Snell & Wilmer L.L.P.

LEGAL ALERT

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The Employee Free Choice Act (EFCA)

WHAT EMPLOYERS SHOULD DO NOW

By Gerard Morales and Kathryn Hackett

Most observers predict that the Employee Free Choice Act (EFCA) will become a reality during the first sixth months of the new Obama administration. Without a doubt, this would be the most significant reform to the Nation's labor laws since the enactment of the Labor Management Relations Act in 1947. It is well known that over the last 30 years, the percentage of the American workforce represented by labor unions has declined dramatically. The EFCA's clear purpose, the stated goal of those who support its passage, is to reverse that trend.

Current Status

Under current law, an employer may decline to recognize a labor union as the representative of its employees, and insist on a secret ballot election conducted by the National Labor Relations Board (NLRB), to determine whether its employees actually want union representation. Only if the union wins the election and becomes certified by the NLRB, is the employer then required to recognize and bargain with the union over its employees' terms and conditions of employment. Once that duty arises, the employer and the union are required to negotiate in good-faith to reach a collective bargaining agreement. They are not required, however, to agree on any particular term or condition.

EFCA

Under the EFCA, the NLRB would certify the union after the union presents cards demonstrating majority support among the employees. There would be *no secret ballot election*, and *no election campaign* to discuss with employees the advantages and disadvantages of union representation. Upon certification by the NLRB, the employer will have the obligation to recognize and bargain with the union.

Equally important, under EFCA, if the union and the employer are unable to agree to a first contract within a certain period of time (130 days under the current EFCA draft), a Federal Mediation and Conciliation Service (FMCS) appointed arbitrator would then decide the terms of the contract. Thus, an employer could be presented with terms and conditions of employment that it would otherwise find unacceptable.

Furthermore, EFCA significantly increases penalties for the employers for various unfair labor practices. Available remedies include treble backpay and civil penalties, up to $20K per violation against employers for certain unfair labor practices ("willfull" or "repeated") that occur during the union's efforts to obtain authorization cards and/or during the first contract negotiations.

What To Do Now

It is essential that *all* supervisors become familiar with EFCA's impact on their company and be trained on the steps the company may legally take to: (a) minimize risks, and (b) avoid the commission of unfair labor practices.

You will be receiving an invitation in the near future to attend breakfast seminars conducted by Snell & Wilmer attorneys on the legal issues raised by the EFCA.

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