March 30 - April 12, 2009

SAN FERNANDO VALLEY BUSINESS JOURNAL

LOS ANGELES • GLENDALE • SANTA CLARITA VALLEY • BURBANK • CONEJO VALLEY • SIMI VALLEY • SAN FERNANDO • CALABASAS • AGOURA HILLS • ANTELOPE VALLEY

Is There a Union in Your Future? Labor Law Reform II

EMPLOYMENT LAW

RICHARD ROSENBERG

Though the ink is hardly dry on the economic stimulus plan, Congressional Democrats have turned their attention to their next big fight: easing the way for labor organizing at companies big and small. On March 10th, both houses of the United States Congress introduced identical versions of the so-called Employee Free Choice Act (EFCA) legislation (S. 560 and H.R. 1409). This legislation is designed to make it dramatically easier for a union to organize your employees.

Notably, in the last Congress, then-Senator Obama was a co-sponsor of an identical bill. That proposed legislation ultimately died in the Senate on June 26, 2007 when Democrats failed to garner enough votes to end a Republican filibuster.

With big labor a huge financial supporter of President Obama's election campaign, labor leaders were aggressively pushing for reintroduction of the same bill once they gained larger majorities in both the House and the Senate as well as an ally in the White House. That day has finally come.

EFCA will make sweeping changes to the rules on how unions organize. Here's a rundown of the three key provisions:

1. "Card-Check" Labor Certification

Currently, employees wishing to unionize can petition the National Labor Relations Board to hold a secret ballot election at their workplace if just 30% of employees in an appropriate unit sign pledge cards or a petition. An "appropriate unit" may range from the employees in one small department to all employees in the company. Notably, supervisory personnel may not participate.

EFCA would virtually eliminate the secret ballot election used successfully for over 70 years in favor of a much more public procedure known as "card check." Under a card check, instead of holding an election, a company's employees can become unionized and insist upon the employer entering into collective bargaining with a union representative if just 50% + 1 of the employees in an appropriate unit sign union pledge cards.

EFCA would require the NLRB to craft "guidelines and procedures" to be followed, including "model" pledge card language and procedures "to establish the validity" of signed pledge cards.

Under EFCA's card check procedure, instead of all employees participating in a government supervised secret ballot election, a full 49% of employees may never even have the chance to weigh in on the issue. Though the bill is dubbed the Employee Free Choice Act, in fact, the law may result in many employees being subject to union representation, though they never had any choice in the matter whatsoever.

2. Compulsory Arbitration to Set Working Conditions

The new compulsory arbitration provision could be the most pernicious aspect of the proposed legislation because it will disturb the process of collective bargaining as we know it. Under the existing law, the union and the company bargain over wages, benefits, hours, and other working conditions through the give-and-take of collective bargaining. Both sides have the ability to use a variety of negotiation tactics, including the threat or actual exercise of economic "weapons" such as strikes or lockouts, to persuade the other to agree. Ultimately, the contract is a product of mutual agreement.

Under EFCA, if no deal is reached within as few as 130 days of the union's certification, a federally-appointed arbitration board or panel (which likely knows nothing about how to run your business) will be selected to literally write the terms and conditions of the contract that the parties could not agree upon. Bargaining as we know it will all but disappear.

The arbitration board's decision will be binding on the parties for at least two years. The arbitrator will have the power to decide how much of a wage increase you will pay, what hours your business will be operated, what type of insurance you will provide your employees, how much paid time off you will give your employees, and the like. The arbitrator's decision on these matters will be final and binding.

3. Huge New Employer Penalties

The proposed legislation adds three new penalties for federal labor law violations. This will up the ante considerably for even the most minor labor law missteps during a union organizing campaign and bargaining for the first contract. They include:

(1) Fines of up to $20,000 for each unfair labor practice committed by an employer. The current law has no such fines. (Notably, these penalties do not apply to violations committed by the union);

(2) Triple back pay for employees who are found to have been suspended or terminated because they are either for or against union organizing (this is a whopping 300% increase in the current penalty); and

(3) Mandatory federal court injunctions against employers alleged to have committed unfair labor practice charges during an organizing campaign.

What's Next?

The pitched battle over EFCA has already begun. EFCA proponents have begun airing a series of very clever TV and radio ads linking the country's economic recovery with passage of the bill. Supporters argue that to spend our way to economic recovery, the unions must be allowed to negotiate for better wages and benefits.

Anticipating the debate over eliminating the secret ballot, EFCA supporters inserted a provision into the bill which allows a union to ask for an election if they want one. However, this is simply window dressing to assuage the concerns of those in the Congress who want to retain some vestige of a democratic process. As a practical matter, it's inconceivable that any union which has enough cards to insist upon recognition would trade that certain victory for the possibility of losing a secret ballot.

Washington insiders are uncertain about the specific timing for EFCA's consideration by the Senate or House of Representatives. The Senate Health, Education, Labor and Pensions (HELP) Committee already has begun conducting hearings dubbed "Rebuilding Economic Security: Empowering Workers to Restore the Middle Class."

Most Senate Democrats are expected to vote the party line. However, a few Democrats from right-to-work states have indicated they may not support the bill.

In order to achieve a 60-vote filibuster-proof majority, nearly all Senate Democrats and some moderate Republicans would need to support the bill. Advocates on both sides of the aisle are gearing up for a huge fight.

Most likely, some type of compromise on the key terms of EFCA would need to occur in order for the bill to make it the White House. Once it does, and most pundits believe it will, President Obama is sure to sign it. The new President has stated repeatedly that passage of EFCA legislation is a major priority of his administration.

Employers need to ready themselves for the impact of this new law. Since a government supervised secret ballot will likely be a rarity, employers must prepare employees for what to say when approached by co-workers and union organizers to sign a union pledge card.

The only effective defensive measure is for employers to begin educating employees before this happens. Few employers actually do this, though this type of education is absolutely essential if the company wishes to have any hope of remaining union free.

Employers who wish do so must be very careful. Many tried and true human resources strategies for assessing and improving employee morale are outlawed by the federal labor law governing union management relations. The National Labor Relations Board has a complex set of rules and regulations governing employer behavior and speech when discussing unions. Since few labor attorneys have any real experience in this area, it's advisable to find one who does.

REPRINTED WITH PERMISSION FROM THE SAN FERNANDO VALLEY BUSINESS JOURNAL - MARCH 30, 2009