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Employment Alert: The Employee Free Choice Act and the RESPECT Act: How Should Employers Respond?

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The proposed Employee Free Choice Act (EFCA) and Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers (RESPECT) Act, both supported by the Obama administration, would amend the National Labor Relations Act (NLRA) in significant ways and potentially lead to an unprecedented revival of unionization in the United States.

Notably, under existing labor law, union-free employers have a reasonable chance to counteract a secretive organizing campaign due to secret ballot elections conducted by the National Labor Relations Board (NLRB) following a four to six-week "campaign" where the employer presents the employees with its side of the story. However, under the proposed EFCA, employers will have no time to "campaign" and will find themselves unionized without so much as a single ballot cast because employers will be forced to bargain with labor organizations that simply deliver authorization cards signed by a majority of employees. Signed authorization cards are easy to obtain by unions, particularly where an employer has not communicated why employees should not sign them.

As the passage of this legislation in the near future is quite likely, there is no better time than the present for union-free employers to be proactive in combating this expected new wave of organized labor.

The EFCA

If organized labor has its way and the EFCA (H.R. 800, S. 1041) is enacted, it will amend the NLRA in the following three significant ways, among others:

- Eliminating the long-standing practice of secret balloting by requiring the NLRB, following receipt of a petition, to investigate and, if applicable, certify a labor organization as a unit's exclusive bargaining representative without the need for an election, as long as a majority of employees in the unit execute authorization cards selecting a union. These secretive card-signing drives, susceptible to peer pressure and coercion, would stymie an employer's effort to educate employees on the benefits of remaining union-free. The typical six-week campaign period, where employees are exposed to "both sides of the story," would be a thing of the past.
- Guaranteeing a first collective bargaining agreement either through collective bargaining during a short time span or through binding arbitration, as follows:

  Requiring employers to begin bargaining with a newly certified union within 10 days of a request to do so;

  Permitting either party in the bargaining process to request mediation if the parties have not reached an agreement within 90 days of the start of bargaining; and

  Empowering a federal arbitration panel to set the terms of the initial collective bargaining agreement if the parties have not come to an agreement after 30 days of mediation. The binding agreement imposed by the arbitration panel will be valid for two years.

  Accordingly, employers will either have to agree to a first contract within 120 days of the start of bargaining or risk having one imposed on them through binding arbitration. Either way, a first contract is guaranteed, and an employer will have to live with it for a minimum of two years.
- Strengthening penalties against employers committing an unfair labor practice (ULP) during organizing campaigns and first contract negotiations, as follows:

  Providing for liquidated damages of three times back pay for employers found to have unlawfully discharged or discriminated against a pro-employee;

  Imposing a civil penalty of $20,000 per occurrence for willful and repeated violations; and

  Providing for compulsory injunctive relief from federal courts where there is reasonable cause to believe an employer committed a ULP.

The RESPECT Act

If the RESPECT Act (H.R. 1644, S. 969) is enacted, it will amend the NLRA by significantly limiting the definition of "supervisor," thus bringing many present supervisors within the ambit of a collective bargaining unit. The RESPECT Act would remove from the definition of "supervisor" the duties of "assigning" and "responsibly directing" the work of other employees. Thus, under the new legislation, "supervisors" must "hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees" for a *majority* of their work time.

The RESPECT Act would effectively remove present front-line, working supervisors from the NLRA's supervisory exclusion, thereby increasing the amount of employees eligible for union representation. In doing so, the legislation would therefore decrease the number of supervisors permitted to campaign on behalf of the employer in the event of union organizing.

What Should Employers Be Doing Now?

The likely passage of the EFCA and the RESPECT Act will pose a whole new set of challenges to employers seeking to avoid unionization. Employers must therefore act now to devise new methods to continue to oppose unionization successfully in this new environment. Delaying until after the new legislation becomes law will leave union-free employers vulnerable to opportunistic labor organizations ready to emerge with signed authorization cards the moment the EFCA is enacted. Once a union is certified, it becomes exponentially more difficult for employers to regain union-free status.

Fortunately, there is time now for union-free employers to coordinate tactics to counteract potential organizing campaigns. As part of these preparations, it is beneficial to have an outside consultant or labor lawyer conduct a union prevention audit to provide a snapshot of the organization's vulnerability to unions and suggest action steps to mitigate risks. Prevention audits assist employers in executing the following steps, which are vital in anticipation of the passage of the EFCA and the RESPECT Act:

- *Manager Training.* On-site managers must be instructed that the company desires to stay union-free and explain why. The company should emphasize that it is in the manager's interest to do so and that they are expected, as an essential function of their job, to adopt and advance this policy. They should learn what the causes of unionization are, stressing that the principal cause usually resides not with promises of better pay or benefits, but rather with managers' poor interaction with line employees and the resulting employee perception of unfair treatment and lack of a voice. Managers should be taught the signs of union organizing and the new significance of union authorization cards. They must also learn what ULP's are (ULP's are more expansive under the EFCA) and how to communicate effectively with line employees while avoiding ULP's. Supervisors also must be taught how to poll employees, in an informal manner, to determine their level of satisfaction with wages, benefits and their work environment generally. It is critical that supervisors are trained regarding what they lawfully can and cannot say about unions and organizing efforts. They must be well-equipped to properly field the inevitable questions rank and file employees will have. Finally, there is a unique opportunity *now* to train supervisors on the risks of unionization so that if their job winds up falling into the bargaining unit with the new definition of "supervisor" under the RESPECT Act, they will be in position to oppose card signing and educate rank and file employees, when the time comes, on the reasons why card signing is not in their best interests.
- *Supervisor Attitudes.* First line supervision makes or breaks an employer's plan to remain non-union. They are the day-to-day face of the company to rank and file employees and, as a result, are either the cause or the cure of employee dissatisfaction. Employers must assess whether the supervisors themselves are content and motivated to avoid the union. Our experience is that their support cannot be assumed.
- *Employee Attitudes.* It is extremely important to learn how employees feel about unions. Since it is a ULP to simply ask employees their feelings about unions, we recommend interviews with first line supervisors to discuss each direct report generally. The interviews often reveal whether the company is vulnerable to unionization and why. The interviews will also reveal how well the supervisors know their employees.

- *Compensation.* Wages and benefits should be compared to those of unionized companies which employ from the same local population. Even though the union shops' compensation may be higher, union-free employers must be armed with the information about the unionized shops to respond credibly to employee questions about pay practices.
- *Communication.* Handbooks and other policies should be reviewed to determine if the company has effectively communicated to employees that it has a policy of remaining union-free. This is a two-pronged approach. First, the company has to foster a workplace where employees feel they can candidly address concerns with their supervisors and Human Resources without fear of retaliation. Management's relationship with employees should be evaluated to determine if everything is being done to ensure that employees enjoy working for the company, free of intimidation from management. Second, the company must proactively communicate to employees the reasons to remain union-free, including the loss of the right to speak to management without a union intermediary, the cost of strikes and the need to hand over part of their paycheck to the union.
- *Policy and Practice Review.* As already noted, the leading causes of unionization are typically employee insecurity, dissatisfaction and poor workplace morale. As such, handbooks, policies and practices should be reviewed to ensure that an effective and widely known complaint or grievance procedure is in place. Additionally, employers should ensure the existence of employee empowerment programs, employee appreciation and recognition events and methods to elicit employee feedback, such as surveys. Employers should also reaffirm a commitment to their policies on equal employment opportunity, anti-discrimination, anti-harassment and anti-retaliation. Also, employers must ensure that they have solicitation and distribution policies in place, and make certain that they prohibit third parties on company premises for solicitation purposes. Finally, employers should update their electronic communications polices and policies concerning bulletin boards and other postings.
- *Review Job Descriptions and Duties.* To get ahead of the possible passage of the RESPECT Act, employers should evaluate supervisors' job descriptions as well as the actual duties they perform and responsibilities they have in order to determine supervisory status under the new definition of "supervisor." Employers would also be wise to start considering the preferred bargaining unit composition should an organizing effort take place.
- *Small Group Meetings.* Human Resources must conduct small group meetings with employees to determine their level of satisfaction and what issues may be concerning them. The meetings will also reveal how employees feel about their supervisors and management, and will be an opportunity to "market" Human Resources as a sympathetic link between employees and management.

Avoid Being a Sitting Target Now

As in so many endeavors, an ounce of prevention equals a pound of cure. These steps amount to a sound union prevention audit and response to the new legislation. Employers will have a good picture of their vulnerability to unionization. Up until now, most companies caught by surprise by union organizers had a chance to repel the union initiative. Under the EFCA, unprepared employers will have no more campaign opportunities, no more elections, and thus no real chance to reverse organized labor's momentum. An employer must bargain with a union which simply delivers union authorization cards. Surprised companies will not have time to avoid bargaining and potential binding arbitration once a manager finds a stack of union authorization cards on his or her desk. So there is no better time to act than the present, before the likely passage of the EFCA and the RESPECT Act.

Our labor lawyers have had great success over the years in assisting employers to counter union organizing campaigns. We would be happy to further discuss with your organization how we can assist in positioning it to successfully oppose unionization in this changed political climate, which we anticipate will bring a major resurgence in organized labor.

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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