

Labor and Employment E-news

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The Senate and House Introduce the Employee Free Choice Act

Yesterday Democrats introduced the Employee Free Choice Act ("EFCA") in both the Senate and the House. The purpose of EFCA is to make it easier for labor unions to organize employees in order to reverse the labor movement's decades long decline in membership.

The introduced version includes card-check recognition of a labor union and compulsory first contract arbitration. The mandatory card-check recognition would effectively end the use of secret ballot elections in which employees can vote on whether to be represented by a union. The proposal also includes new penalties for employers that commit unfair labor practices during a union organizing campaign or during the bargaining of a first contract. The new penalties include triple back pay for unlawfully discharged employees and fines of up to \$20,000 per unfair labor practice.

In support of EFCA, Senator Tom Harkin (D-Ia) described it as "legislation that puts power back into the hands of the people who are truly the backbone of the country." AFL-CIO President John Sweeney similarly characterized EFCA as "common sense legislation that makes good on a simple promise: if a majority of employees in a workplace want a union, they should be able to have a union and bargain for a better life."

Opposing EFCA, Senator Mitch McConnell (R-Ky) stated that to take away the "right to a secret ballot... goes against the ideals of political freedom upon which our nation was founded." Representative Howard McKeon (R-Calif.) described the card-check process as "notoriously unreliable."

EFCA was introduced with 223 co-sponsors in the House and 40 in the Senate. Importantly, when last introduced in 2007, the bill failed in the Senate when only 51 Senators, including one Republican, voted for cloture. Now, Democrats hold 58 seats, suggesting there may be 60 votes, although some moderate Senators - Democrats and Republicans - may not support a cloture vote. The introduction at this time implies a union and Democratic belief that at least 60 Senators will support EFCA and will vote to end a filibuster. According to Senator Harkin, "by the time we bring it up, we will have 60 votes." The AFL-CIO has also publicly claimed that there will be 60 votes for cloture in the Senate. Business groups, including the U.S. Chamber of Commerce and the National Association of Manufacturers, are actively opposing EFCA.

The introduction of EFCA follows last week's statement by President Obama that EFCA "will pass," which was his strongest post-election statement of support for EFCA. The introduction also follows

last week's closed-door meeting between the AFL-CIO and Vice President Biden and Vice President Biden's public statement in support of EFCA.

At this time, it is unknown whether EFCA will pass, either as proposed or as amended during the legislative process, or whether EFCA will again fail to pass the Senate. Some pundits believe that the President's statement that he will work with Republicans for EFCA's passage is a sign that some components of the bill are negotiable. It is also too early to tell whether this will happen or if organized labor will allow it to happen.

The progress or the lack of progress of EFCA in the Congress will be the key labor and employment law story coming out of Washington this spring until EFCA either is enacted or is blocked in the Senate. For all non-unionized employers in the private sector, the enactment of EFCA would be the most revolutionary change in federal employment law in modern history and would expose them to an elevated risk of unionization and, consequently, to the risk of an arbitrator-imposed collective bargaining agreement.

The enactment of EFCA would result in a major effort by labor unions to organize new members by obtaining signed union authorization cards from a majority of employees in a bargaining unit and demanding recognition based on those cards. In anticipation of this effort, employers should start to prepare now for how to remain union-free in the future.

In a post-EFCA era with mandatory card-check recognition, the key to remaining union-free will be to prevent the reasons why employees seek to unionize from existing in a workplace, including improving management of employee relationships. Employers either will succeed in ensuring that employees have no reason to seek union representation or will fail by creating reasons for unionization and becoming unionized as a result of mandatory card-check recognition.

Preventing the causes of unionization is also how employers stay union-free now and will continue to stay union-free even if EFCA is not enacted. Regardless of whether EFCA is enacted, engaging in proactive planning and action to improve the work environment is in an employer's long-term self-interest.

Butzel Long has a long history of not only counseling employers who deal with unions or are confronted with an organizing drive, but also successfully helping employers remain union-free. The firm already is assisting employers plan for how to remain union-free and plan for doing so in a post-EFCA environment.

If you have any questions regarding the Employee Free Choice Act, please contact the authors of this E-News bulletin as indicated below or your Butzel Long attorney.

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