Probable Labor and Employment Changes Following the November 2008 Election

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Today's Presenters

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Employee Free Choice Act: A Look Back

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- Organized labor activity has decreased dramatically
- The past eight years have been devoid of significant new employment legislation
  - Last broad expansion of employee rights was FMLA in 1993
- Many argue employee rights have been reduced in the past eight years
  - Pro-employer rulings by the NLRB and courts have restricted previous broad interpretations of the law
    - Demise of ADA as a truly viable cause of action
    - Broader definition of supervisor under NLRA
- There is a "pent up" demand for employment and labor law changes

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Employee Free Choice Act

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- Most significant labor law change in 60 years
- A Revolutionary Shift Of Power To Unions:
  - Would permit certification of Union without secret ballot election simply based on card count
  - Would establish tight timelines for first CBA and authorize government-appointed arbitrators to bind parties to a two-year deal
  - Would create larger penalties and fines for unfair labor practices during organizing and first negotiations, such as triple back pay and fines up to $20,000

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Employee Free Choice Act - Status

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- Passed the House of Representatives in March 2007 (H.R. 800)
- Had support to pass in Senate, but stalled on veto threat
- Barack Obama Web site:
  - "Obama cosponsored and is a strong advocate for the Employee Free Choice Act, a bipartisan effort to assure that workers can exercise their right to organize. He will continue to fight for EFCA's passage and sign it into law."

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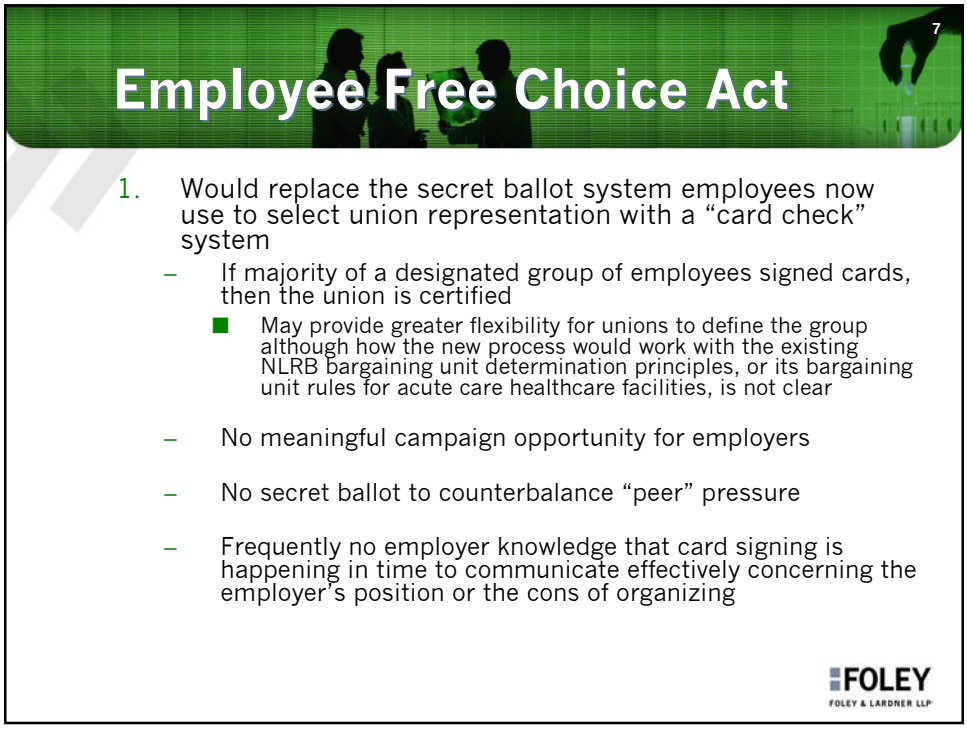
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Employee Free Choice Act
1. Would replace the secret ballot system employees now use to select union representation with a "card check" system
– If majority of a designated group of employees signed cards, then the union is certified
■ May provide greater flexibility for unions to define the group although how the new process would work with the existing NLRB bargaining unit determination principles, or its bargaining unit rules for acute care healthcare facilities, is not clear
– No meaningful campaign opportunity for employers
– No secret ballot to counterbalance "peer" pressure
– Frequently no employer knowledge that card signing is happening in time to communicate effectively concerning the employer's position or the cons of organizing
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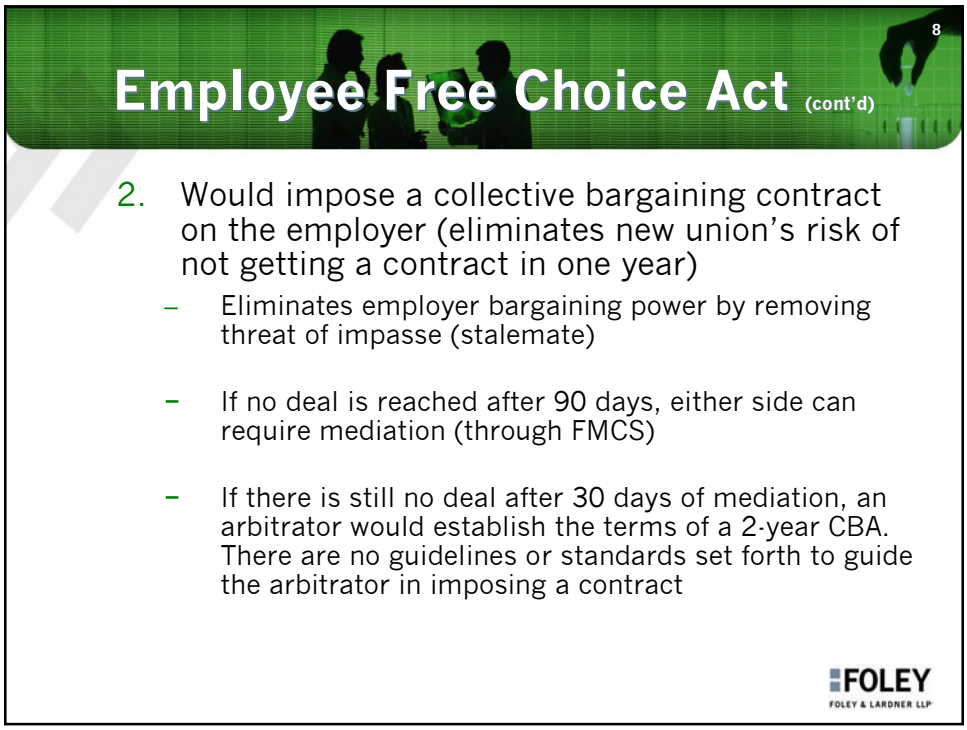
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Employee Free Choice Act (cont'd)
2. Would impose a collective bargaining contract on the employer (eliminates new union's risk of not getting a contract in one year)
– Eliminates employer bargaining power by removing threat of impasse (stalemate)
– If no deal is reached after 90 days, either side can require mediation (through FMCS)
– If there is still no deal after 30 days of mediation, an arbitrator would establish the terms of a 2-year CBA. There are no guidelines or standards set forth to guide the arbitrator in imposing a contract
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Employee Free Choice Act (cont'd)

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3. Would create larger penalties and fines for unfair labor practices
   - Triple back pay and fines up to $20,000 per violation
   - BUT, no corresponding increase in penalties for unions that violate organizing provisions
     - Despite the potential for coercing workers without an anonymous voting process

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Employee Free Choice Act

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- **The EFCA Will Not Likely Accomplish the Stated Goals, And Is, As Practical Matter, A Measure By Congress To Save Unions From Their Own Failure To Adapt To A Changed Workforce And Global Economy**
  - The EFCA is similar in many regards to the labor laws of Canada
    - Some studies have shown that it takes on average 290 days from the first referral to arbitration to the issuance of the arbitrators' decision. Adding the 120 days prior to the referral to arbitration that is 410 days (13-1/2 months)
    - These studies also show that only 47% of unions achieve a second contract, and only 24% achieve a third contract
  - The EFCA is likely to increase the occurrences of work stoppages significantly as employers saddled by arbitrators with untenable or unacceptable contract provisions (from an operational, productivity and/or economic standpoint) bargain to undo those provisions when the 2-year agreement imposed upon them expires

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Employee Free Choice Act

- **The EFCA Will Be Challenged, Creating A Significant Period of Confusion And Disruption In Labor Relations**
  - Likely challenges will include claims that the legislation represents an unconstitutional "taking," that it violates "due process" and that is an unconstitutional "delegation" of legislative power
  - The process of challenging the EFCA could take years, forcing individual employers to make difficult decisions when their workforce is organized through the new procedures and they are forced into the mediation/ arbitration process during the pendency of the process

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Employee Free Choice Act – Preparation

- Supervisor training
  - Spotting signs of organizing and responding
  - Employee relations training – "people skills"
  - Thorough training on legal "dos" and "don'ts," consistent application of rules and disciplinary procedures and documentation to avoid the harsher penalties and remedies available during the "organizing" and "first contract" periods
- Create pro-employee changes that undermine typical union organizing themes
  - Give employees a "voice"
    - Share information
    - Solicit input (surveys and audits)
  - Create an effective grievance mechanism
    - "Open door policy" is not enough

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New FMLA Military Service-Related Regulations

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- Military-related amendments to the FMLA signed by President Bush on January 28, 2008
- Two main provisions
  - "Caregiver leave" – 26 weeks of FMLA leave to care for a family member seriously injured or becoming ill while on active duty (effective upon signature)
  - "Active duty leave" – 12 weeks of FMLA leave in a 12-month period for "qualifying exigency" (not yet effective)

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"Caregiver" Leave

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- Eligible employee who is: (a) the spouse, son, daughter, parent or "next of kin"; (b) of a seriously injured or ill member of the Armed Forces
- 26 workweeks of FMLA leave during a single 12-month period to care for the service member

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"Caregiver" Leave (cont'd)

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- "Next of Kin" defined as "nearest blood relative"
- "Serious illness or injury" defined as "an injury or illness incurred by the member in the line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member's office, grade, rank or rating"
- Member must be: (1) undergoing medical treatment, recuperation or therapy; (2) an outpatient; or (3) on a temporary disability retired list

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"Caregiver" Leave (cont'd)

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- Employers are entitled to "reasonable and practicable" advance notice and can request certification
- Leave can be taken on intermittent or reduced schedule basis
- Caregiver and other FMLA leave runs concurrently (i.e., not in addition to 12 week leave)
- Calculation of 12-month period?
  - When employee first takes leave?
  - When service member is injured?
  - When service member is determined to have serious injury or illness?
  - When employee gives notice of need for leave?

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"Active Duty" Leave

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- "Qualifying Exigency" arising out of the fact that a spouse, son, daughter or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a "contingency operation"
- "Qualifying Exigency" is not currently defined – seeking comments
- "Contingency operation" is a military operation designated by the Secretary of Defense

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Genetic Information Nondiscrimination Act (GINA)

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- H.R. 493 passed the House (420-3) and Senate (95-0)
- President signed May 21, 2008
- Prohibits employment decisions (hiring, firing, job placement, promotion) based on an individual's genetic information
  - Amends ERISA to prohibit such discrimination by health plans
- Prohibits collection of genetic information by employers

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ADA Amendments Act

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- H.R. 3195
- Passed House of Representatives 402-17 on June 25
- Bipartisan support
- Would reverse
  - *Sutton v. UAL* (mitigating measures should be taken into account)
  - *Toyota v. Williams* (impairment resulting in inability to perform specific job not a limitation on a major life activity)

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Proposed Revisions to FMLA Regulations

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- Proposed Rule Published February 11, 2008
- Comment period closed on April 11
- 4,500 comments are now under consideration
- Final rule expected November 2008

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Proposed FMLA Regulations – Advance Notice

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- Advance Notice
  - The current "two day" rule eliminated
  - In all but "most extraordinary" circumstances, notice of need for unforeseeable leave must be given before the shift starts
  - Proposed rule would require notice to be given on the same or next business day as when need for leave becomes known
  - Employers can enforce usual and customary call in procedures

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Proposed FMLA Regulations

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- Medical Certifications for Chronic Conditions
  - Codifies 2005 Wage & Hour Division opinion letter stating that employers can request a new medical certification at the first absence in a new leave year
  - Clarifies applicable time periods for recertification of chronic serious health conditions of "lifetime" or "unknown" duration – recertification can be required every six months
- Five Day Period to Notify of Eligibility and Designate
  - Proposal extends time to send out eligibility and designation notices from two to five days. If medical certification is incomplete or insufficient, certification must be returned to the employee, problems specified in writing and employee given seven days to cure

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Proposed FMLA Regulations (cont'd)

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- Direct Contact With Health Care Providers
  - Employers can communicate directly with health care providers so long as HIPAA requirements are met, but cannot ask for additional information beyond that allowed in updated certification form (WH-380)
- Fitness for Duty
  - Employers permitted to require employees to furnish fitness for duty certifications every 30 days if employee has used intermittent leave and reasonable safety concern exists

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Proposed FMLA Regulations (cont'd)

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- Waivers of past rights made enforceable
- New notice posting and distribution requirements
- Make sure policies and posters are up to date
- Monitor the status of proposed regulations

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"Paid" FMLA Legislative Initiative

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- S.B. 1681 Introduced June 21, 2007 by Sen. Christopher Dodd and Sen. Ted Stevens
- Directs Secretary of Labor to establish an FMLA Insurance Program
- Entitles eligible employees to benefits (specified percentages of daily earnings) for up to eight (8) workweeks of leave during any 12-month period
- Employers can establish voluntary plans meeting specified criteria
- Amends Internal Revenue Code to impose a premium on employers and employees for contributions to FMLA Trust Fund

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Arbitration Fairness Act

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- Would ban pre-dispute arbitration agreements in many employment contexts
- Supported by Senators Dodd (D-Conn.), Durbin (D-Ill.) and Kennedy (D-Mass.)

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Civil Rights Act of 2008 (H.R.2159/S.2554)

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- Sponsors cite need to restore worker's rights that have been limited by Supreme Court decisions
- Would eliminate damages caps in Title VII and ADA claims
- Would make void pre-dispute arbitration clauses
- Would allow state employees to sue under ADEA and FLSA
- Would expand remedies for women under EPA

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Employment Nondiscrimination Act

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- Would make sexual orientation a federal protected classification
- Passed the House (235-184) on November 7, 2007
- Prior bill failed in Senate; current bill does not protect transgendered
- Now in the Senate; Senator Kennedy (D-Mass.) has promised to move the legislation forward

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Questions & Answers

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