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ALERT

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Recent Labor Law Changes Show That EFCA Is Still A Real Threat

The key objectives of the Employee Free Choice Act (EFCA) are to make union organizing easier, restrict the ability to campaign against unions, and punish employers for expressing their opinions that unionization is not in their companies' best interests. EFCA has been sitting dormant in Congress, but it has not been forgotten in Washington.

Senator Tom Harkin (D-Iowa) recently said he had "no higher priority" than to pass EFCA. The new head of the Service Employee's International Union reaffirmed that EFCA was "the main plank of the SEIU's legislative platform." Richard Trumka, president of the AFL-CIO, recently called on Congress to tack EFCA on to more popular legislation when he said, "There are multitudes of things we can get it attached to, and we will." Even a high ranking member of the Utility Workers Union of America said, "If we aren't able to pass the Employee Free Choice Act, we will work with President Obama and Vice President Biden and their appointees to the National Labor Relations Board to change the rules governing forming a union through administrative action."

Indeed, EFCA can become law through piecemeal rulemaking between the National Labor Relations Board (NLRB), the Department of Labor (DOL), and Executive Orders issued by the President of the United States. The recent change in election law at the National Mediation Board (NMB) showcases how easily labor law can be changed.

The NMB governs the Railway Labor Act in the same manner that the NLRB governs the National Labor Relations Act (NLRA). The Railway Labor Act applies mostly to companies in the railroad and airline industry. For 75 years, unions needed a majority of the entire bargaining unit (typically comprised of all employees of a class or craft regardless of location) to vote in favor of representation in order to represent the employees. Now, they need only a simple majority of voting employees to vote in favor of becoming unionized.

Determining union representation through a simple majority of votes cast is the same procedure used for NLRB elections. However, the RLA does not have a provision for decertifying unions once they

are elected as the NLRA does, and now a very small minority of employees (only those who vote) can essentially lock an employer into a union contract forever.

This new law was "enacted" by a 2-1 vote of the NMB members with the sole Obama appointee leading the change just weeks after being seated. As is custom, the changes were published and public comments were solicited. Nearly 25,000 comments were submitted in response to the proposed change, but the law was not changed in response to those comments.

With this change fresh in their minds, several Senators asked Craig Becker during his confirmation hearings whether he would participate in similar rulemaking efforts at the NLRB. Although Becker did not directly answer the question, he has written that he desires to allow unions to "bypass the union election and to gain union recognition outside the NLRB-supervised electoral process." According to him, unions and employers should have recognition agreements requiring employers to remain neutral during campaigns, grant union access to employees, and recognize the union based on a majority of employees' signatures.

The NLRB, like the NMB, will engage in active rulemaking for the first time in decades. The NLRB's new rules will likely drastically shorten the election window during union organizing campaigns, limit employer speech rights, give union organizers access to an employer's workplace, and recognize minority unions – bargaining units comprised of less than a majority of employees in a class or craft.

Secretary of Labor Hilda Solis is already seeking to use her power to accomplish one of these objectives by requiring employers to file financial records of money spent on seeking advice about unions or speaking to employees about union representation. Under proposed DOL rules, employers must file financial disclosure reports if an attorney or consultant is hired to give advice, even if they never speak to the employees, or if an "officer, supervisor, or employee" of the company speaks to employees about unions. Arguably included in the new rule is when the human resource department conveys the company's position on unions during employee orientation, and supervisors respond to employees' general questions about unions.

Penalties for non-compliance with this financial disclosure rule are a penalty of up to $10,000, one year in prison, or both. The rule would satisfy some of EFCA's objectives, namely, stifling employers' union-related speech, making it easier for unions to organize, and imposing stiff penalties for non-compliance. The proposed rule is now subject to a comment period, which may result in modifications or – as was the case with the NMB rule – may not.

Obviously, EFCA is not dead. Although the Congressional bill will likely not pass, unions and federal agencies are working to accomplish their goals through other avenues.

To obtain more information please contact the Barnes & Thornburg Labor and Employment attorney with whom you work, or a leader of the firm's Labor and Employment Law Department in the following offices: Kenneth J. Yerkes, Chair (317) 231-7513; Steven J. Whitehead, Atlanta (404) 264-4045; Norma W. Zeitler, Chicago (312) 214-8312; William A. Nolan, Columbus (614) 628-1401; Eric H.J. Stahlhut, Elkhart (574) 296-2524; Mark S. Kittaka, Fort Wayne (260) 425-4616; Michael A. Snapper, Grand Rapids (616) 742-3947; Peter A. Morse, Indianapolis (317) 231-7794; Kevin R. Coan, Minneapolis (612) 342-0324; Janilyn Brouwer Daub, South Bend (574) 237-1139; and Teresa L. Jakubowski, Washington, D.C. (202) 371-6366. You can also visit us online at www.btlaw.com/laborandemploymentlaw.