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California Employment Law Newsletter

*What's New for
California Employers?*

SPECIAL EDITION

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Because the pending Employee Free Choice Act (EFCA) poses particular risk to some of our employer clients, we are publishing this Special Edition of our newsletter.¹

EMPLOYEE FREE CHOICE ACT

The Employee Free Choice Act (EFCA) was discussed in our last newsletter. On 3/10/2009, it was introduced in Congress. While it is anticipated that the bill will meet with opposition, there is some potential that it (or some version of it) may eventually become law. For that reason, employers should understand the ramifications of the EFCA and take appropriate pro-active steps to avoid unionization, as appropriate.

What The EFCA Does:

The EFCA amends the National Labor Relations Act (NLRA) in three significant respects:

(1) It abolishes the right to a “secret ballot” election, through which employees can decide whether or not to be represented by a union. Currently, the NLRA requires that a majority of a Company’s work force support unionization through a secret ballot election. That election is held following a 42-day campaign period following a petition by the union and notification to the employer of the union’s attempt to organize. During that campaign, the employer can

attempt to persuade employees regarding their position on unionization, followed by an election conducted by the NLRB to ensure fairness.

Card Check Recognition: The EFCA would change this procedure by eliminating the employer’s right to a secret ballot election. Rather, employers would be required to recognize a union upon being represented with “authorization” cards signed by a majority of its employees. Thus, the employer may not be aware that organizing activity is occurring. Employees may lose their ability to hear both sides of the argument and would lose their anonymity in the voting process, thereby creating some potential for coercion and retaliation, as the organizers will know which employees are supporting the union and which are not.

(2) *Interest Arbitration of First Contract:* The EFCA would further inhibit an employer’s collective bargaining rights for the all-important first contract after employees authorize unionization. The bill allows either party to request mediation, if agreement on the Collective Bargaining Agreement is not reached within 90 days, and mandates binding arbitration if agreement is not reached within 30 days. These things would significantly limit an employer’s bargaining strategies and freedom to negotiate.

(3) *Penalties for Unfair Labor Practices:* The NLRA places significant restrictions on an employer’s ability to oppose unionization, and would create substantial penalties for violating these restrictions. The restrictions would be imposed during any period when the unions

¹ This summary is intended to be a brief overview of significant legal developments and is not an in-depth analysis of the cases or statutes discussed. Our clients are advised to contact their employment attorney before making significant decisions related to the legal developments reported herein.

are attempting to organize, as well as during the negotiation of the first contract. Those penalties would include: (1) civil penalties of up to \$20,000 for employers who willfully or repeatedly violate employees' rights during the unionizing process; (2) increased penalties for discharging or discriminating against employees during the organizing period, including treble back pay; and (3) requiring the NLRB to seek a federal injunction anytime it believes an employer is committing an unfair labor practice.

In sum, the EFCA would greatly streamline the process of union organizing and weight that process in favor of unions.

What Employers Should Do:

Before the EFCA's restrictions go into effect (if they do), employers should take certain steps to maintain a union-free workplace, if that is their desire. Before passage of the bill, employers' actions are not restrained by EFCA limitations. Irrespective of whether the EFCA becomes law, the following steps will help maintain a union-free environment:

(1) *Employment Policies and Practices:* Adopt an internal position statement on unions and labor relations. The idea is to define the company's position on unionization and provide preliminary guidance in the event that union organizing is detected.

(2) *Employee Satisfaction Audit:* Dissatisfied employees and festering employment issues are fertile grounds for union organizers. Employers can audit these things through objective audits of employee satisfaction/dissatisfaction with workplace policies and procedures. Also, to whatever extent possible (in these challenging economic times) wages and

benefits should be competitive, and employee concerns regarding health and safety properly addressed.

(3) *Open Communications:* Openness between employees and management and response to employee concerns/complaints is important. Easy access to management in redressing complaints is also important. Employees' view of the fairness of problem resolutions have a significant impact on the way they tend to respond to union organizing efforts.

(4) *Employment Policies & Procedures:* Before union organizing occurs, policies and preventative measures should be implemented to rebut union organizing efforts. The implementation of these policies and practices after the union organizing has begun is likely to be construed as an unfair labor practice. Policies to be considered in this regard include: (1) a no solicitation policy; (2) an open door policy encouraging employees to bring complaints directly to management; (3) an effective dispute resolution policy; (4) an email policy restricting the use of company email systems, and (5) a policy regarding visitors in the workplace that can be used to keep unwanted visitors, including union organizers, away. *Caution:* Any policy that is perceived to be solely to avoid union organizing, may constitute an unfair labor practice. All such policies must be neutral and apply across the board, not just to unionizing efforts.

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If you have questions regarding any of the aforementioned employment law developments, contact your LGG attorney or Ron Souza at rsouza@lgglaw.com.

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