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The Employee Free Choice Act – Dead or Alive?

Although many employers might believe that the Employee Free Choice Act (“EFCA”) is dead, it isn’t. As with many other legislative initiatives, Congress pushed EFCA aside to focus on two other major pieces of legislation: Health care reform and “cap-and-trade.” Although EFCA appears headed for some compromise, it remains organized labor’s top legislative priority and a major objective for the Administration and Congressional Democrats.

EFCA was introduced in the Senate (S. 560) and House of Representatives (H.R. 1409) in March 2009. Since there were more than enough votes to pass it in the House, the focus of debate was in the Senate, where 60 votes are needed for cloture. Last spring and summer, a number of conservative Democrats expressed concern over a union’s ability to organize an employer without a secret ballot election. This is the so-called “card check” provision, which would force an employer to recognize and bargain with a union if a majority of employees in the bargaining unit sign cards supporting it. The opposition to card check by five or six Democratic Senators, together with the focus on health care reform and energy legislation stymied EFCA’s passage, which many commentators had thought would happen by the August recess.

Unfortunately for employers, it would appear that EFCA has been waylaid, but not forgotten. Although unions still are pushing for a bill which includes card check, a group of Senators, including Senators Brown (D-Ohio), Carper (D-Delaware), Harken (D-Iowa), Prior (D-Ark.), Schumer (D-N.Y.) and Specter (D-Pa.), have been working on a compromise, which they reportedly “think will bring 60 votes for cloture.” Indeed, Senator Specter reported the existence of such a compromise to AFL-CIO convention delegates in September.

Although the details are still sketchy, what appears to be emerging is a bill that would replace “card check” with a “quickie” election. Employers now normally have 42 days from the date a petition is filed with the NLRB to the date of the election to run a campaign. This period reportedly would be changed to just seven days under the compromise, which in most instances won’t be enough time to run an effective campaign. For sake of comparison, unions usually win a little over 50% of the elections in the U.S. (but only about 30% where the employer mounts a strong campaign opposing the union), compared with a win rate of more than 70% in the Canadian Provinces of Ontario and British Columbia, which require elections within five to 10 days. The EFCA compromise also reportedly includes a provision permitting union access to the employer’s premises during the campaign under certain circumstances, which currently is prohibited.

Perhaps even worse, the compromise in the works continues to require binding arbitration for a first contract. This means that if there were no contract agreement within 120 days, an arbitrator would impose a contract of two years duration. This is a huge change from current law, under which neither party can be forced to agree to any contract provision, and would prevent an employer from even attempting to remove a union until after the contract has expired. Under current law, if there’s no contract, a union can be removed one year after its certification as a bargaining representative.

Thus, while employers might have dodged the card check bullet, something almost as bad appears to be on the horizon. This means that employers desiring to remain union-free need to implement such measures as: (1) Effective group and individual communications mechanisms; (2) understandable and consistent personnel policies and procedures; (3) supervisory training on how to manage employees and avoid unionization; and (4) confidential employee surveys designed to measure objectively the effectiveness of an employer's human relations program and uncover issues that could lead to unionization. Although you now have the ability to uncover and correct such issues, the law severely restricts your ability to do so once union organizing activity begins.

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