THE HOSPITALITY LAW SEMINAR EASTERN REGION
JUNE 1-2, 2009

Key Legislation in the Area of Employment and Labor Law: The Employee Free Choice Act

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Mr. McCallum regularly defends employers in areas such as employment discrimination, retaliation, wrongful discharge, and wage/hour regulation both in court and before federal and state agencies. He also provides advice to managers and human resources professionals on a wide variety of personnel matters, and conducts training on union avoidance, FMLA compliance and other employment law issues.

After law school, Mr. McCallum served as a Judicial Clerk for the Honorable Robert N. Wilentz, former Chief Justice of the New Jersey Supreme Court. Immediately prior to joining Shawe Rosenthal, Mr. McCallum served as in-house counsel with a major telecommunications company, providing advice to management on various employment law issues, and litigating employment discrimination, harassment, wrongful discharge, and other employment lawsuits before federal and state courts and enforcement agencies.

Mr. McCallum is a frequent speaker on employment law issues, and is a member of the Board of the Maryland State Bar Association Section of Labor and Employment Law as well as the Board of the Maryland Hotel and Lodging Association. Mr. McCallum is also Co-Chair of the Labor and Employment Subcommittee of the American Bar Association Litigation Section's Committee on Corporate Counsel and has contributed articles to the Corporate Counsel Subcommittee's quarterly newsletter. He has also served as a revisions editor for the Matthew Bender publication: *The Employment Law Deskbook*.

Mr. McCallum earned his B.A. degree, *cum laude*, from Princeton University, and his J.D. degree from Harvard Law School. He is a member of the Maryland, New Jersey and District of Columbia bars, and is also admitted to practice in the United States District Court for the District of Maryland and the United States Court of Appeals for the Fourth Circuit.

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I. SCOPE OF ARTICLE

This article examines the potential impact of pending labor legislation in Congress known as the Employee Free Choice Act (the "EFCA"). The following is a discussion of the major provisions of the EFCA in its current form and the significant changes it would make to the way unions organize. I also offer some perspective regarding possible compromise legislation as well as steps that employers should take to be prepared should the bill, or some compromise version, eventually become law.

II. HISTORY OF THE EFCA

On March 10, 2009, the much anticipated Employee Free Choice Act (EFCA) was once again introduced in Congress. The EFCA, also known as the "card check" bill, was originally passed by the U.S. House of Representatives in March 2007. In June 2007, the bill stalled in the Senate, falling 9 votes short of the 60 needed to limit Senate debate. Given the opposition to the bill from the White House at that time, the bill stood virtually no chance of becoming law even if it had passed both Houses of Congress. President Obama's election in November 2008 breathed new life into the EFCA, as labor unions strongly supported Mr. Obama's candidacy and the President has consistently expressed his support for the EFCA. Passage of the EFCA, however, is not a virtual certainty, as the bill faces strong opposition from the business community and it is not clear that the Democrats will have a sufficient number of votes to break a Republican filibuster in the Senate.

III. THE KEY PROVISIONS OF THE EFCA

The EFCA, in the form in which it was introduced on March 10, 2009, contains two key provisions:

1. The EFCA would require that employers recognize a union as the exclusive bargaining representative for a group of employees where a majority of the employees have signed union authorization cards (*i.e.*, the "card check" process). The secret ballot election process would be eliminated.

2. If a union is certified and the employer and the union cannot agree on a first contract after 90 days, either party can request assistance from the Federal Mediation and Conciliation Service ("FMCS"), but if mediation does not result in a binding contract within 30 days (or such additional period as the union and the employer may agree upon), the FMCS must refer the matter to binding arbitration (which would result in a collective bargaining agreement that is binding on the employer and the union for two years). An arbitrator would set the terms of the labor agreement**.**

The Act also imposes stiffer money penalties (back pay plus double back pay as liquidated damages) on employers who discriminate against employees in connection with a union organizing campaign, plus the possibility of civil penalties of up to $20,000 per violation for willful or repeated violations or during negotiations for a first contract.

A. How the EFCA Would Change Current Law

While an employer, under current law, may agree to recognize a union under the card check method, it is not required to do so. Typically, a union secures its status as bargaining representative only by winning a National Labor Relations Board (NLRB)-supervised secret ballot election. That process requires a union to file a petition for representation with the NLRB, supported by at least 30% of the employees in an appropriate bargaining unit. The NLRB promptly (typically within ten days) holds a hearing, if necessary on any unit composition issues. If no hearing is necessary, the election typically occurs no later than 42 days following the filing of the petition. If a hearing is necessary, the election is usually delayed by a few weeks. The election is decided by a majority of those eligible voters who actually vote on election day. A union must win at least 50% plus one of all votes cast to be designated as the employees' bargaining representative.

The secret ballot election is the preferred method for employers because it allows them the opportunity to get their message out to employees prior to an election that is overseen by the NLRB. In some cases, a union is able to secure the 30% sufficient showing of interest without the employer becoming aware of the card signing activity. Under current law, the employer still has an opportunity to communicate to the employees its views about the union during the pre-election process. It can do so provided that such communication contains no threat of reprisal if employees vote for the union or promise of benefit if employees vote against the union. Thus the campaign is not necessarily one-sided.

Either the employer or the union may claim that improper conduct by the other party – such as threats, restrain, or coercion – affected the results of the election. Such claims are subject to an evidentiary hearing conducted by the NLRB and may result in an election being overturned and a new election held, or in the case of a substantial violation by the employer, may result in the imposition of a bargaining order as a remedy. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 591-92 (1969).

If the union wins the election, the employer is required to bargain in good faith with the union at reasonable times over wages, benefits, and other terms and conditions of employment. 29 U.S.C. § 158(d). The duty to bargain in good faith does not compel either the union or the employer to agree to the other party's proposal or to make concessions. However, the parties must provide each other with accurate information that is relevant to performing their responsibilities in negotiating collective bargaining agreements. For example, the employer must provide the union with sufficient "wage data" to allow union representatives to gain an understanding of the issues raised in

collective bargaining. "It is recognized that the sharing of relevant information in negotiations and contract enforcement helps to achieve the NLRA's [National Labor Relations Act] purposes of promoting productive collective bargaining and industrial peace." Kenneth D. Dau-Schmidt, "The Duty to Bargain in Good Faith: *NLRB v. Truitt Mfg. Co. and NLRB v. Insurance Agents' International Union*," Berkeley Electronic Press (2005), http://law.bepress.com/expresso/eps/1318, at 33.

Under current law, a failure to reach agreement will likely be resolved by the respective strength and will of each side. A union always has the right to call a strike to pressure a recalcitrant employer to agree to its proposal, but an employer still retains the right to continue to operate its business. That may mean using replacement labor or having management do bargaining unit work. Ultimately, it may come down to a contest of economic warfare as to whether the company or the union can wait out the other party.

Under the EFCA, an employer would be required to recognize a union under the "card check" method and could no longer insist on a secret ballot election. Former Democratic Senator George McGovern, in a *Wall Street Journal* editorial, states the following regarding the potential impact of card check legislation:

> Instead of a private election with a secret ballot overseen by an impartial federal board, union organizers would simply need to gather signatures from more than 50% of the employees in a workplace or bargaining unit, a system known as "card check." There are many documented cases where workers have been pressured, harassed, tricked and intimidated into signing cards that have led to mandatory payment of dues.

The Wall Street Journal, Opinion, August 8, 2008, http://online.wsj.com/article

Within ten days after the written request of the newly certified bargaining representative, the employer would be required to meet with the union to begin collective bargaining negotiations. After 90 days, if no agreement is reached, the parties can request a mediator to help them reach agreement on a contract. If the parties still cannot reach agreement within 30 days of requesting mediation (or such additional period as the parties may agree upon), then an arbitration panel appointed by the Federal Mediation and Conciliation Service gets to decide the terms of the parties' first contract.

The binding arbitration provision for first contracts may give unions significantly increased authority to influence the terms of a first collective bargaining agreement. In requiring first labor contract disputes to be submitted to binding arbitration, unions will be able to promise employees whom they are trying to convince to sign union cards that the law *guarantees* that the union will secure for them a labor contract. Imposing mandatory arbitration after 120 days of negotiations will limit the employer's bargaining power and make the first collective bargaining agreement subject to the decision of a panel of arbitrators who are free to impose the agreement they deem best.

For example, where the employer and the union are trying to reach agreement on often contentious issues such as wage rates and health insurance benefits, the employer currently has a "bargaining chip" of taking the position that it will not agree to union security (mandatory union membership as a condition of employment) or dues checkoff (collection of union dues by mandatory deduction from wages). Such provisions are legal in states such as Maryland, which is not a "right to work" state. The employer may then decide to compromise by agreeing to a "dues checkoff" provision in exchange for certain other favorable terms for the employer, such as a reasonable economic package and strong management rights provisions. Under the EFCA, employers likely would lose this bargaining chip, as unions would have less of an incentive to make concessions, knowing that an arbitrator would eventually be able to decide on any provisions as to which the union and employer have been unable to agree. Thus, arbitrators could impose terms such as the following:

- Wage rates and wage increases
- Health insurance benefits (including participation in union health and welfare plans)
- Pension/401k (including participation in union plans)
- Vacation/sick leave and other benefits
- Overtime after 8 hr/day
- Job classifications and work rules
- Restrictions on supervisors performing bargaining unit work
- "Union shop" and "check off"

As a result, management, in seeking to avoid the uncertainty (and cost) of arbitration, may accept union demands it otherwise would have steadfastly rejected.

The EFCA also greatly increases penalties for unfair labor practices. For instance, if a pro-union employee is fired during an organizing campaign or first contract negotiations, and the NLRB finds that unlawful anti-union animus motivated the company, the employee will be awarded *triple* back pay damages. If an employer commits unfair labor practices that are willful or repeated, civil penalties of $20,000 per violation can be imposed in addition to any "make-whole" remedy ordered.

B. The Argument Against the Card Check Bill

One of the main arguments business groups have made against the EFCA is that, as opposed to a secret ballot election, where employees can vote their own conscience, authorization cards may by signed based on pressure, misinformation and union "blitz" tactics. Doing away with the secret ballot election in favor of card check would mean that a union could be selected before the employer is ever aware a union organizing campaign is ongoing. Thus, the employer might no longer have a chance to inform its workforce of the risks and potential downsides to union organization.

Unlike the current secret ballot election process that takes a "snap shot" of employee sentiment on a given day, the card check process is cumulative over time, during which

employee sentiments may waver. It is unclear whether there will be a process for employees to "revoke" their authorization if there is a change of mind. Also unclear is how long authorization cards will be valid. The current version of EFCA is silent on these points. The Act does provide that the NLRB will be charged with developing the authorization card and regulations relating to it so it possible that some of these issues will be resolved through that process.

C. Potential Compromise Legislation

The main battleground for the EFCA is the Senate, where 60 votes are needed to end debate and permit the bill to proceed to a floor vote. Thereafter, a simple majority vote would carry the bill. Whether there will be enough votes to end debate and have the bill proceed to a floor vote is unclear, especially now since Senator Arlen Specter, the deciding vote in the Senate who on March 24th stated that he will oppose the bill, announced on April 28, 2009 that he is changing his party affiliation from Republican to Democrat. Spelling more trouble for EFCA, on March 27th, Democratic Senator Diane Feinstein pulled her prior support for the bill, saying that a compromise was needed to reconcile the legitimate interests of management and labor.

Given the uncertainty, Representative Joe Sestik (D-PA) has introduced similar legislation that would amend the NLRA to require employers to provide unions with equal access to employees prior to a secret ballot election but would not mandate that unions be recognized through the card check process. This legislation, called the National Labor Relations Modernization Act, proposes identical penalties to the EFCA for alleged unfair labor practices and, like the EFCA, provides for mediation and arbitration should the employer and the union be unable to reach an agreement on their own. However, the time period for the parties to reach an agreement before arbitration is required is twice as long as in the EFCA (*i.e.*, 240 days after the date on which bargaining commenced) and, if arbitration is necessary, the first agreement remains in effect for a period of eighteen months, rather than two years, as provided for by the EFCA. This legislation addresses a concern raised by labor unions over equal access to employees during the union election process while deleting the mandatory card check provision that business groups find most abhorrent. This legislation will no doubt gain momentum if it becomes apparent that there will not be enough votes for the EFCA to head off a Senate filibuster.

IV. STEPS EMPLOYERS SHOULD TAKE IN THE FACE OF A LIKELY INCREASE IN UNIONIZATION

One thing is for certain: if passed, the EFCA would be the most significant change to the union organizing process since the enactment of the NLRA. Employers would therefore, be well advised to be prepared for the potential enactment of the EFCA or some compromise legislation that makes it easier for unions to organize. It is quite common for unions to campaign on the platform of "respect and dignity." This is a theme that often resonates with a workforce. For that reason, it may be helpful to implement diversity programs and other programs designed to increase employee morale, such as by

recognizing employee achievements. Such programs go hand-in-hand with EEO policies as well as policies dealing with sexual and other forms of harassment, and probably contribute to overall staff satisfaction in any event. Another way of anticipating standard "union issues" and addressing them with employees in advance is to create an internal grievance and/or arbitration procedure. Such a procedure often has an added benefit of reducing discrimination charges and other employment-related litigation because employees may choose to resort to the internal complaint procedure rather than seeking outside counsel or redress through various federal/state/local discrimination agencies.

Finally, it is almost impossible to overemphasize the need for effective and ongoing communications with employees. Too often the demands of business result in a company ignoring the need to focus on communications, about both good and bad news, with its employees. While the meaning of communication is fairly straight forward, in the employment concept the focus should be on things such as:

- Providing timely notice of changes
- Explaining in advance of decisions being implemented
- Seeking employee input in decisions (where appropriate)
- Delegating to lower level employees (where appropriate)
- Getting to know a company's employees
- Being an employee's advocate
- Dealing with employee performance issues on a timely basis.

In short, employers should use the time before enactment of EFCA, or whatever compromise legislation may be passed, to improve their odds of withstanding union organizing efforts. Employees, when choosing to sign a union authorization card or to vote for a union, are essentially voting on whether they are satisfied with their employer and the way they are being treated by management. The more workers believe that they are treated with the respect and dignity they feel they deserve, the less likely they will feel the need to resort to a third party, *i.e.*, a union, to advocate on their behalf.

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