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SPECIAL FEATURE

Memo to employers: Employee Free Choice Act is on the horizon

By William E. Hannum III

Soon it will be dramatically easier for labor unions to organize employees. President Barack Obama has promised to sign the Employee Free Choice Act, or EFCA, and the unions that supported his campaign are calling for its quick passage. The free-choice measure will substantially change the National Labor Relations Act — and the balance of power in the workplace.

Ideally, the EFCA should be changed before it becomes law, but that change does not seem likely. Thus employers should act now to minimize the risk of being unionized without the protection of a secret-ballot election.

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The act's provisions

The EFCA would allow unions to represent employees without having to win a secret-ballot election; arbitrators to write first collective bargaining agreements; and more injunctions against unfair labor practices, or ULPs, in union-organizing campaigns as well as substantially increased penalties.

As drafted, the EFCA will permit unions to represent employees based solely on signed authorization cards, i.e., without having to win a secret-ballot election. This should be of great concern to employers. Unions engage in high-pressure tactics to get employees to sign authorization cards. Employees sign union authorization cards simply to get the union "off their backs" or perhaps to "send a message" to the employer. Not surprisingly, then, employers often win secret-ballot elections where a majority of employees had previously signed union cards.

Unfortunately, after the EFCA, there will be no secret-ballot election. This change will increase unions' success in organizing employers.

Also deeply troubling to employers is the provision permitting an arbitrator to decide the terms of a first collective bargaining agreement. Specifically, if the first CBA is not completed within 120 days following the commencement of bargaining, then the matter can be referred to an arbitrator who would decide the terms of, and effectively write, that first CBA for a period of up to two years.

This 120-day time frame is unreasonable. Negotiating a first CBA will be a new experience for most employers and employees, and every single provision is being negotiated. Negotiating first contracts frequently takes more than a year, even when parties are negotiating in good faith.

The EFCA will also lead to more injunctions against ULPs in union-organizing campaigns and increased penalties if the National Labor Relations Board finds that

William E. Hannum III is Managing Partner at the labor and employment law firm of Schwartz Hannum in Andover, Mass.

an employer has discriminated against an employee, either while employees were seeking representation or after a union was recognized and before the first collective bargaining contract was entered into.

A call for reforms

The EFCA should be changed to protect the secret-ballot election and to allow parties a reasonable opportunity to negotiate first CBAs, while also addressing the problems that the EFCA is purportedly intended to address. Those problems include extremely aggressive campaign and negotiating tactics by employers.

Under the current system, union campaigns take months (or years), consume substantial resources and are perceived to deprive employees of a meaningful right to organize. These campaigns result in protracted litigation over issues such as who gets to vote, whose vote gets counted or whose campaign propaganda violated the law. This litigation can be a strategy to impose costs and delay or manipulate the ballot count. And even when unions "win" elections, they are often faced with protracted negotiations, which sometimes lead to decertification.

The strategy that it is better to win the election at all costs, or delay reaching a contract as long as possible, is facilitated by the weak remedies and enforcement not by the secret-ballot election. Thus, we do not need to get rid of secret-ballot elections.

If the problem is employers' hard-ball tactics and undue delay, then the solution should fit those problems. The NLRA should be amended to implement alternative protections, such as:

Conduct a secret-ballot election quickly (within five to10 days) after the election petition is filed so that neither side has much time to engage in aggressive campaign tactics.

Limit the types of campaign communications that either the employer or the union can utilize, as part of an alternative procedure that preserves the secret- ballot election, at the employer's option.

Impose more substantial penalties (monetary or otherwise) on a party that engages in unlawful campaign tactics and/or bad-faith bargaining.

In short, the EFCA should be revised to solve the problems described by those who support the EFCA.

Similarly, the 120-day provision must be eliminated or dramatically revised to give the parties time to negotiate their own CBA. Allowing an arbitrator to set wages and work rules, for example, is not in the parties' best interests. Concluding the "negotiations" of the first CBA by having an arbitrator unilaterally decide the terms will get the new labor-management relationship off to an adversarial start.

Campaigns are rough-and-tumble, and the process of negotiating the first CBA and reaching a successful conclusion, with all its compromises and disappointments, is essential to giving the parties the chance to learn to work together successfully. This could be done by extending the one-year "contract bar" to allow unions a longer time (perhaps 18 months or two years) to negotiate the first contract.

In the meantime …

While change to the EFCA may be needed, dramatic change seems highly unlikely. Thus, even the best-case scenario for employers means they will soon be playing by a significantly different set of rules in the high-stakes game of union organizing.

So, what can employers do? Make a plan. Act now. Specifically, employers should begin to evaluate compensation and benefits and address any areas of weakness; conduct a wage/hour audit and rectify any potential concerns; audit worker classifications and update job descriptions as necessary; evaluate the performance of senior executives, managers and front-line supervisors; and offer training as needed. Poor management is a leading cause of successful union-organizing efforts.

Employers would also do well to conduct employee surveys and/or 360-degree reviews; audit all human resources practices; audit workplace safety; audit and rectify any unresolved workplace complaints; provide separate training to managers and employees to educate them on topics pertaining to potential union organizing; identify and gather information about relevant unions in the industry and geographic area; and develop and implement a comprehensive communications plan.

In short, the employer's best chance to avoid a union is to comply with all applicable laws, take the best possible care of employees and communicate effectively with employees. In theory, employers who do so will have employees who are productive, happy, understanding and loyal and who will not be interested in paying union dues for the privilege of paying a union representative to negotiate for something that they already have. NEIH