

Work Matters

PLAN NOW FOR THE IMPACT OF THE EMPLOYEE FREE CHOICE ACT

BY MICHAEL P. MASLANKA

Americans will elect a new president and Congress next month. A lot is riding on the outcome. Here's one of particular importance for general counsel: the fate of the Employee Free Choice Act (EFCA). U.S. Sen. Barack Obama, D-Ill., supports it; U.S. Sen. John McCain, R-Ariz., does not.

The EFCA dramatically modifies the National Labor Relations Act on how employees select unions and how unions and employers negotiate collective bargaining agreements. To understand the change, let's talk current law.

As a former trial attorney for the National Labor Relations Board, I conducted lots of elections. They're pretty straightforward. A union gets employees to sign cards asking for an election. The union needs 30 percent of the employees to sign off. It then hands the cards and a petition for election over to the NLRB. If all is in order, the NLRB sets an election. Last year, the median period from the filing of the petition to the date of the secret ballot election was 39 days, according to the Annual Report of the General Counsel for the NLRB. The NLRB agent then goes out to the employer's facility, unfolds the election booth — I always had the contraption in my car — and folds a cardboard box into which the ballots will go. The process has not changed much since the days when NLRB agents wore fedoras.



If the union wins, it sits down with the employer and tries to hammer out a collective bargaining agreement. But neither side is required to reach agreement, just to talk and talk and talk.

The EFCA scraps this procedure and says back to the drawing board. It starts with a new model. First, there is no secret ballot election. If 50 percent plus one of the employees sign the authorization cards, the employer must recognize the union and bargain with it.

The contract? If the employer and union do not reach an agreement in 90 days, the Federal Mediation & Conciliation Service is called in to broker a deal. No deal? An arbitration board is empanelled to impose a contract that is binding for two years.

No way, you say? Think again. The EFCA passed the House last year, by a vote of 241-185. It got bottled up in the Senate, where the vote to end debate and send the bill to the floor for a vote (that is break cloture) failed by nine votes.

CRYSTAL BALL

I don't know who will win the presidency or capture Congress. Here are few predictions, though.

First, even if McCain wins, the EFCA can still become law if the Democrats get enough Senate seats to break cloture.

Second, I don't think Americans will accept elimination of the secret ballot. Its sacredness is too ingrained in our culture. But Congress easily could amend the EFCA to set an election in, say, seven days to 10 days of the filing of the petition. Here's the dynamic: The closer an election is held to the petition filing, the more likely a union victory becomes. With a shortened election cycle, there is little time for an employer to explain why employees should vote no. To borrow a political phrase, the momentum under EFCA is the union's.

Third, should scenario No. 1 above come to pass or should the voters elect Obama with a 60-person Democratic Senate,

- *Ask questions.* GCs concerned that their companies are vulnerable to an organizing campaign should conduct employment-satisfaction surveys. Ask what's right and what's wrong in the workplace. If the results of the survey show employee concerns, address them.

There are other issues to ponder. Is the EFCA constitutional? Likely not unless Congress spells out in the act some guidance on exactly how these arbitrators will determine the terms of the collective bargaining agreement. What if, under EFCA, employees sign the cards but later say, "Hey, we've changed our minds?" Likely the NLRB will need to promulgate regulations on that score as well as on how to deal with cards supposedly signed under duress.

Keep in mind that the sausage-making that is the American legislative process may produce an entirely different bill. Unions say they are at a disadvantage now, because employers can campaign like crazy in the interim between petition and election. To address this problem without over-

hauling the whole system, Congress could give unions greater access rights to the employees. May the better idea win.

These are all interesting issues. Lawyers will talk about and debate them, scholars will write essays and conference panelists will expound. But make no mistake. The EFCA does not merely amend the law. It alters the law in a primal and fundamental way: Who has power and who does not? Now, that's change, welcome or not.

GCs CONCERNED THAT THEIR COMPANIES ARE VULNERABLE TO AN ORGANIZING CAMPAIGN SHOULD CONDUCT EMPLOYMENT-SATISFACTION SURVEYS.

employers need to pull together a game plan to implement on Nov. 5. Union-avoidance is a front-loaded process. General counsel need to be at the center of planning now, not later. Here are some discussion points for the smart GC:

- *Review the employee orientation materials and handbook.* Does the GC's company have a statement on its views of unions? Express them in writing. The National Labor Relations Act protects that right.

- *Take a hard look at front-line supervisors.* Is the company promoting people to management positions based on their interpersonal skills (good, that's what a supervisor does) or merely on their performance in nonsupervisory roles? The latter is bad. Why? Think about Michael in "The Office," who was promoted beyond his ability as a manager because he was a decent salesman. I have practiced labor and employment law for almost 30 years; untrained supervisors are the single biggest source of union organizing. Think management training is expensive? Try the alternative.

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