the parties fail to negotiate a mutually acceptable contract within 120 days. Third, the EFCA will fundamentally alter the remedial nature of the NLRA by imposing treble-backpay awards and civil damages against employers for improper conduct during a union organizing drive, without

any corresponding increase in penalties for union misconduct.

The chances for passage of at least some version of the EFCA this year have improved dramatically from last year, when it easily passed the House but was blocked by a threatened filibuster in the Senate. The election of President Barack Obama, who cosponsored the EFCA last year, as well as Democratic gains in the Senate last fall and Al Franken’s (D-Minn.) recent victory in Minnesota – which gave Democrats control over 60 Senate seats, the number needed to overcome any Republican filibuster – increased the chances of the EFCA’s passage in some form in the short term. In fact, reports have indicated that Senate Democrats have made a deal that will result in a Senate vote this fall. 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 drafted.

This article examines: (1) the representation and collective bargaining process under the NLRA; (2) how the provisions of the EFCA, as presently drafted, will make it easier for labor organizations to organize nonunion workforces and will fundamentally change the good-faith bargaining pro-

cess; (3) potential revisions to EFCA; and (4) steps employers can take to be ready for the changes the EFCA is expected to have on the organizing and collective bargaining processes.

### No Secret-Ballot Election

#### The Union Representation Process Under Current NLRA Law

The key provision of the EFCA is its virtual elimination of an employee’s long-standing right to a secret-ballot election to vote for or against union representation. Under current law, the representation process begins with a demand for recognition by the union. If the employer declines to recognize the union voluntarily, the union may file a representation petition with the National Labor Relations Board (NLRB or the “Board”) regional office where the bargaining unit is located. The petition must be supported by a “showing of interest,” which is typically satisfied by signed “authorization cards,” dated no more than one year prior to the petition date, from at least 30% of employees in an appropriate bargaining unit. As a practical matter, most unions will not file a representation petition until they have obtained signed authorization cards from at least a supermajority (60% to 70% or more) of the employees in the proposed unit. Notwithstanding a union’s demand for recognition based upon its claim to the employer that it has a majority, as evidenced

by the signed authorization cards, an employer has an absolute right to reject a union's demand for recognition. For example, the employer may not be convinced that a majority of its employees have knowingly selected to be represented. If an employer declines to voluntarily recognize the union, the union files an election petition with the NLRB, and the Board schedules a federally supervised secret-ballot election during which employees have an opportunity to vote on the question of representation.

The period of time between the filing of the petition and the election (on average six to seven weeks) is the "campaign period." During this time, the employer and the union have an opportunity to advise employees about the practical implications of union representation by distributing literature and holding informational meetings. Employees discuss the issues, raise questions, and request information and answers to their questions from both their employer and the union. With unionization of the private sector currently at an all-time low of 7.6%, this campaign period has become an increasingly important time for employers to answer questions from employees who, in large part, have limited exposure to unions, little experience with union representation or the election and bargaining process, and little knowledge of their legal rights in the face of organizing efforts. The Board closely regulates the campaign process and the parties' conduct by imposing content and time restrictions on electioneering activity and by providing a forum for challenges to improper or coercive campaign efforts. Objections to conduct affecting the outcome of an election are resolved by an investigation and a hearing.

The secret-ballot election, like any election in our democracy used to select local, state and federal representatives, affords an opportunity for informed voters to determine whether they want to be represented by a union in a neutral and anonymous setting, free from judgment, intimidat-

ion or fear of reprisal. Employees who have signed authorization cards for the union nevertheless have a right to vote "no" in the election if they have changed their mind, or had signed in order to have the opportunity to learn what the union was about. Only if a union receives a majority of votes cast in an election will the Board issue a "Certification of Representative."

### Representation Election Procedure Under the EFCA

The EFCA eviscerates the time-tested and democratic procedural safeguards of the secret-ballot election. Specifically, the EFCA amends Section 9(c) of the NLRA to provide that when a petition is filed by an individual or labor organization claiming to represent a majority of the employees in a unit appropriate for the purposes of collective bargaining,

[i]f the Board finds that a majority of the employees . . . has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the Board shall not direct an election but shall certify the individual or labor organization as the representative described in subsection (a).<sup>1</sup>

In other words, the Board will issue a Certification of Representative based solely on authorization cards signed by a simple majority of the employees in an appropriate unit – with no election and no campaign period for the employer to communicate with its employees. In this regard, the EFCA effectively overturns the U.S. Supreme Court's decision in *Linden Lumber Co. v. NLRB*,<sup>2</sup> which held that an employer does not commit an unfair labor practice by declining to recognize a union based on a majority of authorization cards.<sup>3</sup>

While organized labor contends that signed authorizations provide all that is necessary to determine employ-

ee free choice, significantly, the EFCA applies a different set of rules regarding decertification elections. The EFCA explicitly restricts its application to circumstances where "no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit."<sup>4</sup>

Both the Board and the courts "have long recognized that the freedom of choice guaranteed employees by Section 7 is better realized by a secret election than a card check."<sup>5</sup> Note, however, there is no mechanism for the employees to request an election, leaving the decision entirely up to the union. A union with cards from a majority of employees is unlikely to request an election when it can "win" and be certified on the basis of the cards and avoid a challenge. Thus the EFCA's proposed sole reliance on authorization cards can pose significant dangers for the employer.

First, the legislation is devoid of any safeguards to ensure that a union will not gain representative status through coercive tactics. Union representatives and employees fervently advocating unionization have historically employed a variety of improper tactics in connection with solicitation of authorization cards, including peer pressure, misrepresentation, harassment and intimidation. It is not uncommon for union representatives to unlawfully promise that union initiation fees will be waived only for employees who sign authorization cards or to threaten that employees who do not sign cards will be terminated if the union is certified as the employees' exclusive bargaining representative. Second, there are no safeguards to prevent signatures being obtained by fraud or forgery. The secret-ballot election currently serves as an inherent check on improper organizing efforts because it allows employees who may have been improperly coerced into signing an authorization card the opportunity to anonymously vote for or against representation under the protected veil of a secret ballot. By removing this layer

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of protection, there is no mechanism in place to ensure that a union's certification as a bargaining representative was achieved through proper and noncoercive efforts.

Furthermore, given the discreet – even stealthy – nature of card-signing campaigns, an employer will often have little or no notice of union efforts to organize its workforce until it is too late and will have no opportunity to campaign against organizational efforts. As a result, the EFCA actually facilitates employees' having to make a choice on such an important issue without the benefit of hearing all sides – getting the full information and answers to their questions that election campaigns provide. Since most labor contracts contain "union security" clauses that compel all employees (even those who would decline representation) to pay union dues, unions have a significant financial incentive to organize as many employees as possible. Solicitation of authorization cards under the EFCA is both easy and inexpensive, and unions are likely to increase organization efforts in nonunion workplaces and in traditionally nonunion industries. At its core, the removal of the secret-ballot election will make it easier for unions to organize employers of all sizes, across all industries.

### Imposition of First Labor Contract The Current Collective Bargaining Process Under the NLRA

Once a union wins an election, the union and the employer engage in collective bargaining. The duty to bargain is set forth in Section 8(d) of the NLRA:

To bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agree-

ment reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.<sup>6</sup>

The NLRA does not prescribe any specific time period within which negotiations must begin or end, and states only that the parties must "meet at reasonable times and confer in good faith."<sup>7</sup> The parties can negotiate indefinitely until reaching the point of agreement or impasse.<sup>8</sup> The NLRA does not require the parties to make concessions or agree to the demands of the other party; nor does it require participation in mediation or binding arbitration of contract disputes. Rather, the NLRA is premised on the understanding that the market forces at play will bring pressure on the parties, resulting in a resolution of the dispute.

Unlike certain public-sector labor laws (such as New York's Taylor Law) that prohibit public employees from striking and instead provide for interest arbitration or legislative proceedings to resolve impasses in labor disputes affecting essential public services – like the police, firefighting, education and the judiciary – the NLRA provides for no such impasse-breaking mandate. In fact, neither party may insist that the other agree to arbitration of contract terms as a substitute for "good-faith bargaining." Indeed, interest arbitration is not even a mandatory subject of bargaining.<sup>9</sup> Instead, the principles of the NLRA promote the right of employers and unions to engage in good-faith collective bargaining without any artificial restraints on free-market forces.

### Collective Bargaining Under the EFCA

The EFCA once again fundamentally alters the freedom of contract reflected in the NLRA. Under the EFCA, the employer would be required to enter into negotiations within *10 days* after the union requests bargaining for an initial contract. Specifically, the EFCA would amend Section 8 of the NLRA to add a new provision, which states that

not later than 10 days after receiving a written request for collective bargaining from an individual or labor organization that has been newly organized or certified as a representative as defined in Section 9(a) . . . the parties shall meet and commence to bargain collectively and shall make every reasonable effort to conclude and sign a collective bargaining agreement.<sup>10</sup>

The EFCA would also provide that, if an employer and a union are engaged in bargaining for their first contract and are unable to reach agreement within 90 days, either party may refer the dispute to the Federal Mediation and Conciliation Service (FMCS or the "Service") for mediation:

If after the expiration of the 90-day period beginning on the date on which bargaining is commenced, or such additional period as the parties may agree upon, the parties have failed to reach an agreement, either party may notify the Federal Mediation and Conciliation Service of the existence of a dispute and request mediation. Whenever such request is received, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.<sup>11</sup>

If the FMCS is unable to bring the parties to agreement after 30 days of mediation, the dispute will be referred to arbitration, and the results of the arbitration will be binding on the parties for two years. As stated in the EFCA:

If after the expiration of the 30-day period beginning on the date on which the request for remediation is made . . . or such additional period as the parties may agree upon, the Service is not able to bring the parties to agreement by conciliation, the Service shall refer the dispute to an arbitration board established in accordance with such regulations as may be pre-

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scribed by the Service. The arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties.<sup>12</sup>

In other words, if an employer and a union cannot reach agreement on an initial contract within 120 days, the union can request an independent arbitrator to impose on the employer initial contract terms, including wages, benefits, hours and other economic and noneconomic terms and conditions of employment. The resulting contract would be in place for two years, and the employer would be precluded from appealing the arbitrator's ruling, regardless of the economic or organizational burden it may impose.

This change in the law is significant for a number of reasons. Currently, there is no requirement of binding interest arbitration in the contract negotiation process, and the parties must reach agreement on an initial contract through collective bargaining – a process that can take nine months to a year or even more – considerably longer than the four months provided by the EFCA. Not only does the EFCA severely truncate the collective bargaining process for the first labor contract, which serves as the foundation for all future collective bargaining, it provides for wholesale imposition of terms of employment by an arbitrator who likely has no understanding of the employer's unique business needs and challenges. For example, the arbitrator could determine that seniority, rather than merit, should determine decisions regarding promotions, transfers and layoffs; require the employer to make mandatory contributions to a union's under-funded pension plan; prohibit the employer from subcontracting certain work that can be obtained more cost-effectively from another source; or establish holiday schedules, amounts of vacation and wage premiums, such as overtime pay after eight hours a

day rather than 40 hours a week. In these uncertain economic times, any one of those changes could cripple an employer's competitive standing.

As a result of these provisions, the traditional economic weapons of bargaining (*i.e.*, strikes and lockouts) would, for all practical purposes, be eliminated from first contract negotiations. This will inevitably strengthen a union's position during its card-check campaign because employees will not have to fear a period of unemployment due to potential strikes or lockouts. As previously noted, historically interest arbitration has been limited to resolving contract disputes for critical public sector services, such as the police or firefighting, where because of public safety concerns the public employees do not have the right to strike.

As drafted, the EFCA provides no substantive guidelines regarding the nature of the arbitration or the procedures to be followed. Most arbitrators have little or no experience in creating contracts, particularly first contracts and particularly those where private-sector competitive issues are involved. Yet the EFCA contains no guidelines for the exercise of this formidable arbitral authority; nor does EFCA provide a mechanism to appeal the arbitrator's determination. For example, will the arbitrator have absolute discretion to write the contract as he or she sees fit or will the arbitrator be subject to a "baseball-style" approach where he or she is forced to choose wholesale one party's contract (or a modified baseball style in which he or she may pick and choose among parties' proposals on each subject)? This gives arbitrators the ability to write collective bargaining agreements without any governing standards or guidelines, so there will be no uniformity to serve as precedential guidance for the parties.

### Increased Penalties Current Remedial Measures Under the NLRA

Under current law, relief under the NLRA is remedial in nature, not punitive. The NLRA was designed to make

the offended party "whole" for its losses. Remedies against employers for unfair labor practices are generally limited to cease-and-desist orders, reinstatement and back pay, posting of notices to employees and injunctive relief. There are no fines, penalties, compensatory damages or attorneys fees, except in extraordinary cases.

### Penalties Under the EFCA

The EFCA would unreasonably strengthen the NLRB's remedies for unfair labor practices committed by employers without making any corresponding changes to remedies for unfair labor practices committed by unions.

#### 1. Injunctions

The EFCA would *require* the NLRB to seek a federal court injunction against an employer whenever there is reasonable cause to believe that the employer has threatened, discharged or discriminated against employees or engaged in conduct that significantly interferes with employee rights during an organizing drive or first contract negotiations.

Specifically, the EFCA would amend Section 10(l) of the NLRA to require the General Counsel to seek injunctive relief whenever it is charged that any employer (1) "discharged or otherwise discriminated against an employee in violation of subsection (a)(3) of Section 8"; (2) "threatened to discharge or to otherwise discriminate against an employee in violation of subsection (a)(1) of Section 8"; or (3) "engaged in any other unfair labor practice within the meaning of subsection (a)(1) that significantly interferes with, restrains, or coerces employees in the exercise of the rights guaranteed in section 7," either (a) "while employees of that employer were seeking representation by a labor organization" or (b) "during the period after a labor organization was recognized as a representative defined in section 9(a) until the first collective bargaining contract is entered into between the employer and the representative."<sup>13</sup>

Unions could use Board-initiated injunctions as a powerful weapon to enjoin important employer plans, such as layoffs, mergers, transfers of work, changes in operations, etc., arguing that the plans are intended to interfere unlawfully with union organizing efforts. Employees getting wind of these changes could seek protection from the union, which could argue that the changes are retaliatory for organizing efforts that were actually commenced only in reaction to the planned changes.

## 2. Treble Back Pay; Liquidated Damages

The EFCA increases the amount an employer is required to pay when an employee is discharged or discriminated against during an organizing campaign or first contract negotiations to three-times back pay. EFCA amends Section 10(c) of the National Labor Relations Act to provide

[t]hat if the Board finds that an employer has discriminated against an employee in violation of subsection (a)(3) of section 8 while employees of the employer were seeking representation by a labor organization, or during the period after a labor organization was recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract was entered into between the employer and the representative, the Board in such order shall award the employee back pay and, in addition, 2 times that amount as liquidated damages.<sup>14</sup>

## 3. Civil Penalties

The EFCA also provides for civil fines up to \$20,000 per violation against employers found to have willfully or repeatedly violated employees' rights during an organizing campaign or first contract negotiations. The EFCA would add civil penalties to the NLRB's remedies in certain unfair labor practice cases. The EFCA provides that

[a]ny employer who willfully or repeatedly commits any unfair

labor practice within the meaning of subsections (a)(1) or (a)(3) of section 8 while employees of the employer are seeking representation by a labor organization or during the period after a labor organization has been recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract is entered into between the employer and the representative shall, in addition to any make-whole remedy ordered, be subject to a civil penalty not to exceed \$20,000 for each violation. In determining the amount of any penalty under this section, the Board will consider the gravity of the unfair labor practice and the impact of the unfair labor practice on the charging party, on other persons seeking to exercise rights guaranteed by this Act, or on the public interest.<sup>15</sup>

## 4. Result of EFCA's Increased Penalties

The extreme remedies in the EFCA – including injunctions, treble damages and civil penalties – would have the effect of putting NLRA violators on par with criminal RICO conspirators. Instead of leveling the playing field, unions and employees would be incentivized to file meritless unfair labor practice charges to seek interference with an employer's planned operational changes, substantial economic settlements and/or to up the ante in terms of bringing pressure to force employers to capitulate to union demands.

## Legislative History of the EFCA

The EFCA was first introduced in Congress on November 21, 2003, by Rep. George Miller (D-Calif.) and Sen. Edward Kennedy (D-Mass.). The bills died in committee in both the House and Senate, were reintroduced by the same sponsors on April 19, 2005, and once again died in committee. Representative Miller reintroduced the EFCA in the House of Representatives on February 5, 2007, and the House passed the bill (H.R. 800) on March 1,

2007, by a vote of 241-185. On March 29, 2007, Senator Kennedy reintroduced the Senate version (S. 1041) in the Senate with 46 cosponsors, including then-Senator Obama. Three months later, on June 26, 2007, the bill was pulled after the Senate failed to invoke cloture – the 60 votes required to end debate on the bill – by a vote of 51-48.

Proponents of the EFCA contend that the legislation is needed to bypass an election process that favors employers and denies employees the opportunity to self-organize and designate representatives of their own choosing. Specifically, unions contend that employers avail themselves of administrative and procedural delays between the filing of a petition and the holding of an election. Yet the length of time between the union's filing of a petition and a secret-ballot election has *decreased* over the years. Proponents also argue that the EFCA is needed to counter alleged unlawful conduct by employers during the campaign period and the inherent advantage employers have to speak with their employees during "captive audience" meetings held during working hours. Notably, however, statistics demonstrate that unions have filed objections to employer conduct in only a small number of instances. Out of the 1,850 representation elections in 2006, objections were filed in only 177 cases (a number which includes objections filed by employers against unions).<sup>16</sup> Moreover, it is not clear how many of those 177 objections were meritorious and resulted in an election being set aside.<sup>17</sup>

Significantly, unions already have a remedy for employers who engage in unfair labor practices that result in an unfair election or that undermine a union's majority. Not only can a union get the election set aside, but, in egregious cases, the union can obtain a bargaining order that requires the employer to recognize and bargain with it without a showing of majority status.<sup>18</sup> Given that unions won almost 67% of Board-supervised representation elections in the first half of 2008, it is unlikely that employers have an

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undue advantage that must be remedied by enactment of this legislation. Indeed, the real thrust of the EFCA is that it represents an opportunity for organized labor to reverse the drastic decline in private sector unionization over the past several decades.

Year	Percentage Organized <sup>19</sup>
1953	35.7%
1973	24.2%
1983	16.5%
1993	11.1%
2003	8.2%
2008	7.6%

### Likely Reach of the EFCA

The EFCA is likely to have far-reaching effects on employers across all industries, including those that have never before been the target of a successful union organizing campaign.

### Nontraditional Industries/ Workforces

Small- and medium-sized employers would be ill advised to assume that they are insulated from organization. Indeed, more than 70% of employers involved in NLRB elections had fewer than 50 employees in the bargaining unit.

Under 10	24.7%
10–19	18.3%
20–29	12.6%
30–39	8.8%
40–49	6.1%
Under 50	70.5% <sup>20</sup>

In this current economic environment where workers are increasingly concerned about job security and are dissatisfied with employers' efforts to control costs, no industry is immune from union organization. Even white-collar industries that have not traditionally been the target of union campaigns may experience a card-check campaign. The prospect of significant union dues and the ease with which unions can obtain representative status without an election will create a surge in organizing efforts.

### Right-to-Work States

Right-to-work laws prohibit agreements between unions and employers

that mandate membership or payment of union dues or "fees" as a condition of employment, either before or after hiring.<sup>21</sup> Unions have traditionally limited their organization efforts in right-to-work states given the expense of running an election campaign and the unavailability of automatic dues payment from each employee in an organized bargaining unit. Upon passage of the EFCA, however, workers in right-to-work states will be just as likely as those in other states to find themselves unionized because of the ease and modest costs of a card-check campaign.

### Potential Revisions to EFCA

Discussion of potential modifications to the EFCA has included the following:

- having the NLRB run secret-ballot elections, but in a substantially shortened time from petition to election (*i.e.*, within five to 10 days from the date of filing a petition);
- making employer captive-audience speeches an unfair labor practice unless the union is given equal opportunity under identical circumstances for the same;
- making any employer or union captive-audience speeches an unfair labor practice if held within 24 hours of the election (currently, an employer captive-audience speech within the 24-hour period prior to an election is objectionable conduct that can result in an employer election victory being set aside);
- making any employer or union visit to an employee's home, if related to an election campaign, an unfair labor practice;
- increasing enforcement and punitive remedies, such as imposing civil penalties for willful violations of the NLRA, treble damages for discriminatory discharges, reasonable attorney fees on a finding of bad faith, harassment or unnecessary delay and *Gissel* bargaining orders where a fair election is deemed not possible by the NLRB;

- more closely regulating the negotiating process, including mandatory bargaining commencement dates, the imposition of a bargaining schedule, costs and attorney fees to combat bad-faith bargaining and requiring mandatory mediation after a period of 120 days;
- broadening provisions for injunctive relief with reasonable attorney fees upon a finding that a party is not acting in good faith; and
- streamlining NLRB procedures.

Other possible, but unconfirmed, aspects of a potential deal include denying employers the right to require employees to attend meetings on work time to discuss unionization issues, requiring 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.

### Steps Employers Can Take to Prepare for the EFCA

Given the potentially significant impact of the EFCA in its current form, or even in a slightly watered-down version, nonunion employers must understand the challenges and related business costs the EFCA presents and prepare now for the union organizing efforts companies may soon face.

### Conduct a Vulnerability Assessment of the Workforce

Under the EFCA, nearly all employers will be at risk of encountering an aggressive union organizing drive. Employers should examine their workforces to determine the following:

- The vulnerability of their employees to lawful union efforts, as well as unlawful organizing tactics (*e.g.*, fraud, misrepresentation, harassment, threats, coercion, etc.). Some employees may be particularly vulnerable to harassment, intimidation or coercion to sign a union authorization card. Others may be vulnerable to misleading statements by organizers,

misrepresentation or fraud. They may lack a full understanding of the significance of signing a union card – for example, due to language issues or a lack of sophisticated knowledge of their rights or the implications of unionization.

- The vulnerability of the employer and its various facilities to organizing efforts based on its operational structure, workplace practices, policies and relationships with its employees.
- The vulnerability of business plans that may impact operations and personnel and, in so doing, could be viewed as unlawful or subject to injunctive relief if implemented during an organizational campaign.

### **Documentation of Business Planning**

In this current economic climate, many employers may be contemplating or planning discipline, changes in compensation or benefits, a transfer of work to another facility, layoffs or other restructuring. If any of these are implemented during a union organizational effort (perhaps one the employer may not even be aware of at the time of the planning), or an organizational effort is started in reaction to word of impending plans, the union may charge that implementing such plans during an organizational campaign would be discriminatory or interfere with employee rights.<sup>22</sup> The EFCA may require the NLRB to seek an injunction to stop implementation of the plans. Treble-backpay awards and costly civil penalties could be sought if any such changes in this period are later found to be discriminatory (*i.e.*, motivated, in whole or in part, by anti-union animus).<sup>23</sup> Careful documentation of personnel decisions and planned business changes, and the timing and reasons for those actions, may be critical.

### **Implement and Maintain Best Practices**

Since unions will likely seek to organize and get employees to sign cards

before employers are aware of their activity, an employer's best defense may be to create a well-run workplace, through the implementation of "Best Practices in Human Resources," so that employees will be more likely to reject unionization when approached. Employers should evaluate current personnel policies and practices to determine whether the current relationships between management and employees will make it harder or easier for unions to persuade employees to organize. Examples of Best Practices include: full compliance with applicable law ("respect for employee rights"), fair and nondiscriminatory treatment of employees, elimination of actual or perceived favoritism in personnel decisions, prompt and accurate communications on issues that affect employees, managed employee expectations, effective processes for promptly resolving disputes in-house, and competitive compensation and benefits.

### **Develop Response to Union Organizing Strategies**

In the event employees may be subject to "mischief" by union organizers, such as noted above, employers should adopt a strategy to assist employees in dealing with this misconduct. This includes training employees on what to do if they feel harassed or coerced in any way to sign an authorization card and providing them with a source of information and a place they can go to get answers to questions they may have about their employment, the union organizing effort or related matters. Consider also adopting a strategy to manage the impact of union organizing efforts, *i.e.*, promulgating lawful no-solicitation/no-distribution rules, evaluating operational and organizational issues that affect the scope of the "appropriate" unit, and identifying those who qualify as "supervisors" and who therefore will be part of the management team to deal with organizing efforts. This team will train employees, gather intelligence on vulnerabilities to organizing and organizing activity and advocate the company

position on organizing. The correct identification of supervisors will be critical if the RESPECT Act,<sup>24</sup> another bill backed by organized labor that is designed to narrow the classification of supervisors exempt from the NLRA, is passed.

### **Training of Supervisors**

One important step an employer should take immediately is to train its supervisors to handle their increased responsibilities and broad role in dealing with the implications of the EFCA. That training regimen should include the following :

- **Communicating Best Practices.** Supervisors need to understand their vital role in implementing the employer's Best Practices in Human Resources, including developing effective communication skills and relationships with subordinates.
- **NLRB Rules.** The NLRB's rules governing the conduct of supervisors both before and during an organizational effort are often counter-intuitive – common sense and good motives are not enough to avoid violations. In light of the EFCA's significantly increased penalties for NLRA violations by supervisors, supervisors should be made keenly aware of the rules governing their conduct.<sup>25</sup>
- **Warning Signs.** Supervisors should be trained to recognize the earliest signs of employee unrest and union card-signing drives in order to provide the employer with the maximum amount of time to react and persuade employees on the issues.
- **Training the Trainers.** Human resources and supervisory personnel should be trained for their role in the training of nonsupervisory employees, as discussed below.
- **Campaigning on Substantive Issues.** If employers are fortunate enough to learn of a union organizing effort in sufficient time to persuade employees why unionization is not in their best inter-

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ests, supervisors should be prepared to provide employees with information they need to make an informed decision and which the union will not provide to them. They should also be prepared to deliver the employer's message, to listen to the employees' concerns and answer employees' questions in a knowledgeable, confident manner. Employers are unlikely to have sufficient time to conduct this training if they wait until they first learn of an organizing drive in the workplace.

### Training Employees

The EFCA gives the union a roadmap for organizing without a similar opportunity for the employer to provide information, discuss the issues or communicate its views to its workers. Thus, the EFCA puts a premium on effective action by the employer *before* an organizing campaign starts. Employers should consider training their current employees and new hires during their orientation on the following issues:

- **Best Practices.** Explain, even if the word "union" is never used, why the employees do not need a union. Supervisors can help employees understand and appreciate the employer's Best Practices, so that the union will have difficulty offering employees anything of sufficient value that would prompt them to sign a union card.
- **Union-Free Philosophy.** Explain the company's union-free philosophy and why/how that is likely to benefit the employee.
- **The EFCA and Authorization Cards.** Help employees understand the true legal significance of the cards and the implications of signing. Employees should know that by signing an authorization card they may be voting for a union without the benefit of information as to what they are getting themselves and the company into.
- **Dealing with Harassment, Coercion, Misrepresentation, Lack**

of Information/Discussion. If employees may be subject to "mischievous" by union organizers, the employer should prepare employees by explaining how to deal with such misconduct, how the employer can help protect them, and what resources the employer is providing to correct misinformation and answer questions.

- **Campaign Issues.** Review the facts and arguments on the key issues the employees can and will consider in deciding whether to sign an authorization card, or decline to do so ("campaign issues"). Since the "election campaign" as we know it may be a thing of the past after the EFCA, each employer may have to decide when the time is right to schedule this training for the employees.

### Rapid Response Team

For most employers, their first awareness of a union organizing campaign will come long after the union has started the effort. Thus, the employer is most often starting from behind. Employers should therefore be prepared to respond quickly and capably to a card-check campaign. This quick response task force should be composed of a small number of trained and prepared members of the management team. That team will have worked with outside counsel to prepare a well-thought-out plan to respond to a union organizing effort in the most effective manner.

### "Campaign in a Can"

Since the employer will likely need to communicate with its employees on the campaign issues and will have little time to prepare these materials, the Rapid Response Team should have a set of materials prepared and ready to go in the event an organizing effort is discovered.

### Preparation for Bargaining/Interest Arbitration

Under the EFCA, the time period for negotiating a first contract is extremely short, and employers may have little

time to prepare.<sup>26</sup> In the likely event the union will use the availability of arbitration as leverage in negotiations, the employer will need to be prepared for "interest arbitration," *i.e.*, an adversarial hearing before an arbitrator where the arbitrator's decision will be to impose the terms of a two-year labor contract on the parties.<sup>27</sup> In such proceedings, the employer's preparation of its contract proposals and its documented defense of the reasonableness of those proposals are important. Bargaining strategy should be planned early on. This includes the steps the employer can take to document its exercise of management rights that will support its position that the same should not be restricted in a labor contract.

### Conclusion

The EFCA is anticipated to change the labor law as we know it, making it substantially easier for unions to organize, more likely that employers will be saddled with expensive and restrictive labor agreements, and more costly to employers subject to union-filed unfair labor practice charges challenging an employer's actions. Prudent employers should take steps now to limit the likelihood of an EFCA organizing drive and to be ready to defeat one should it occur. ■

1. Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. § 2(a) (2009) (EFCA).

2. 419 U.S. 301 (1974).

3. A secret-ballot election would still be conducted if a representative petition is filed unaccompanied by a claim that the union represents a majority of employees in an appropriate unit. Given that few unions file petitions with less-than-majority support, the practical impact of the EFCA would be to virtually eliminate secret-ballot elections, but for decertification scenarios.

4. EFCA § 2(a).

5. *Dana Corp.*, 351 NLRB No. 28, at \*5 (2007).

6. 29 U.S.C. § 158(d).

7. *Id.*

8. At impasse, the employer may unilaterally implement new terms and conditions of employment reasonably comprehended by its final proposals, and the union may either walk away from the bargaining table or engage in a strike.

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attorneys under New York's Code." The *DePallo* Court's observation was clearly shaped by its view, shared with the *Whiteside* Court, that "a defendant's right to testify at trial does not include a right to commit perjury and the Sixth Amendment right to the assistance of counsel does not compel counsel to assist or participate in the presentation of perjured testimony." This has implications for the civil side as well. If in the constitutional context of representing a criminal defendant (as stated by the *DePallo* Court, again quoting *Whiteside*) "an attorney's duty to zealously represent a client is circumscribed by an 'equally solemn duty to comply with the law and standards of professional conduct . . . to prevent and disclose frauds upon the court,'" then, in the civil context, there is an even stronger argument that, at least since the *DePallo* decision in 2001, a litigator may reveal client perjury, notwithstanding the proviso to DR 7-102(B)(1).

In short, when you consider the developments described above, which took place prior to the adoption of Rule 3.3, you might agree that things have not changed as much as you think. Even under the Code, the duty to maintain client confidentiality has never been absolute, just as the litigator's duty of loyalty to a client has never been absolute. Under *DePallo*, a litigator arguably is permitted – even if not required – to reveal client perjury. Thus, while Rule 3.3 does effect a change in the litigator's relationship to a client, that change is not nearly as dramatic as you believe. It may further complicate the relationship between litigator and client, but the Court of Appeals seems to have struck the right balance in reminding litigators that no client has the right to testify falsely. The adversary system of justice depends upon litigators helping to preserve its integrity. According to *DePallo* and now Rule 3.3, a litigator's duty of loyalty and client confidentiality is circumscribed – that is, limited