

Genova, Burns & Vernoia

NEWS ALERT
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Preparing for the Employee Free Choice Act

Given the results of yesterday's elections, getting prepared for the Employee Free Choice Act ("EFCA") must become a priority for employers. This legislation, which will amend the National Labor Relations Act, includes several provisions that will dramatically change the way unions organize your workers and, once organized, the way the first labor agreement is bargained.

First, the EFCA eliminates the current secret ballot election process employees use to voice whether they want to be represented by a union and replaces it with a basic card check system. Right now, if a union wants to represent your employees and has the required showing of interest - i.e., union authorization cards signed by at least 30% of the employees in an appropriate unit - the employer has the right to require the NLRB to conduct a secret ballot election so that employees can vote, in private, for or against the union. This election is typically held within 45 days after the union files a representation petition with the NLRB and the employer can use this time to educate its employees on the cold realities of unionization and the employer's preference to remain union free. The EFCA does away with this process and allows a union to represent your employees simply by demonstrating that a majority of them have signed union authorization cards. This is so even if these employees have signed the authorization cards on the basis of misinformation - misinformation that the employer never had the opportunity to rebut as it typically would during the pre-election campaign process.

In theory, a secret ballot election could still be held if the union has more than 30% but 50% or less of the employees signed up. However, this is an unlikely scenario. Unions now typically file a representation petition only when they have more than 50% of the workers signed up, even though they only need cards from 30% of the employees to file a petition. If the EFCA passes it is very unlikely that a union would file a representation petition with signed cards from less than 50% of the employees rather than getting the required majority to qualify for a card check.

Almost as radical as the elimination of the NLRB's secret ballot election process - a process that has been used successfully by employees for decades - is the EFCA's implementation of a new binding arbitration process that employers can be forced into if they cannot quickly reach agreement with a new union on the terms of their first labor agreement. In its current form, the EFCA gives an employer 90 days to reach an agreement with the union on a collective bargaining agreement. If unable to do so, the union can force the employer to mediation and ultimately binding arbitration over the terms of the contract. The arbitrator is then empowered to set the terms of the first contract and the employer must live with this contract for two years.

Finally, the bill provides for stiffer penalties for unfair labor practices committed by employers, including what are essentially treble damages for conduct determined to be unlawful during the bargaining process for the first labor agreement.

How likely is it the EFCA will become law? Barack Obama's election makes it very likely that we will see some version of the EFCA in the near future. President Elect Obama openly supported the EFCA during his campaign and stated that he would sign the bill if given the opportunity. And there is no reason to believe that this opportunity will not come. The EFCA received significant support in the House of Representatives last year - passing by a vote of 241 to 185. While it lacked the support to get through the Senate, which at the time was just narrowly controlled by the Democrats, this will not be a problem now that Democrats' have increased their seats in the Senate from 51 to 56 with an additional four seats yet to be decided.

While we cannot predict whether or when the EFCA may be enacted, the prudent employer will prepare now. After the EFCA becomes law, there may be little time to train your managers and supervisors how to communicate properly with employees. Most importantly, the legislation does not indicate how union authorization cards signed prior to the legislation's passage will be treated. It may very well be that the union authorization cards unions are securing today may be used to gain immediate recognition once the legislation is signed into law. For this reason, supervisory training on how to recognize union activity and employee education on the costs and realities of becoming unionized should be done now.

Genova, Burns & Vernoia can assist in this regard. Our labor attorneys regularly advise our clients and train their managers and supervisors proactively how to remain union free. While such training should always be part of an employer's supervisory training program, the possibility of the passage of the EFCA makes the implementation of such training an even higher priority. If the EFCA passes in its present form, our firm can also draw upon its vast experience to assist employers in the new mandatory arbitration process. The proposed process is akin to the fact-finding and interest arbitration processes that have been used for years in New Jersey's public sector to overcome impasses at the negotiation table. Our firm has handled hundreds of public sector fact-finding and interest arbitrations since its inception.

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