



THE KULLMAN FIRM

A PROFESSIONAL LAW CORPORATION

CLIENT NEWSLETTER

Published as a service to clients and friends of The Kullman Firm, this newsletter discusses recent labor relations laws, regulations, policies, practices, and employment cases particularly applicable to the labor and employment arena.

EFCA

DON'T LET THE NAME MISLEAD YOU!

Election Day has passed and Barack Obama has been elected President of the United States. Following this election, these four letters—EFCA—may be the worst letters in the history of labor relations for employers who are union free and wish to remain that way. EFCA stands for the

EMPLOYEE FREE CHOICE ACT

The law, which would top any list of misleading names, was passed by the House of Representatives in 2007, but never came to a vote in the U.S. Senate because of the threat of a presidential veto and the lack of votes from Senate Democrats to prevent a filibuster. Times have now changed. Come January, expect newly-inaugurated President Obama to get behind the EFCA one hundred percent. On the campaign trail, Candidate Obama had this to say:

We're ready to play offense for organized labor. It's time we had a president who didn't choke saying the word "union." A president who strengthens our unions by letting them do what they do best: organize our workers. . . . I will make it the law of the land when I'm president of the United States. . . . ~ Barack Obama

In the Senate, tentative results show that Democrats increased their majority on Election Day to 56 votes. At the time of publication, four Senate elections remain undecided. This means Senate Democrats have close to the number of votes (60) within their own party necessary to invoke cloture—the ability to cut off debate and thus avoid a filibuster. With the potential for cross-over votes by Republicans and with President-Elect Obama making the EFCA a priority during his first 100 days as President, the EFCA is likely to become law in some form in 2009.

For over 70 years, the primary method used by a union to get into a union-free facility was by a secret ballot election conducted by an agency of the fed-



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eral government, the National Labor Relations Board (NLRB). The Supreme Court of the United States has called the secret ballot election the most satisfactory and preferred method of determining whether a union has the support of a majority of voting employees. The secret ballot process, in place since 1935, has allowed employees to make informed choices and has provided protection from union coercion, intimidation, and misinformation.

The existing and time-honored process begins when a labor organization obtains at least 30% support from employees in a potential voting unit. A union may then petition for an election. After an NLRB hearing or stipulation setting the parameters of the election and an election date, employers have 4-6 weeks to educate employees about the disadvantages and risks of union representation. More importantly, employers have the ability to educate employees on the significant advantages of a union-free workplace. Paramount to this process is the ability of employees to make an informed choice and to cast a secret ballot, free from intimidation and coercion.

Under the EFCA, there will no longer be secret ballot elections. There will no longer be a period of time for employees to become fully educated and informed of the risks and disadvantages of union representation before casting a vote. Instead, democratic principles of free and fair elections will likely be replaced by union pressure tactics and coercion.

* The first provision of EFCA states that a union may successfully organize a union-free company by having 50% plus 1 of the employees sign a union authorization card.

Thus, if a majority of employees in a bargaining unit signs a union authorization card, the employer is unionized! Under current law, organizing starts with card signing. Under the EFCA, organizing will end with card signing. Inherent in the card signing process is the very real risk that employees may be pressured and intimidated into signing a union authorization card by a paid union organizer or a sympathetic group of co-workers. At a minimum, employees run the risk of being swayed by misinformation and untruthful representations.

Under existing law, pressure tactics and misinformation can be overcome during the crucial period between the election petition and the date of the election. Under the EFCA, the crucial period to educate and overcome adverse and unfair union tactics is lost. Card signing will be almost the entire battle because once a majority of employees signs a card, the employer is automatically unionized.

The overwhelming danger is that employers will not know that organizing is occurring until it is too late. The organizing itself may very well be conducted in a secretive, coercive and threatening manner. Everyone knows what may happen with public card signing--pressure, coercion, fear, just wanting to be left alone, lack of facts, and the like--all of which are reasons why we have had secret ballot elections for over 70 years.

Compounding the danger of the EFCA is there is no real time limit on card signing. Under current law (which is not changed by EFCA), cards are valid for a minimum of one year and even longer if the organizing is continuous. So, union organizers and their friends can apply the pressure for a year or more to obtain the necessary signatures.

* The second significant aspect of the new law may be even worse. Under the EFCA, a newly organized employer will lose the right to bargain in good faith and say "NO" to unreasonable union demands.

Under the new law, a company will have 90 days to negotiate a collective bargaining agreement (CBA) with the union representative(s) of its newly organized employees. If no CBA is reached within 90 days, mediation

will be ordered and given 30 days to succeed. If an agreement is still not reached within the additional 30 days, 120 total days, mandatory arbitration will be ordered. Thus, a third-party arbitrator will have the right to set the terms of your CBA with the union.

This could mean almost anything:

- Unreasonable wage increases
- Exorbitant benefit increases
 - Union security clauses
 - Check off clauses
 - Mandatory participation in multi-employer pension fund with millions of dollars in unfunded liability
 - Weak management rights
 - Limited no strike clauses
 - And on, and on, and on . . .

* Finally, the EFCA significantly increases the penalties for unfair labor practices. Back pay awards would be tripled, injunctions would be more prevalent, and employers could face additional fines of up to \$20,000 per violation as determined by the NLRB.

Obviously, the increased penalties are an attempt to discourage or frighten union-free employers into not resisting the card signing campaign of a union. As further evidence of this new law's extreme bias is the fact the increased penalties do not apply to union unfair labor practices!

WHAT CAN A UNION-FREE EMPLOYER DO?

While the new law would be discouraging to say the least, resisting a union is not hopeless. You cannot take a "wait and see" approach. This is the same as the "bury your head in the sand and hope the problem goes away" approach, which will not end well. There are some steps you should consider implementing immediately.

- Perform self-critical analysis through a comprehensive employee relations audit.
- Develop a continuing communication program to educate employees on the dangers of card signing, the dangers of unions and the company's position on unions and why it is important that the company remain union free.
- Train management and supervisors on how to recognize union card signing activity. This was always important—now it is even more important. To be effective, union-awareness training must educate management and supervisors on union avoidance skills and successful communication techniques. Managers and supervisors must effectively and legally communicate the company message.
- Provide leadership training to all management and supervisors.
- Perform an in-depth review of your employee relations programs and have a method for continual review.

- New employee relations strategies may need to be implemented and managers and supervisors must be held accountable for effective employee relations.
 - * A complaint line;
 - * Grievance box(es);
 - * Weekly supervisor meetings;
 - * Monthly management meetings;
 - * Safety awards;
 - * Social functions;
 - * Employee recognition programs.

This is not to say everything applies to every union-free employer, but an analysis needs to be performed to see what is best for you.

WHAT IS CERTAIN IS YOU CANNOT WAIT. NOT TAKING THE NECESSARY STEPS MAY LEAD TO CARD SIGNING. TAKING THOSE STEPS AFTER CARD SIGNING BEGINS MAY LEAD TO INCREASED PENALTIES FOR NLRB VIOLATIONS.

On November 20, The Kullman Firm is presenting a program in Baton Rouge which will include an analysis of EFCA. We encourage you to attend our program, but you should also contact the attorney with whom you work to begin the specific union avoidance program for your company. Registration forms can be found on our website at www.kullmanlaw.com.



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