

SMITH O'CALLAGHAN & WHITE

33 NORTH LA SALLE STREET

SUITE 3800

CHICAGO, ILLINOIS 60602

TELEPHONE
(312) 419-1000

FACSIMILE
(312) 419-1007

WEBSITE
WWW.SOCW.COM

Employee Free Choice Act: President-Elect Obama's Most Significant Possible Change to Labor and Employment Laws in 2009

The election of Barack Obama could bring key changes to federal labor and employment laws, but the most significant change may be the Employee Free Choice Act ("EFCA"). If passed, the EFCA would critically impact employers nationwide and have far-reaching implications for labor-management relations. In fact, the EFCA in its present form would outweigh the impact of all other contemplated changes identified to date by the Obama administration.

The EFCA has passed in the U. S. House of Representatives and is strongly supported by the new administration: President-elect Obama promised to sign the EFCA into law if elected; Vice President-elect Joe Biden was one of the strongest proponents of the law in the Senate; and Hilda Solis, newly tapped to be Secretary of Labor, has a strong record of support for labor unions.

Given the current economic climate and opposition to the Act from Senate Republicans, passage of the EFCA may be delayed. With many important economic issues taking precedence, the EFCA could be of less priority in the first year of the Obama presidency. However, employers should remain aware of the EFCA and would be well advised to use this additional time to assess the impact of the EFCA and to plan for its possible enactment in some form.

In anticipation of the EFCA's passage, some highly respected companies have taken well-publicized action. Wal-Mart Stores Inc. has held mandatory meetings for certain managers and department heads to discuss key provisions of the EFCA and consequent potential union organizing efforts and management responses. See, The Wall Street Journal, August 1, 2008. McDonald's Corporation, with more than 600,000 employees, has taken steps to advise store owners of details of the EFCA and has formed an internal "response team" to help mobilize store owners to fight its passage. See, Crain's Chicago Business, December 8, 2008.

The four (4) key provisions of the EFCA are as follows:

- The EFCA would eliminate secret-ballot elections. Under the EFCA, when a union collects a majority of signed authorization cards from employees, the National Labor Relations Board ("NLRB") would automatically designate that union as the bargaining representative for employees. Currently, authorization cards are used to determine only whether sufficient interest in representation exists to warrant a secret-ballot election. Under the EFCA, employers would lose the chance to speak freely to employees about the implications of union representation prior to a secret-ballot election.

- The EFCA provides that negotiations for a first contract must begin within 10 days of a request for bargaining by the newly designated union. Presently, no specific time frame is required. Employers would be disadvantaged by the 10-day time frame because initial negotiations often require preparation and scheduling.
- Under the EFCA, if agreement on a first contract cannot be reached after 90 days of negotiation, there is a 30-day period during which a federal mediator attempts to facilitate a contract. If the mediation is not successful, a federal arbitration panel will determine the terms of the contract between the employer and the union, and such contract will be binding for two (2) years. Presently, binding arbitration never occurs, let alone imposition of contract terms in a first contract. This very significant change to current law is sometimes overlooked. Often a union is elected, but the first contract is never reached, or the first contract negotiated is far less lucrative than the union promises.
- The EFCA would increase available remedies for certain unfair labor practices committed by employers. Under the EFCA, the NLRB could now impose fines of up to \$20,000 for an employer's willful or repeated interference with employees' rights to organize and/or to bargain. The NLRB could also award an amount equal to double backpay as liquidated damages (on top of the currently available award of actual backpay) in cases involving discharge or discrimination against employees attempting to negotiate a first contract or obtain union representation. Notably, the EFCA does not provide for increased damages for unfair labor practices committed by unions.

To plan before possible enactment of the EFCA in some form, particularly during 2009 when the EFCA may be of less priority given current economic priorities, employers should ensure that managers and supervisors fully understand the impact of unionization and can relay this information to employees as soon as union organizers start collecting authorization cards. Employers also should educate employees as to the legal effect of signing authorization cards. Employers may want to tighten their policies prohibiting solicitation of employees in the workplace, which would have the impact of making it more difficult to collect authorization cards. Finally, employers need to regularly assess the potential for unionization and address possible weaknesses in wages, benefits, working conditions and employer-employee communications to decrease the likelihood of union organization.

Smith O'Callaghan & White

www.socw.com

Terry J. Smith

terry.smith@socw.com

Mary Aileen O'Callaghan

maoc@socw.com

January 2, 2009

This is an update provided for informational purposes to our clients and friends.
©2009 Smith O'Callaghan & White