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TMG Update

THE EMPLOYEE FREE CHOICE ACT – THE NEXT ROUND

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The highly promoted heavyweight fight between the business community and organized labor began earlier this year when The Employee Free Choice Act (EFCA) was introduced in both the Senate and in House on March 10th. The first several rounds of this fight are now complete. These rounds have been hard fought with both participants trading strong jabs and punches, but neither being able to knock out the other. Those scoring the fight have awarded the first several rounds to the business community and its lobbyists.

EFCA supporters knew that they would be in for a battle, but perhaps underestimated the united passion of the business community and how hard the business community was willing to fight. They realized that their opponent would focus in on the elimination of the secret ballot election. They also realized that certain fence sitting democratic senators (Specter-PA, Lincoln-AK, Pryor-AK, Nelson-NE and Feinstein-CA) were supportive of their cause, but had issue with the secret ballot elimination. Nevertheless, EFCA supporters believed they could overcome whatever punches were thrown and that in the end they would prevail. Thus far the business community's strategy to hit the elimination of secret ballot elections hard has worked. Even though only several rounds have been completed it appears that organized labor doesn't have a strategy that can successfully counter this punch.

The Next Rounds

Now, some three months later, the next rounds are ready to begin. During the initial rounds the participants got a good feel for one another and took some time to re-charge and re-assess their strategies and positions. Despite their loss and apparent setback in first few rounds, organized labor has not given up the fight. They remain confident that they can win, but have come to realize that the path to victory will be longer and somewhat different than that for which they originally had planned.

Organized labor's supporters in Congress are not "throwing in the towel", but appear to have given up on EFCA's card check provision. They believe that it's the card check provision that prevented them from getting the 60 votes needed for passage in the Senate. As a result they have recently been floating several compromises that keep secret ballot elections in place, but at the same time aiding organizing while maintaining EFCA's other key provisions. They hope that these compromises will win-over the previously mentioned fence-sitting senators. It's the supporters' belief that the votes of these fence-sitters when combined with the vote of Al Franken, a democrat from Minnesota who hopes to be seated soon upon court resolution of litigation related to the November election, will put them at or above the 60 votes needed for passage.

Several of the compromises being reported call for a much shorter time frame between the time that a petition is filed and the date that an election is scheduled. Today, this time frame is typically 42 days. These compromises closely resemble legislation already in existence in various Canadian provinces where, it should be noted, unions represent about 30% of the workforce. Time frames being discussed as part of possible compromises range from a low of 5 days to a high of 25 days.

Also being floated as a possible compromise is exclusive use of mail-in ballots rather than manual voting at the work site. Supporters of organized labor feel this compromise accomplishes two things. It shortens the time period that an employer can use to campaign and conduct employee meetings. It also takes away some of the control that they feel employers may have over voters when participating in the current on-site secret ballot election process.

Changing Strategy

Some, but not all, of organized labor supporters in Congress seem prepared to alter their strategy and give up on card check. The leaders of organized labor are divided as to whether or not to do so. There are some members of union leadership

who do not want to change their position on this very key issue and want to continue fighting for the bill as it is currently drafted. At the same time, there are other members of union leadership who realize that victory can only be achieved with a more realistic approach.

Even though the business community appears to be in the lead and, as a result, has developed some momentum going forward, their leaders are not in total agreement with a unified strategy. There are some business leaders who want to take advantage of what they've accomplished thus far and to float compromises of their own; there are other business leaders who don't want to give in at all and who will not accept any changes to the existing labor law. However, there does appear to be agreement within the business community to continue a strong offensive approach. They may take aim at another key provision of EFCA, binding arbitration. Their hope is to be able to generate the same level of concern among fence-sitters about binding arbitration as they did over card check.

Expected Timing

We expect the next series of rounds to end some time before Congress's August recess, but it's difficult to predict the amount of activity that will take place during this period. The Administration and Congress appear to have other high priority items such as Health Care Reform on their immediate agenda. This issue is also very important to both the business community and to organized labor. It's also possible that some compromise version of EFCA could become a factor in the give and take on possible Health Care Reform.

There are some who believe that EFCA, in any form, will never make it through the Senate. There are others who feel that should it make it through the Senate, it may not make it through until the next 112th Congress. There are also others who feel that a compromise version of EFCA will make it through the Senate some time this year. No one has a good feel for how long this fight will go, whether or not there will be a winner and who that winner will be, or whether or not this fight ends in a split decision. Much will depend on how flexible each side is and the impact their flexibility/lack of flexibility will have on those legislative decision-makers who are sitting on the fence. This much is clear; unions and those who support EFCA do have a sense of urgency and will not remain dormant.

Another Route To Victory

There are obvious advantages to changing the law, but if EFCA supporters sense that they cannot accomplish what they need to legislatively, union leaders may be prepared to shift gears and push for regulatory and procedural changes by taking advantage of a new Labor Board and Department of Labor appointments known to favor the expansion of union and worker rights. Regulatory and/or procedural changes may not necessarily be permanent and may not accomplish for organized labor what changes to the law would, but they could still significantly alter the playing field and provide them with some advantage. Organized labor will almost certainly encourage the Board to change the time period for elections. The 42-day standard was established by the Board in 1996 and has been in place since that time. The Board appears to be free to change this standard at any time. It's also likely that once the new appointees to the Board are approved, organized labor will encourage this new Board to revisit and perhaps reverse many of the key decisions of the previous "Bush" Board.

We will continue to monitor developments closely and prepare for changes to the labor landscape. In the meantime, The Mickus Group continues to encourage our clients to be proactive in their actions by (1) reviewing their existing employee relationships and core values; (2) training and educating leadership in regard to EFCA and the possibility of union organizing; (3) assessing/identifying organizational and employee relations vulnerabilities and acting upon these vulnerabilities; and (4) educating employees related to EFCA and the potential for future union organizing and card signing.

Please do not hesitate to seek our assistance during these uncertain times.

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