

EMPLOYER PROTECTION BRIEFING

Preparing for the Employee Free Choice Act (EFCA)

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History of Unionization in America

- ❖ In the mid 1950's more than 35 percent of all employees on private payrolls were union members.
- ❖ Union membership has been on the decline ever since.
- ❖ In 2008, union membership was a mere 12.4% overall, and to 7.6% in the private sector.

Reasons for Union Declines

- ❖ Unions like to blame their failure on opposition from management but the fact is that the working people of America have rejected the unions' class-warfare, us-against-them approach to employment.
- ❖ According to a 1999 Gallup survey, only 21 percent of employees who aren't union members would like to be in a union.
- ❖ A Zogby Poll conducted in 2005 found that only 16 percent of employees said they would definitely vote for union representation compared to 38 percent who said they would definitely vote against.
- ❖ When you combine those who would definitely and probably vote for a union compared to those who would definitely or probably vote against a union, the numbers were 36 percent for and 56 percent against with the rest undecided.

How EFCA Would Reverse the Trend

- ❖ Currently, employers don't have to recognize a union unless it receives support from a majority of employees voting by secret ballot.
- ❖ A key element of the proposed new legislation is the ability of union organizers to obtain a consensus through a card-check provision, meaning individuals would be asked to sign a pledge card if they wished to form a union.
- ❖ If a majority (50% plus 1) of the employees were sign such a card, recognition of the union would be automatic.

The Current Law

- ❖ The National Labor Relations Act (NLRA)
 - Originally passed in 1935
 - Major amendments passed in 1947 and 1959

- ❖ Two primary purposes
 - Encouragement of collective bargaining
 - Protection of employee exercise of freedom of association, self-organization and designation of representatives

- ❖ Has remained unchanged – until now?

Recognition Rights Under NLRA

- ❖ Employees have the right to a secret ballot election.
- ❖ Process begins with the filing of a representation petition
- ❖ Must be supported by at least 30% showing of interest
- ❖ Hearing available to determine appropriate unit, eligibility of voters, election scheduling, etc.

Employer's Free Speech Rights

- ❖ NLRA protects rights of employers to express views, argument or opinion during a pre-election campaign.
- ❖ Threats, interrogation, promise of benefits and surveillance by employers are prohibited.
- ❖ Rules different for unions, as they are permitted to make promises to employees, even outlandish ones.
- ❖ NLRB regulates campaign conduct.

Employee Free Choice Act (EFCA)

- ❖ Would amend the NLRA by:
 - Eliminating secret ballot elections
 - Certifying unions based solely on a “card check.”
 - Restricting employer’s ability to litigate issues of appropriate bargaining units.
 - Providing for interest arbitration if first contract cannot be negotiated within 120 days.
 - Increasing penalties against employers when employees are organizing or when first contract is being negotiated.
 - Provide for injunctive action for alleged unfair labor practices committed by the employer during union organization or negotiations for a first contract.

Requirements Upon Union Certification

- ❖ Parties must have an initial bargaining session within 10 days of certification.
- ❖ Either party may force mediation after 90 days of negotiations.
- ❖ If not agreement is reached after 30 days of mediation, binding arbitration must occur.
- ❖ Arbitrators would have the authority to write the first-time collective bargaining agreement setting the wages, benefits and working conditions for all bargaining unit employees.

Steps to Take Now to Prepare

- ❖ Perform vulnerability assessment audits.
- ❖ Identify all Section 2(11) supervisors.
- ❖ Train supervisors to handle workplace issues.
- ❖ Communicate with employees to ensure that they understand unionization issues and the dangers of signing authorization cards.
- ❖ Implement effective policies:
 - No-Solicitation
 - Electronic communications
 - Open communications
 - Bulletin boards

Strategies in Response to EFCA

- ❖ Constitutional challenges to EFCA.
- ❖ Protection of free speech rights.
- ❖ ULP charges against unions for organizational abuses.
- ❖ Challenges to validity of signed cards (procedures to be implemented by NLRB).
- ❖ Protection of rights in bargaining (hard bargaining).
- ❖ Use of lockouts during negotiations.
- ❖ Decertification.