

TMG Update

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“The Employee Free Choice Act — The Rest of the Story”

(by Howard R. Kraus)

In the last issue of *TMG Update*, we reported that it appeared likely the 110th Congress would make changes to the National Labor Relations Act (NLRA) a priority for its current legislative session. Much has happened in the past several months. Moreover, as the full extent of these changes have come to light, we have learned how insidious this initiative really is.

Update

The members of the 110th Congress wasted little time in giving organized labor their “payback” for helping to change party control of Congress. It took the House less than two months and a vote of 241 to 185 on March 1st to pass H.R. 800 (more commonly known as the Employee Free Choice Act). It also didn't take the Senate long to follow suit. On March 29th, the Senate's version of the bill, S.1041, (identical to H.R. 800) was introduced in the Senate. This Bill was sponsored by Senator Ted Kennedy and co-sponsored by 46 of his fellow senators.

What We Already Know

Well publicized has been the core provision of the Bill -- to negate an employer's ability to require the scheduling of secret ballot elections by the National Labor Relations Board (NLRB) for the purpose of determining if a union is to become the collective bargaining representative of an appropriate voting unit of employees. The Bill calls for certification of a union as the bargaining representative of a group of employees if the NLRB finds that those employees are an appropriate bargaining unit, and that a majority of those employees has designated the union to be their representative. The

Bill leaves it up to the NLRB to develop language and procedures for determining the authenticity of signed authorizations, either in the form of cards or petitions. However, to put it simply, if a majority of employees in an appropriate unit sign authorization cards, the union will win the right to represent this group of employees without an election being conducted.

The Rest of the Story for Employers

Two other provisions of this bill are equally troubling – but, less well publicized.

First is a provision of the Bill that would eliminate the voluntary nature of the collective bargaining process during negotiations over a first time contract. The proposed Bills provide for a mandatory mediation and arbitration provision in first time contracts. This provision would require both parties to begin negotiations within 10 days of the certification of the election, and if an agreement isn't reached within 90 days, gives either party the right to trigger the assistance of the Federal Mediation and Conciliation Service (FMCS). If the parties are still unable to reach an agreement after 120 days of bargaining (including 30 days with a federal mediator), either party can force all the remaining open issues into binding arbitration, in which case an arbitrator will set the final terms for your first collective bargaining agreement and the union can choose to agree to nothing in negotiations and still end up with a valid labor contract!

The second significant provision included in these Bills is stronger penalties for employer violations of the NLRA. It triples the damages for back pay, allows for greater civil penalties, and gives the NLRB the authority to seek court injunctions against employers for alleged illegal actions. More importantly, it creates monetary penalties for violations of the NLRA – as much as \$20,000 per violation.

Even though our campaigns are rarely tied up with ULPs, this is of great concern given how little evidence a union needs to file a charge, and historically, how the NLRB investigates and handles such charges.

The Rest of the Story for Employees

As we have explained, this legislative initiative includes some insidious changes. Employers stand to lose some important rights if this becomes law. But, employees also stand to lose some of their rights as well!

The first right employees stand to lose is the right to cast a knowledgeable secret ballot on the matter of representation in an election conducted by an agent of the federal government. As we know, employees currently have the opportunity to cast their ballots under fairly sterile conditions, with no one looking over their shoulder, in the privacy of a voting booth and understanding what they are voting about. Obviously, these same conditions are not present during a card signing campaign. We have all seen and heard stories of pressure and intimidation on the part of unions and/or their supporters to secure signatures from employees. Often

times, employees don't know or understand exactly what they are signing or they sign cards to simply get the pressure "off their back." Unions have also been known to misrepresent the legal significance of signing an authorization card, and we also know that a union doesn't always keep information secret about who signed cards since they will try to grow support by building off the perception of support from others. To take this further, should this Bill become law, unions can become the certified employee representative without acquiring a true majority. It's been our experience that the number of signed authorization cards submitted as proof of the employee's showing of interest does not accurately represent the number of employees that really want a union.

Another right that these bills would cause employees to lose is the opportunity to vote on the acceptance of a collective bargaining agreement. In good faith collective bargaining both parties have a right to agree/disagree with the other's proposals. When a final agreement is reached it is the product of mutual agreements by the employer and employee bargaining committee, reached without any predetermined time restrictions and ratified by the vote of a majority of the employees, not the whim of an arbitrator who has no stake in the operation/business. Jobs and profits could be jeopardized if an employer is forced to agree to terms of a contract within a fixed time period and/or terms imposed by a third party.

Oh...and One More Thing

Supporters of these bills within the labor movement and within the respective houses of Congress support the notion that employees' signatures should suffice as evidence of employee desire and intent. If that is so, then why do these bills not similarly respect employee signatures in the event of Decertification? These bills propose no change in the complicated, restrictive process involved in employees getting a union out. Shouldn't employee signatures be good enough to get rid of their union? Apparently, "what's good for the goose" isn't good for the gander.

What's Next?

The Bill has already passed the House by a good margin and in the Senate has the support of at least Senator Kennedy and its 46 co-sponsors. While at this time there may be enough support in the Senate to pass this Bill, it isn't known if the Bill's supporters have enough support to override an anticipated filibuster of this legislation and even if the Bill passes the Senate, President Bush has already stated that he will veto it. However, given President Bush's low level of public support, one wonders whether or not there could be enough support to override a Presidential veto or if some of the Bill might be removed or exchanged for something else just to gain his signature? Regardless, if in the 2008 elections a Presidential candidate supportive of organized labor is able to take control of the White House, and more supporters of organized labor increase their majority status in Congress, this Bill is likely to become law sometime in early 2009. There are many who are predicting that this will happen.

What You Can Do

The worst thing that you as an employer can do is to say nothing and do nothing about this legislation, or fail to prepare now for the possibility that these reforms will become law. Even though this legislation first surfaced in 2003 and again in 2005, it appears that organized labor has finally surged ahead on its labor reform agenda. Although organized labor has a lot of support and momentum and is going to be difficult to stop, it may not be too late for business to block this movement if they act quickly. One thing you can do now, as either a business or an individual, is to let your elected representatives in Congress know where you stand on this matter by writing to them and/or contacting their offices directly. For a listing of Federal, State and local officials go to www.congress.org.

Another thing you can do now, if you are part of any industry or professional association, is to make them aware of this matter and to seek out their support in urgently opposing this legislation.

Should this Bill become law, the entire paradigm for preventive labor relations will change. No longer will employers be able to let informed choice and the secret ballot election process be their ally. Employers will have to constantly communicate with their employees regarding their positions and views on unionization. Once union organizers begin approaching employees and asking them to sign cards things could happen quickly and employers won't have an opportunity to get their message across during an election campaign. Preventive labor budget dollars will need to be spent up front and early to stay ahead of union organizing through employee labor awareness and education, vulnerability assessments, two-way communication improvements, and the timely identification and resolution of both perceived and actual employee issues.

A note in closing: The best approach to maintaining an employee relationship free of any third party involvement is to practice good management and communicate with your employees about all issues including unions on a continuing basis. By doing so, the union issue including card signing will take care of itself.

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