

Prepare now for passage of the Employee Free Choice Act

Employers must prepare themselves for the very real possibility that the Employee Free Choice Act (EFCA) will become a reality next year. This legislation, already approved by the U.S. House of Representatives and likely to come up for a Senate vote in early 2009, would amend the federal National Labor Relations Act.

If passed and signed into law, the EFCA would dramatically change the way unions organize workers and how unions and employers negotiate initial collective bargaining agreements.

No more secret ballots

The EFCA would eliminate the current secret-ballot process by which employees choose to be represented by a union. In its place would be what's known as a basic card-check system.

Currently, a union seeking to represent workers must get 30% of employees to sign union authorization cards. If that happens, the employer has the right to require the National Labor Relations Board (NLRB) to conduct a secret-ballot election so that employees can vote in private for or against the union.

This election typically occurs within 45 days after the union files a representation petition with the NLRB. An employer can use that time to educate employees about the realities of unionization and the employer's preference to remain union-free.

The EFCA would scrap that process and allow a union to represent employees simply by demonstrating that most of them have signed the union authorization cards. This would occur even if employees signed the authorization cards on the basis of faulty information—information the employer never had the opportunity to rebut.

The EFCA would still allow secret-ballot elections if more than 30% but less than 50% of employees signed the authorization cards. However, that's unlikely to happen because unions typically file representation petitions only after they have signed up more than

Are you a target for unionization?

Here are some of the factors that make an employee more likely to seek union representation:

- Job insecurity or lack of opportunity
- Poor communication with supervisors or managers
- Noncompetitive compensation or benefits
- Perceived favoritism in the workplace
- Poorly trained supervisors
- Lack of standards or feedback

Many issues that make a company vulnerable to organizing efforts deal with fairness. Unions sell the idea that a collective bargaining agreement eliminates favoritism.

Employers should evaluate all aspects of employee relations. How do pay and benefits compare with the rest of your industry? Look at terminations, discipline and lawsuits to see if there are practices or particular supervisors that keep causing problems.

50% of workers. As a practical matter under the EFCA, a union will be certified if more than 50% of workers sign the authorization cards.

Here comes binding arbitration

Almost as radical as the scrapping of secret-ballot elections would be a new binding arbitration process that would govern how an employer and a union would achieve a first contract that couldn't be settled quickly through traditional negotiation.

The EFCA would give 90 days for management and labor to agree to a contract. If negotiations did not result in a signed contract, the union would be able to force the employer to mediation and then to binding arbitration. The arbitrator would be empowered to set the terms of the first contract, which would be in effect for two years.

Even now, bargaining a first labor agreement in 90 days or less is almost impossible. New union locals are often

unprepared to begin bargaining immediately because they are busy getting themselves organized. When bargaining finally begins, both parties face the daunting task of organizing through dozens of economic and working-condition contract provisions—a process that typically takes many months and sometimes years.

The EFCA's binding arbitration provision won't make that process go any faster. It will likely ensure that many contracts won't be reached through collective bargaining.

Employers face stiffer penalties

Under the EFCA, employers would face stiffer penalties for unfair labor practices, including what are essentially triple damages for conduct determined to be unlawful during the bargaining process for the first labor agreement.

It's impossible to predict whether or when the EFCA will be enacted. However, it's smart for employers to get ready now in case it does. If the EFCA becomes law, there may be little time to train your managers and supervisors on how to communicate properly with employees.

Note: The EFCA legislation doesn't address union authorization cards signed before the law is enacted. It's possible that unions could collect authorization cards now and use them to gain immediate recognition once the legislation is signed into law. That makes it all the more important to train supervisors now on how to recognize union activity.

Now is also the time to educate employees on the realities of working in a unionized environment.



John Vreeland is an associate at Genova, Burns & Vernoia (www.gbvlaw.com), a New Jersey-based law firm with offices in Livingston, Red Bank, Camden, New York and Philadelphia.

He can be contacted at (973) 533-0777 or jvreeland@gbvlaw.com.