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Union-Friendly Initiatives Promise Dramatic Workplace Changes

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Shortly after the inauguration of President-elect Obama, the Democratically controlled Congress will be re-introducing union-friendly initiatives including the Employee Free Choice Act (EFCA), the Re-Empowerment of Skilled and Professional Employees and Construction Trades Act (RESPECT) and the Patriot Employers Act. Senator Obama co-sponsored these measures during the last Congressional session and has said that he will sign the legislation if it reaches his desk. The enactment of any one of these initiatives could dramatically impact the American workplace.

EMPLOYEE FREE CHOICE ACT

The EFCA, or so-called "card check" legislation, would be the most significant amendment to the National Labor Relations Act (NLRA) in more than 60 years. Passage of the EFCA will, in most instances, eliminate the right of employees to privately vote for or against union representation. Instead of having to win an election, unions will be able to obtain collective bargaining representative status merely by demonstrating to the National Labor Relations Board (NLRB) that they have obtained signed authorization cards from a majority of employees in an appropriate bargaining unit.

Presently, employers often first become aware that a union is attempting to organize their employees when the union files a petition for an election with the NLRB. Thereafter, employers are allowed, under existing law, to present their position on unionization during an election campaign. Secret ballot elections, established by NLRA to ensure true employee free choice, are conducted under the watchful eye of a neutral NLRB agent. The NLRB has recently commented on the significance of the secret ballot election, "There is good reason to question whether card signings ... accurately reflect employees' true choice concerning union representation" (*Dana Corporation*, 351 NLRB No. 28, September 2007) Employees often sign authorization cards under pressure, real or imagined, and without being informed of all the pertinent facts. Indeed, unions that have been supported with a 50% to 70% majority of signed authorization cards traditionally win just over one-half of elections – evidence that employees often respond favorably after employers have an opportunity to respond to employee inquiries regarding a union's impact on the workplace. The EFCA will eliminate the right of employers to present their views on unionization during an election campaign and, in many instances, the right of employees to vote in private.

Moreover, under the EFCA, the NLRB will be able to penalize, for the first time in its history, employers found to have willfully or repeatedly violated the law. Currently, employers are only liable for backpay. Under the EFCA, they would be subject to civil penalties including up to $20,000 per violation and treble damages.

As if eliminating the secrecy of the election process and imposing monetary penalties were not enough "change," the EFCA will change the rules for bargaining an initial collective bargaining agreement. Once the union submits valid authorization cards from a majority of employees, employers will be required to meet and bargain with the union within 10 days of a request. While current law does not require that either side reach an agreement, the EFCA will mandate agreements by referring first time contract disputes to government-run mediation (after 90 days) and ultimately binding arbitration (after 120 days).

Passage of the EFCA will, in effect, require employers who wish to remain non-union to perpetually campaign against unionization. Because employers may not know when a union is attempting to organize, campaigning must be ongoing and constant. At a minimum, employees should be educated regarding the significance of signing union authorization cards. Also, employers should begin reviewing and revising employment policies. For example, carefully crafted and consistently enforced no-solicitation policies and company equipment policies can serve as effective union avoidance tools. Finally, supervisors should be trained on the do's and don'ts of union organizing campaigns because supervisors are often an employer's most effective means of communicating its message.

RE-EMPOWERMENT OF SKILLED PROFESSIONAL EMPLOYEES AND CONSTRUCTION TRADES ACT

The RESPECT Act is a legislative response to a line of NLRB and court decisions interpreting the supervisor exclusion under NLRA. If an employee falls under NLRA's definition of supervisor, that employee is excluded from union eligibility. The RESPECT Act would make it more difficult for employees to be declared supervisors because assigning and directing work would no longer be indicia of supervisor responsibility. The effect would be to expand the number of employees eligible for unionization and limit management's ability to communicate its message about union organizing through its front line supervisors.

PATRIOT EMPLOYERS ACT

During the Presidential campaign, Senator Obama often referenced providing tax breaks to employers who keep jobs in the United States. The Patriot Employers Act would provide a tax credit to companies that:

1. maintain headquarters in the United States;

2. pay at least 60% of employee health care premiums;

3. increase the number of U.S. workers compared to workers abroad;

4. provide military pay differential for employees called to duty;

5. provide a specified retirement benefit (generally, 5% of annual salary); and

6. maintain a union neutrality policy. Union neutrality policies prevent employers from opposing unionization and effectively allow unions to gain majority support through card checks.

The enactment of any of these initiatives will change the scope of American labor law. There is much employers can do to protect themselves from unionization, but prompt and thoughtful action is necessary. Employers would be well advised to consult with experienced labor attorneys to begin preparing for what could be the most dramatic change to the American workplace in more than 60 years.

For more information on these legislative endeavors or if you have questions, please contact the authors. Mr. Yates and Ms. Flynn may be reached at our Toledo office (419-241-6000) while Mr. Hortop works from our Novi office (248 994-7757).

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