PROSKAUER ROSE LLP®

Client Alert

A report
for clients
and friends
of the Firm

April 2008

The Employee Free Choice Act: Will You Be Prepared for it?

There is widespread belief in Washington that the Employee Free Choice Act – possibly the most significant amendment of the National Labor Relations Act since its enactment nearly 75 years ago – will be passed in some form in 2009.

Many have predicted that EFCA could increase union representation in the private sector – presently at an all-time low of around 7% of the workforce – to levels that have not been seen for decades, by permitting the National Labor Relations Board to certify a union as exclusive representative based solely on authorization cards signed by a majority of the employees in a unit appropriate for purposes of collective bargaining. If EFCA is enacted in its present form, employers no longer will have the right to insist upon a government-supervised election to establish whether employees in fact desire union representation.[1]

There are several reasons why non-union employers should be concerned about EFCA. Most importantly, EFCA would effectively eliminate the secret-ballot election as the NLRB's preferred method of testing union claims of majority status. Currently, when a union demands recognition, the employer may insist that its employees have an opportunity to vote on the question of representation. If the employer declines to recognize the union voluntarily, the union typically files a petition with the NLRB and an election is held around six weeks later (assuming that no legal issues require a hearing). During that critical period leading up to the vote, the employer has an opportunity to communicate with its employees concerning the reasons why union representation is not in their best interest. Although election outcomes vary by geographic region, industry and labor organization, the employer win rate is approximately 50% – despite the fact that the union on the ballot may have succeeded in obtaining signed authorizations from a majority of the employees in the proposed bargaining unit. (Experience shows that employees sign cards readily, but often change their mind by election day).

Under EFCA, if a union files a petition accompanied by evidence of majority status in the form of signed authorization cards, the NLRB would certify the union as the employees' exclusive representative. No election would be held and, except for the most vigilant of employers, the opportunity prior to a petition to communicate with employees concerning the shortcomings and disadvantages of collective bargaining will be lost given the surreptitious nature of most card solicitation. At this time, it is unclear what safeguards, if any, will be implemented to ensure that the Board does not certify a union based on signatures that have been solicited through fraud or coercion. The secret-ballot election has been the NLRB's way of neutralizing the effect of such improper organizing tactics.

EFCA also would make radical changes to the collective bargaining process that follows certification. First, it would require that negotiations for an initial contract commence within 10 days after a request for bargaining is made. Second, it would require mediation (by the Federal Mediation and Conciliation Service) if after 90 days the employer and union are unable to reach agreement. Third, if after 30 days of mediation the parties remain unable to agree, the terms of the initial contract would be determined by an arbitration board established by the FMCS, rather

[1] EFCA, which enjoys a degree of bi-partisan support in the Congress, was introduced by Representatives George Miller (D-Calif.) and Peter King (R-NY). The House of Representatives passed the bill (H.R. 800) on March 1, 2007, by a vote of 241-185. On March 30, 2007, Senator Ted Kennedy (D-Mass.) introduced the Senate version of EFCA (S. 1041). Three months later, on June 26, 2007, the bill was pulled after a motion to invoke cloture and end a filibuster narrowly failed.

than being left to the economic forces normally at play in collective bargaining.[2] The resulting "agreement" would be binding for two years.

The take-away from all this is obvious. A pro-active approach to positive employee relations is essential. Among other things, employers should consider the following:

- Adopt and communicate a basic philosophy on unions in employee handbooks, stressing the importance of direct dealing between employer and employees.
- Assess (and regularly reassess) vulnerability to unionization and promptly address any identified weaknesses in the area of wages, benefits, working conditions, conflict resolution procedures, employee communications, *etc.*, before a union appears on the scene.
- Train managers and supervisors to be vigilant for signs of unionization and instill a sense about the importance of union-free status to the success of the business.
- Inform managers and supervisors about unions, *i.e.*, what they can/cannot do and the risks/costs of unionization, so that they are ready and able to answer employee questions.
- Prepare management and employees for card-signing "blitzes" so that the union never achieves the majority necessary for NLRB certification; and
- Analyze the scope and composition of potential bargaining units, recognizing that the larger the unit, the more difficult it is for a union to attain majority status.

As you can see, EFCA could pose some very serious challenges to non-union employers. The time to start dealing with those challenges is now! Over the coming months, we will be conducting programs for our clients to help them prepare for and withstand what is expected to be an onslaught of union organizing and NLRB card-counts. Keep an eye out for announcements to follow. Until then, feel free to call any of the Proskauer attorneys named in this Client Alert for assistance.

[2] In addition, EFCA would significantly strengthen the NLRB's arsenal of remedies for unfair labor practices. Most notably, in cases involving the discharge of employees for seeking union representation, the Board would have the authority to award what amounts to treble damages for lost pay and benefits. EFCA also would empower the NLRB to impose civil penalties of up to $20,000 for each violation of the NLRA occurring either while employees are seeking representation or while the employer and union are negotiating an initial contract.

BOCA RATON • BOSTON • LONDON

LOS ANGELES • NEW ORLEANS • NEW YORK • NEWARK

PARIS • SÃO PAULO • WASHINGTON, D.C.

Client Alert

Proskauer's nearly 175 Labor and Employment lawyers are capable of addressing the most complex and challenging labor and employment law issues faced by employers.

If you have any questions about the impact of this new decision, please contact your Proskauer relationship attorney or one of the attorneys listed below:

New York
Peter D. Conrad
212.969.3020 – pconrad@proskauer.com

Newark
Marvin M. Goldstein
973.274.3210 – mmgoldstein@proskauer.com

Los Angeles
Mark Theodore
310.284.5640 – mtheodore@proskauer.com

Washington, D.C.
Lawrence Z. Lorber
202.416.6891 – llorber@proskauer.com

New Orleans
Howard Shapiro
504.310.4085 – howshapiro@proskauer.com

Boca Raton
Allan H. Weitzman
561.995.4760 – aweitzman@proskauer.com

Boston
Mark W. Batten
617.526.9850 – mbatten@proskauer.com

Proskauer Rose is an international law firm that handles a full spectrum of legal issues worldwide.

You can also visit our Website at **www.proskauer.com**