

## Labor Law Changes in 2009?

In January 2009, President Obama and the new Congress will begin tackling the challenging issues that face our country both at home and abroad. Every employer, whether large or small, should pay especially close attention to coming changes to labor and employment laws. This newsletter will focus on two pieces of legislation that relate to union organizing.

In 2007 and 2008, Congress considered two bills that would dramatically change the labor law landscape. Both bills are substantially more likely to be enacted with a Democrat in the White House and a seemingly pro-union majority in Congress. Thus, we recommend that employers start planning *now* for these two significant pieces of legislation.

### The Employee Free Choice Act (EFCA):

EFCA would fundamentally alter the National Labor Relations Act in ways that will shift the current balance of power between unions and management significantly in favor of unions. For example:

- **No More Secret Ballot Elections:** Under the current rules, if a union gathers signed union-authorization cards from more than 30% of the employees in a bargaining unit (i.e., in a designated work group) it can demand a secret ballot election in which employees get to vote on whether or not to have union representation. The currently proposed version of EFCA would make it far easier for unions to gain representation by allowing a union to become the sole bargaining agent of a group of employees *without any election* if it collects signatures from more than 50% of the employees in the appropriate bargaining unit.
- **Mandatory Arbitration Of Proposed Contract Terms:** Current rules require the union and employer to bargain in good faith and give employers certain rights if bargaining reaches an impasse. The EFCA would change those rules by giving an arbitrator the right to impose contract terms on the parties in certain circumstances. Under the currently proposed version of EFCA, the union and employer would be required to successfully negotiate their first labor contract no later than 90 days after the union is recognized as the employee's bargaining agent (i.e., within 90 days after the union gathers enough signatures and is recognized by the National Labor Relations Board as the sole bargaining agent for a group of employees). If negotiations are not successful by the end of that period, the law would require that proposed contract terms be submitted to an arbitrator who would have authority to resolve the parties' differences and to dictate the terms of the parties' first labor agreement.
- **Significant Penalties:** Today, the National Labor Relations Act provides only "make whole remedies" for employees who are harmed by an employer's misconduct during a union organizing campaign or in the course of a labor/management conflict. EFCA would establish punitive remedies (i.e., double or treble damages) for employer violations of the Act.

### The Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers (RESPECT Act):

The RESPECT Act is another proposed bill that would benefit unions and make organizing efforts easier. This law would expand the pool of potential union members in each workplace by limiting an employer's ability to classify certain positions as supervisory positions.

### Employer Preparedness:

In light of these proposed laws and the heightened economic uncertainty that many employers are facing, this is a good time for employers to conduct a candid assessment of whether workplace management fundamentals are in place. For those of you who attended our October Breakfast Briefing, we were advised by two experienced plaintiff-side employment attorneys that many employment discrimination lawsuits are precipitated by an employee's perception that he or she has been treated with something less than dignity or respect. These attorneys suggested that employers often make the correct decisions but execute or communicate those

decisions in ways that lead to unnecessary conflict. These are often the same factors that cause employees to seek union representation.

While these proposed laws, if passed, will make it easier for unions to organize and will likely lead to more organizing activity, unionization is far from inevitable. To be prepared, we strongly recommend that employers train supervisors now on the proper and legal way to respond to organizing efforts, and on sound management practices. Even under these proposed laws, employees will have a choice about whether or not they want a union to represent them. Employees will be less likely to choose a union if they feel they are being treated fairly by current management and have open channels of communication. Key union avoidance practices include the following management basics:

- Treat employees with respect, fairness and integrity; be cautious about playing favorites except for legitimate and well-documented work reasons (i.e., strong job performance).
- Provide employees with regular and candid feedback about their performance; employees should never be surprised with an annual review which discloses for the first time a months-long concern about employee performance issues.
- Communicate openly and candidly with your workforce about your company and the opportunities and challenges it faces. In uncertain economic times, employees need to know that the company is being honest and responsive.
- Make sure that your business provides education and training to your workforce – particularly to your managers and supervisors. Managers and supervisors are the “eyes” and “ears” of your business, and they need to have the tools to recognize and properly address workplace problems and union organizing activity as they arise.
- When employees express concerns or when a business discovers concerns, address these workplace problems before a union or government agency comes to your “assistance.”

Instead of feeling paralyzed by impending changes to employment laws, employers should strive right now to create positive employee relations, which will reduce the risk of unionization or litigation, and have the added benefit of maximizing the productivity of their business.

### Stay Tuned: 2009 Breakfast Briefings

We will provide you with additional guidance when and if the ECFA or other significant pro-labor laws are enacted. We are also planning to conduct a Breakfast Briefing early in the new year to provide a full briefing on these and other major workplace law changes that have been or may soon be enacted. In the meantime, please let us know if you are interested in more information about our supervisor training programs, including those on effectively maintaining a union-free workplace.

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