HUNTON& WILLIAMS

CLIENT ALERT

UPDATE FROM THE LABOR & EMPLOYMENT TEAM

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Contacts

If you have questions or would like more information, please contact any of the attorneys listed at the end of this Alert. Hunton & Williams' labor and employment law practice covers the entire spectrum of labor and employment litigation, arbitration, administrative practice before the NLRB, EEOC, and the DOL, federal contract compliance, wage-hour standards, workplace safety and health standards, workers' compensation, contractual rights and remedies, Sarbanes-Oxley and whistleblower claims, workplace investigations and client counseling under federal and state labor and employment laws.

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Twelve Things You Can Do Today To Prepare For The Employee Free Choice Act

As early as 2007, President-elect Barack Obama was quoted as saying, "We will pass the Employee Free Choice Act. It's not a matter of *if*, it's a matter of *when*." Now that the 2008 elections are over, "when" is rapidly approaching. The election results, with increased Democratic majorities in the Senate and House, greatly enhance the prospects for passage of the Employee Free Choice Act ("EFCA").

The EFCA, "when" enacted, will have a dramatic effect on labor relations in America. It will bypass a secret ballot election to determine whether a union should represent employees and will permit unions to obtain recognition based on authorization cards, which are often solicited surreptitiously. Once a union is recognized, the EFCA short-circuits collective bargaining and can give a government-appointed arbitrator the ultimate authority to set the terms of a first collective bargaining agreement.

Listed below are twelve important steps employers can take to prepare and protect themselves from the inevitable increase in union activity that could result from the EFCA's enactment in the near future.

I. The Employee Free Choice Act — The Basics

The EFCA modifies the National Labor Relations Act, applicable to most employers, in three important areas:

First, it streamlines union certification. Secret ballot elections will be replaced by a "card check" procedure. If a majority of employees sign authorization cards, the union will be certified as the exclusive bargaining representative of the employees. In other words, in many cases employees will not get to vote in private on whether to elect a union.

Second, the act imposes new strict and limited timelines to the collective bargaining process and mandatory "interest arbitration" to determine terms of an agreement if negotiations do not produce one. Once a union is certified as the collective bargaining representative, employers have only 10 days to commence the collective bargaining process with the union. If the parties fail to reach an agreement within 90 days, then either party may refer the dispute to mediation. If mediation fails and the parties do not reach an agreement within 30 days, the dispute will go to binding arbitration. A federally appointed arbitrator will decide what should be the terms of the parties' collective bargaining agreement.

Third, employers can be liable for monetary damages in the event of a finding of misconduct. Although previously the remedial scheme in labor law has been to "make whole" those deemed to have been harmed, the EFCA grants the National Labor Relations Board ("NLRB") the power to award liquidated damages at twice the amount of back pay. In addition, the NLRB has the authority to impose civil penalties of up to $20,000 per violation.

II. A 12-Step Program

Recognize The New Challenges

If the sweeping changes in EFCA become law, many employers who have never considered unions a threat to their organizations will need to change their thinking. Unions will be able to target workforces of their choosing and begin work on obtaining authorization cards — which will be the equivalent of votes for unionization — before management has any suspicion that such efforts have begun. Traditional methods of responding to union activity will no longer work. With card-check certification, employers no longer have a safeguarded pre-election period to inform employees about the downsides of union representation. As a result, employers must recognize the need to communicate with employees about unions before becoming the target of an organizing campaign.

Develop A Strategy For Responding To Union Activity

Company management must develop a position and strategy for responding to various types of union activity, including potential corporate campaigns, consumer handbilling, strikes, picketing or other efforts to generate adverse publicity for the company or a parent organization. The strategy should take into account the company's particular circumstances and business objectives in the short term and in the long term. Because of the wide-reaching implications of unionization, developing this strategy will require time and attention from the highest levels of management. All actions taken by management, both in advance of union activity and in response to union activity, should be consistent with this overall strategy.

Button Up Your Policies

The company should review all its employment-related policies to ensure that they are both fair and workable. To foster good labor relations, all first line supervisors should be trained on policy enforcement. In particular, the company should ensure that its no-solicitation, no-distribution and no-trespassing rules are comprehensive but lawful. Managers must know these policies and be prepared to enforce them consistently and as often as necessary. Also, employers should not forget to include their position on unions in the employee handbook.

Identify Your Supervisors

It is not necessarily easy to determine who is part of management and who is not. Generally speaking, supervisors are not eligible to vote in a union election. Accordingly, it is important to clearly define who the supervisors are within the organization and, if necessary, redefine their job responsibilities. This is particularly important in light of new potential legislation known as the "RESPECT Act," which would redefine the test to determine supervisory status. If an individual has a primary responsibility of making work assignments or handling discipline, management should define, recognize and authorize that individual as a full-fledged supervisor. Supervisory status must be communicated clearly to the individual and to other employees. The designation should make clear the company's expectations regarding supervisors' performance, their authority and the functions for which they will be responsible.

Train Your Supervisors Now

An employer's effective resistance to union organization efforts begins with its first line supervisors. Training on union-related issues should begin immediately. It cannot wait until union activity already has been confirmed. The training should cover the company's position on unions, appropriate ways to disseminate information about unions, early telltale signs of a union-organizing campaign and how to appropriately address employee concerns before a third party is involved. Training also should cover what supervisors can and cannot say about unions, and what types of management actions are prohibited by labor laws (no threats about actions that may be taken, no interrogation about union sympathies, no promises about actions that may be taken, no surveillance to determine whether employees are engaging in organizing activities). Most importantly, however, training should cover all employment-related policies and the importance of enforcing these policies. Untrained supervisors might not consider how inconsistent policy enforcement undermines employee confidence in the type of treatment they can expect from the company. This training should reoccur periodically.

Educate Your Employees Now

As early as employee orientation, the company should begin informing and educating employees about its position on unions, what unique aspects of its culture could be jeopardized by a union and what guarantees a union can and cannot make in the event of unionization. These messages should be reinforced throughout the entire cycle of employment. Employers should explain to employees early and often the many disadvantages of union membership: paying dues, assessments and fees (part of which can go to the international union and its political causes); incurring fines for going through a union picket line; and becoming replaceable if the union strikes. It is also important to emphasize the many advantages of remaining union-free — good wages, benefits and direct access to management. The method of informing and educating employees may vary according to the company's structure, culture and technological capability. Some companies already have developed customized websites and videos. Some companies have posters. Some companies have meetings with individuals and groups. Whatever the method, it is vital that employers educate their workers about the dangers of signing a union authorization card; they may not get a second chance after signing a card.

Periodically Review Employee Morale

Depending on the nature of the company, the employer should assess the most effective way to take the pulse of employee attitudes. In some circumstances, a survey could be appropriate. Surveys, however, can be both beneficial and harmful. Depending on how they are conducted, they can create employee expectations — and employee disappointment if results are not acted upon. There are a number of other methods for gathering valuable information on employee morale and attitudes, including conversations with first line supervisors and employees. But it is vital to seek and obtain such information on a periodic, if not continual, basis.

Ensure That Wages And Benefits Are Competitive

There is no quicker way to encourage an employee's desire for union representation than by offering less-than-competitive pay and benefits. We recommend obtaining surveys of wages and benefits of other unionized and nonunion companies whose employees perform the same or similar work, and adjusting wages and benefits accordingly.

Resolve Complaints

It is essential for employers to review employee complaints of any nature quickly but fairly. Make sure to immediately and fairly resolve any problems and complaints against any supervisors whose supervisees allege favoritism or disparate treatment. When organizing, unions tend to exploit these kinds of employee complaints about management. Unhappy employees lead to unhappy employers at the union bargaining table.

Anticipate The "Salts"

Unions often retain "salts" to seek employment and then organize a workforce from the inside. Remember, although employers cannot discriminate in hiring on the basis of union affiliation, employers can refuse to hire on a non-discriminatory basis (e.g., lack of experience). Employers also can adopt a no-moonlighting rule for a valid, non-discriminatory reason, as long as it is consistently enforced.

Place The Right People In Supervisory Positions

One of the most critical areas of supervisor training is to ensure that first line supervisors take ownership of policies and decisions. If a supervisor blames an unpopular decision on upper management, employees are left feeling that the supervisor, and therefore the employee, has no control over issues. This is one reason why ongoing supervisor training and evaluation is so important. A supervisor whose paycheck depends on his or her supervisory skills is motivated to ensure results are achieved.

Continual Improvement

Employers should constantly try, and ensure employees perceive the effort, to improve communication and teamwork. One effective way for employers to demonstrate that they are open to employee concerns is by holding regular, short meetings with employees before work to discuss problems on the job, to answer questions and to take suggestions for improving the way that things are done. When employees feel that they can communicate effectively with management on their own, they are less likely to invoke the assistance of a third party.

As the EFCA approaches, this is a watershed time for employers. With the coming upheaval of decades of settled labor law, employers act at their own peril if they do not adapt to the new reality. The labor and employment team at Hunton & Williams LLP is prepared to help every employer face these changes with confidence.

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