



WOODS ROGERS P.C.
ATTORNEYS AT LAW

EMPLOYEE FREE CHOICE ACT (EFCA)

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Labor & Employment Update

WOODS ROGERS PLC

Preparing for the Employee Free Choice Act: Urgent Attention Required

With the election season over, Barack Obama in the White House, and a Democratic majority in both houses of Congress, it is imperative that employers be aware of monumental changes to labor and employment laws that are now on the horizon. The most sweeping of these proposed changes are included in a bill commonly known as the Employee Free Choice Act (EFCA). This legislation, if passed, would allow unions to organize much more easily by 1) doing away with secret ballot elections and going to a “card check” system; 2) allowing wages and benefits to be set by government arbitration boards; and 3) establishing much harsher penalties for employer unfair labor practices. The bill passed the House last year, and with possible passage and approval by the President this year, employers must act now to educate employees about the goals of union organizing and what the EFCA will mean for them.

HOW UNION ORGANIZING WORKS NOW

The current system where employees may choose a union to represent them in collective bargaining negotiations with their employer has been in place for over sixty years and is overseen by the National Labor Relations Board (NLRB). If a union is able to obtain signed authorization cards showing an interest in the union from at least 30% of employees in a potential bargaining unit, the union may petition the NLRB to oversee a secret ballot election. (In reality, an election petition almost never is filed until the union has signed cards from around 70% of the bargaining unit). After the election petition is filed, the employer has approximately six weeks to educate employees as to why a union would not be in the best interests of workers or the employer.

After the six-week campaign period, representatives of the NLRB supervise a secret ballot election on-site in which employees democratically, and without fear of reprisal, vote for or

against unionization. If 50% plus one employee in the bargaining unit vote for the union, then the employer must recognize the union and attempt to negotiate a labor contract. Currently, unions win between 50-60% of elections, and there currently are methods for either party to contest the results of an election. This system has many safeguards within it to allow both employees and employers to express their opinions on whether employees should be represented by a union. This well established system effectively will be eliminated if the EFCA passes.

HOW THE EFCA WILL CHANGE THE SYSTEM

Elimination of Secret Ballot Elections

If the EFCA becomes law, it will turn the current system on its head and allow unions to organize without affording employees and employers the right to a secret ballot election. The current system of secret ballot election will give way to a process known as “card check.” Under the “card check” system, if the union can show that 50% plus one employee in a bargaining unit have signed authorization cards, they can petition the NLRB to declare the union as the sole bargaining representative of employees in the bargaining unit. This change will strip employers and employees of the fundamental democratic right to a secret ballot election, and will subject employees to potential coercion and harassment during public “card check” campaigns. The employer is also stripped of the six-week campaign period preceding the secret ballot election that is necessary to ensure employees hear both sides of the story before they choose. Furthermore, under the EFCA the entire process of gathering signed cards can occur without the employer ever knowing organizing is occurring and without affording the employer the opportunity to educate employees regarding the effects of unionization.

Mandatory Mediation/Arbitration

After the NLRB recognizes the union, management would be required to begin bargaining with the union within 10 days of receiving a written request from the union to do so. If the two sides cannot negotiate a first contract within 90 days, government officials from the Federal Mediation and Conciliation Service (FMCS) in Washington will be brought in and will attempt to mediate a contract. If, after 30 days of mediation, an agreement is not reached, the negotiations are then referred to a government arbitration board, which will set the terms and conditions (i.e., wages, benefits, holidays, etc.) of the new contract. It is highly likely that the board may be composed of individuals unfamiliar with the nuances of the particular employer, industry and labor force. The resulting contract imposed by the arbitration board will be effective for two years.

Harsh Employer Penalties

If the changes eliminating the secret ballot election and the imposed contract arbitration process were not drastic enough, the EFCA greatly enhances the penalties that could be awarded against employers, but not against unions. This new legislation provides that any employee deemed to have been retaliated against or discriminated against during the process before a first contract is reached, would be entitled to back pay plus two times back pay in damages. The current amount is limited simply to back pay. Additionally, the EFCA provides for civil penalties against the employer of up to \$20,000 for willfully or repeatedly violating employees' rights during the process. As the law currently reads, there are no fines for these violations. The legislation does not impose similar penalties or fines on unions who violate the law during the process.

WHY UNIONS WANT THE EFCA

Union membership among private sector employees has declined significantly over the years. In the 1940's, union membership among private, non-agricultural employees was around 33%. By 2008, that percentage had plummeted to around 7%.

Because unions are big businesses, their existence depends on their ability to generate a large stream of revenue. This comes from the dues paid by union members. Because union membership has declined precipitously, the EFCA was devised as a means to allow unions to add additional new members by avoiding the secret ballot election and the open exchange of information that is provided for by the existing system.

WHAT YOU SHOULD BE DOING NOW

The passage of the EFCA is now more likely than ever. As an employer, there are steps you should take now to prepare for the changes that are sure to affect your business:

Education and Training –It is critical to discuss with employees the significance of signing authorization cards, and the facts

about joining a union. Union dues are a reality that many do not anticipate. Also, employees should realize that if a union becomes their exclusive bargaining representative, management is forbidden by law from discussing terms and conditions of employment (such as paid leaves of absence, holiday schedules, wages, etc.) directly with employees. Finally, it is imperative that employers immediately train their supervisors on the EFCA and the dramatic changes it will have on all American workplaces.

Communicate – Understanding employee concerns and gauging employee satisfaction is the first step toward preparing for the EFCA. Employees who feel their concerns are understood by management are less likely to feel the need for a union when they hear promises from union organizers. Simple fixes, like suggestion boxes, small group meetings, fair and consistent treatment of employees, and regular evaluations, can go a long way toward easing potential employee frustrations and opening the channels of communication.

Advocate – EFCA has not been signed into law. Contact your local, state, and federal representatives and voice your opinion on this bill. With strong opposition from the business community, especially in these difficult economic times, Congress can still decide to defeat this unnecessary and counter-productive bill.



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