

March 11, 2009

New Advantages for Unions Under the Employee Free Choice Act

In an effort to reverse an almost 80% decline in private-sector unionization during the past 50 or so years, labor unions are pressing hard for the enactment of the Employee Free Choice Act (EFCA) and are looking to President Obama, who was an original co-sponsor of the EFCA, to lead the way. The EFCA passed the House in March 2007, and the Senate version was introduced by Senator Ted Kennedy later that month. However, its supporters could not muster the 60 votes needed to invoke cloture and the bill did not pass.

Current Union Certification Procedure

Currently, the process for a union to obtain certification from the National Labor Relations Board (NLRB) as the representative of a unit of employees usually involves a secret-ballot election supervised by a NLRB agent, in which employees may vote in favor of or against designating the union as the representative of the employees. A majority of those voting determines whether or not the union will be certified. Occasionally, and only with the employer's agreement, a union may be certified upon the union presenting signed authorization cards from a majority of the employees.

Union Certification Under the EFCA

The EFCA would profoundly change the way labor unions seek to organize and become the certified representative of employees. If enacted in the form approved by the House in 2007, the EFCA would provide for certification if a union obtains authorization cards from a majority of the unit employees and presents them to the NLRB. There would be no requirements for the employees to vote in a secret-ballot election and the employer may very well be unaware of the union's efforts to obtain the signed authorization cards until the union presents them to the NLRB, thus eliminating the employer's ability to communicate to the employees the reasons that it believes union representation is not in the employees' best interest. The union may well have obtained the signed authorization cards off-site and by misrepresentation, misinformation, peer pressure and intimidation. Employees who are disinclined to favor union representation (and the attendant cost of union dues) may well be unable to express their views until it is too late.

Initial Bargaining Under the EFCA

Once the union is certified, the EFCA would require the employer to commence bargaining with the union within 10 days of a union request and, if no agreement is reached within 90 days of the commencement of negotiations, either party may request that the Federal Mediation and Conciliation Service (FMCS) attempt to mediate the differences between the parties. If no such agreement is reached within 30 days thereafter, the matter is referred to binding arbitration, which conclusively determines the terms of an agreement that is binding upon the parties for a two-year period. The procedure is profoundly different from the current requirements under the National Labor Relations Act. Presently, if a union gains certification through an NLRB-conducted secret-ballot election, the parties are only required to enter into good faith bargaining in seeking to reach an agreement. Neither party is required to agree to any proposal, and certainly is not required to reach an agreement on an inevitably complex first agreement with a union in a 90-day period. Instead, under the EFCA, a union has every incentive to insist on its proposals that reflect its promises made to the employees in inducing them to sign the authorization cards. Whether an arbitrator designated by the FMCS is capable of understanding and evaluating the business implications of imposing on an employer the terms of a binding contract is highly questionable and might well endanger the employer's ability to survive, particularly in current economic conditions.

New EFCA Penalties

The EFCA also significantly increases the penalties to be assessed against employers who are found to have committed an unfair labor practice (ULP) occurring during the union's organizing efforts or during the negotiation of an initial contract. Rather than the current "make-whole" remedies, the EFCA provides for triple back pay for employees who are unlawfully discharged during the union's organizing efforts or otherwise in connection with lawful union activities, as well as additional penalties up to \$20,000 for each such unfair labor practice and, where applicable, mandatory injunctive relief in a proceeding by the NLRB where the NLRB has "reasonable cause" to conclude that a ULP occurred during the union's organizing efforts or initial negotiation.

Expected Timetable for Enactment of EFCA

While the strong support of the Obama administration for passage of the EFCA seems to suggest that the EFCA would be enacted by this summer, there is some question whether President Obama's priority is to address the current economic issues before confronting the Republican opponents of the bill. In January 2009, President Obama seemed to suggest that the EFCA might need some "tweaks," and that the recent huge loss of jobs raised a question as to when to turn to pressing for its enactment. However, major union leaders are pressing for prompt enactment. As recently as February 3, James Williams, president of the International Union of Painters and Allied Trades and an AFL-CIO Executive Council member, predicted that passage of the EFCA, with no major changes, would be enacted within five months.

What Should Employers Do?

Whether or not the EFCA is enacted, employers should consider taking the following steps now. Even if the EFCA is not enacted, it is likely that union organizing will increase as employees' concerns about layoffs and the possible loss of jobs increase. Moreover, if the EFCA is enacted, it is likely that employers may not be aware of a union organizing campaign until it is too late for action.

- (1) Undertake a comprehensive training program for supervisors and managers so that they are able to recognize the often subtle signs of an ongoing union organizing campaign that is frequently off-site (at employees' homes, employer parking lots, nearby bars or luncheonettes, etc.). The training program should educate supervisors on how to lawfully communicate with employees during an organizing campaign, and how to explain the disadvantages of union representation (union dues, inflexible work rules, inability to deal directly with employer management, strikes, etc.), as well as the advantages of not being represented by a union.
- (2) Distribute updated no-solicitation policies and "business-use only" email policies.
- (3) Conduct polls of employees to ascertain and promptly address employee concerns.
- (4) Communicate openly, directly and respectfully with employees concerning business issues that may affect them, so as to maintain employee morale at a high level.
- (5) Undertake wage and benefit surveys to assure, if possible, that employees are receiving wages and benefits that compare favorably with other comparable area businesses.
- (6) Schedule holiday parties and other celebratory events for employees, if feasible, as they may assist in maintaining employee morale at a high level.

The EFCA is likely to bring a profound change and increase in union activity. For more information on how this might affect you, contact Merrill Mironer at 212.940.8910 or merril.mironer@kattenlaw.com.

Published for clients as a source of information. The material contained herein is not to be construed as legal advice or opinion.

CIRCULAR 230 DISCLOSURE: Pursuant to regulations governing practice before the Internal Revenue Service, any tax advice contained herein is not intended or written to be used and cannot be used by a taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer.

©2009 Katten Muchin Rosenman LLP. All rights reserved.

Katten

Katten Muchin Rosenman LLP

www.kattenlaw.com

CHARLOTTE

CHICAGO

IRVING

LONDON

LOS ANGELES

NEW YORK

PALO ALTO

WASHINGTON, DC

*Katten Muchin Rosenman LLP is an Illinois limited liability partnership including professional corporations that has elected to be governed by the Illinois Uniform Partnership Act (1997).
London affiliate: Katten Muchin Rosenman Cornish LLP.*