



TO: All Clients and Friends

FROM: Alaniz & Schraeder, L.L.P.

DATE: November 14, 2008

RE: Employee Free Choice Act

With the election of Barack Obama to the White House, it is certain that the Employee Free Choice Act will become law. The timing of when he signs the Act into law is uncertain but many commentators feel that it will occur within his first one hundred days in office. This leaves little time for employers to contemplate the ramifications of this revolutionary legislation.

What does it mean?

It is estimated that organized labor spent between \$400-\$500 million dollars on Democratic candidates to assure passage of the Employee Free Choice Act. Inaptly named, the act would replace the current system of secret-ballot organizing elections with card checks, in which workers publicly sign union cards to organize and join a union. Under the current method, if organizers collect authorization cards from at least 30% of a company's workers, a secret ballot election may be held providing the employer the opportunity to stage its own campaign against unionization. However, the EFCA would strip workers of the right to a secret ballot and once organizers collect authorization cards from 50% + 1 of a company's employees, certification of the union with that employer is automatic and all of the company's workers are forced to join the union.

Currently, even if a union is certified through the election process, both parties are only required to bargain in good faith in an attempt to enter into a contract. However, if both parties reach an impasse, no contract is forced upon either side. The EFCA would require that companies and newly certified unions enter binding arbitration if they cannot

reach agreement on an initial contract after 90 days of negotiation. That means that the control of wages and working conditions would be put in the hands of unaccountable government officials with no experience in the industry in question.

Finally, the EFCA dramatically increases the penalties for unfair labor practices committed by employers, but not unions, during an organizing drive. Under current law, when an employer illegally discriminates against a worker for supporting a union during an organizing campaign, the law requires the employer to provide that worker with full back pay. The EFCA would require the employer to provide triple back pay and would add a civil penalty of up to \$20,000 for each unfair labor practice committed. As an example, assume a group of 10 employees working for a non-union employer refuses to work on certain equipment because they say the equipment is unsafe. Each employee is then given a written warning for his or her conduct. Since, under the National Labor Relations Act, employees have the right to engage in “concerted activities” regarding the terms and conditions of their employment, the employer has unknowingly committed 10 different unfair labor practices with potential fines reaching as high as \$200,000.

What can be done?

1. Ensure that the Company utilizes a strong No Solicitation policy

Before the Act goes into effect, we must ensure that your Company has a No Solicitation policy in place. If you do not have a policy in place, or if it has been some time since it was last reviewed, please contact us and we can assist you with this. We also encourage posting this policy in conspicuous areas and sending it across the email system to all employees, letting them know that electronic communications are also included in the policy. We are also recommending that contractors who are regularly present on the premises receive a copy of the policy and be required to comply as well.

2. More strictly monitor electronic communications

Because the EFCA permits a union to be recognized solely on card check, one highly dangerous scenario involves a union contacting a company’s employees by email and encouraging employees to return an authorization card to the union with their electronic signature. This worst case scenario could lead to a union obtaining signed authorization cards with little or no notice to the company. More strict monitoring of emails and internet sites visited will give us the advance warning we need in the event of an organizing attempt.

3. Train managers and supervisors on recognizing union activity

We currently provide training to managers and supervisors on labor and employment

issues, and we are developing more extensive training materials on defending against the EFCA. This type of training will be crucial to ensuring that all of your managers and supervisors can recognize the signs of union activity, especially given the fact that the EFCA eliminates the need for a union to put the company on notice that it is seeking an election. It is also critical since most of your supervisors and managers have had little or no experience with unions.

4. Focus on the employees

Surveys in a variety of workplaces year in and year out find that employees are most concerned with communications with management and being recognized for their contributions to the success of the company. Therefore, many of the strategies we are developing deal with this issue, such as placing more of a focus on employees in your company's advertisements, holding internal town hall sessions with employees, encouraging employee contributions to newsletters, conducting informal surveys of employees by supervisors and managers at scheduled meetings to determine potential concerns, and acting quickly to deal with any concerns raised by employees.

5. Communicate your views on the EFCA to employees at the appropriate time

We also advise working on specific communications that properly prepared managers and supervisors can make to employees to explain why the company has always been non-union and why it is much better off without a union. We feel that this approach would work well for the EFCA, and we are able to create an engaging presentation, including a video presentation, that managers can deliver to their employees. These presentations must abide by certain legal requirements, and we will ensure that the presentations are informative and persuasive without opening up the company to legal attacks. The timing of the presentations is also crucial, and it would seem that the best time to make the presentations would be shortly before it appears that passage of the EFCA is inevitable.

6. Consistently monitor the mood of the employees

It is self-evident that monitoring of the workplace for possible signs of union activity must take place on a constant, ongoing basis. This may involve supervisor surveys, or more regular meetings with employees by management. Given the fact that the EFCA could permit a union to very quickly get cards signed by employees, the company needs to remain vigilant and ensure that we know the sense of the employees at all times. While most of managers and supervisors already do a reasonable job in this area, we will nonetheless work with management teams to ensure that the issue remains at the forefront.

7. Attack the legal basis for the EFCA

We are also working on strategies for attacks on the EFCA itself and trying to determine the best legal, constitutional, and practical attacks that can be raised to thwart the Act. The company can also potentially join with other employer associations and/or business groups in attacking the EFCA on a legal basis or through lobbying efforts. We have already discussed such efforts with several national business associations with which we are involved. However, these efforts may have a slim chance for success given the political climate and the willingness of the unions to throw hundreds of lawyers and millions of dollars into the fight. Nonetheless, we are looking at all possible scenarios for attacking the EFCA both before it is passed or if it ever directly impacts your company.