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The Other Edge of the Sword: **The Employee Free Choice Act**

By Phillip Kujawa

The security industry and virtually all other employers in our nation have derived an unexpected benefit, perhaps only temporarily, from the recession and the worst economic condition in our country since the great depression. It is largely because of the dire economic conditions that the President concentrated a vast amount of his initial efforts in developing and implementing an economic stimulus package -- instead of attempting to make good on a campaign promise to organized labor by aggressively pushing for passage of the Employee Free Choice Act ("EFCA") (H.R. 1409) during the first 100 days of his presidency. Ironically, some of the direct benefits intended to flow from the stimulus package (revitalized business activities) may be crippled by the other edge of the sword in the EFCA.

The EFCA, as currently proposed, presents ominous consequences to small and large businesses alike. So much, in fact, that certain multi-million dollar business deals have been including contingency

clauses hinging upon the final outcome of the bill. For example, in a recent contract between FedEx and Boeing for the purchase of 777F planes (which represents the largest order from all purchasers worldwide), a provision was included which permits FedEx to cancel the order if Congress passes the EFCA.

Since the introduction of the EFCA, there have been at least two alternative proposals discussed. A brief synopsis of the current state of the law in this area is provided along with a summary of the EFCA and two alternative proposals. Finally, some suggestions for the security industry are provided for surviving in these difficult and uncertain times.

Current Law

Under current law, union organizing activities may be commenced in a bargaining unit where more than 30% of employees sign authorization cards requesting representation by a union. After that

amount is obtained, a petition can be filed with the National Labor Relations Board ("NLRB") for a secret-ballot election. The NLRB may hold a hearing to determine which employees are eligible to vote. The NLRB governs employers and unions on conduct during an election campaign. If the union is successful in obtaining a majority of votes in the election, the employer is required to commence collective bargaining with the union. There are no time limits currently in place for concluding collective bargaining and there is no method for resolving bargaining disputes. If an employer is deemed to have engaged in an unfair labor practice, the employee is reinstated with back pay.



Employee Free Choice Act

Under the current version of the EFCA, the union determines the collective bargaining unit. If the union obtains authorization cards signed by 51% of the bargaining unit, the employer is required to engage in collective bargaining with the union. There is no opportunity for a secret-ballot election under the EFCA. The NLRB does not hold a hearing to determine who is eligible to vote. The employer has no opportunity to challenge or object to the propriety of the authorization cards or the manner in which they were obtained.

In the collective bargaining phase, if an agreement is not negotiated within 90 days, Federal Mediation Conciliation Services (“FMCS”) attempts to mediate the issues between the union and employer for 30 days. If the initial collective bargaining agreement is not negotiated within a total of 120 days, all open issues will be resolved through arbitration which would result in a collective bargaining agreement which can be binding on the parties for two years.

Under the EFCA, if the employer is deemed to have engaged in an unfair labor practice, the employee can be entitled to reinstatement with liquidated damages in a sum of triple back pay. The employer would also face a fine of \$20,000.00 for each willful or repeated unfair labor practice.

Starbucks/Costco/Whole Foods Proposal

A proposal suggested by the Presidents of Starbucks, Costco, and Whole Foods has not been memorialized in the form of a bill but is being discussed by some law makers. Under this proposal, an employer would be required to collectively bargain with the union if 70% of the employees sign authorization cards. If 50% of employees signed authorization cards, a “quickie secret ballot election” will be held within 10 to 15 days. If 30% of employees sign authorization cards, collective bargaining would be required and then a traditional election will be held by the NLRB. There are no time limitations for completion of the collective bargaining agreement and this proposal does not contemplate interest arbitration.

National Labor Relations Modernization Act

Under the National Labor Relations Modernization Act (“NLRMA”) (H.R. 1355), organizing would proceed in a manner consistent with the existing law whereby a union is permitted to petition the NLRB for a secret-ballot after obtaining 30% of employee’s signatures on authorization cards. Unlike the EFCA, the NLRMA does not contain the card-check provision that would eliminate an employee’s right to choose a

The EFCA’s Threat to Business

Under the EFCA, there is a flawed process in the manner in which authorization cards are gathered. Indeed, there are no controls in how signatures are gathered. Other than the existing criminal code, there is no check on the utilization of coercion or threats in obtaining signatures. In organized labor, there is no question peer pressure plays a role. There is no ability for an employer to determine if an employee signed the authorization card because he or she truly believed in the mission of the union or rather to simply relieve the employee of increasing pressure to sign the authorization card.

The 90 day requirement for completing the collective bargaining agreement under the EFCA is completely unrealistic and unattainable. Under a typical situation, it takes anywhere between six to twelve months to complete negotiation of a collective bargaining agreement. Not only is the time limitation for the completion of the collective bargaining agreement under the EFCA unrealistic, there is no incentive for the union to negotiate in good faith given the certainty of all disputes being resolved by an arbitrator. ■

union as his exclusive representative through a secret-ballot election. During the election campaign, unions are granted equal access to employees including group meetings with employees, the ability to post signs, and distribute literature.

If the union is successful at the election, collective bargaining ensues. If the initial collective bargaining agreement is not negotiated within 120 days, the FMCS appoints a panel to mediate. If the initial collective bargaining agreement is not negotiated within a total of 240 days, the parties are forced into mandatory interest arbitration before an arbitration panel appointed by the FMCS. The arbitration panel’s ruling is binding for 18 months. The remedies available to an employee under the NLRMA are the same as suggested by the EFCA.



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Conclusion

Given the strong union support of the democratically controlled executive and legislative branches of our federal government, some type of labor reform legislation will likely be passed in the coming months. The card check provision of the EFCA has gained much notoriety and is the subject of much debate. While the card check provision should be of concern to employers, it is arguable not the most problematic feature of the labor proposals currently under consideration. Indeed, the binding interest arbitration requirement called for in the EFCA could have catastrophic ramifications on employers. There are no rules or procedures governing the binding arbitration proceedings and there is no check or balance on the authority of the arbitrator. Accordingly, there are numerous constitutional concerns presented by a binding interest arbitration provision of this kind including violations of the 4th Amendment as an impermissible governmental "taking" and violations of due process under the 14th Amendment.

It can only be hoped that a significant compromised piece of legislation emerges as law in the final analysis. While the next federal election is not until

2010, the concerns of the security industry should be made known immediately to federal and state officials. The well drafted and reasoned Sample Letter contained in the Spring 2009 edition of The NCISS Report (pg. 13) provides an excellent start for broadcasting the concerns of the security industry to our elected officials. The security industry is also encouraged to support and partake in the NCISS Hit the Hill Campaign in Washington, D.C. on September 24, 2009. Detailed information on this and other events is available at www.nciss.org. Perhaps enough sustained pressure on our elected officials and continued recessionary concerns can derail the imposition of new legislation in this area long enough to provide new leadership of our country. ■

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What Employers Can Do Now

In these difficult economic times, an environment of uncertainty and a feeling of insecurity among employees may make employees particularly vulnerable to union promises. Accordingly, good business and management practices are particularly important. Managers and supervisors must be sensitive to the concerns and interests of their workers. Management must know the permissible manner of addressing union issues with employees. Comprehensive management training on labor and employment issues is readily available and is strongly encouraged for all members of management. The investment now in such training will better protect employers from exposure in our current pro-employee climate.

There are a number of simple, good business practices which can be implemented immediately which might help to maintain or create a good working environment for employees. For instance, changes or reductions in employee benefits, which are currently

very common place, must be carefully communicated and implemented. Whenever possible, an employer should solicit and take into account employee feedback with respect to significant proposed benefit changes to help minimize the potential adverse impact on employees. Employers should take particular attention during these difficult times to address employee concerns about feelings of job insecurity. Additionally, employers should continue to recognize the importance of long term and high performing employees. Such employees should continue to benefit in terms of pay, benefits, recognition, and performance reviews.

An employer should attempt to limit the interaction between its non-union employees and union employees of outside contractors and customers. Obviously, significant interaction between non-union employees and union employees of outside contractors and customers will increase union awareness and may present significant opportunity for union solicitation. Employers can significantly reduce this contact by being mindful of the composition of the workforce of its customers and suppliers. ■