

# Labor & Employment Inner Workings



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## Labor & Employment Inner Workings

### The Employee Free Choice Act – Prepare NOW

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## Agenda

- Introduction
- The Employee Free Choice Act – What Would It Change and Why Is It So Important?
- What Employers Can and Should Be Doing Now to Prepare for EFCA
- Questions and Answers



## Today's Presenters



- Richard Albert, Partner, Los Angeles



- Laurence Arnold, Partner, San Francisco



- Ann Mennell, Partner, Milwaukee



## Housekeeping

- Call 866.493.2825 for technology assistance
- Dial \*0 for audio assistance
- Ample time for Q&A will be allotted at the end of the presentation
  - Drop-down menu for questions
  - Live Q&A
- Today's program is being recorded and will be available on the Foley website ([www.foley.com](http://www.foley.com)) along with the accompanying slides
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## EFCA - Introduction

- 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
  - ADA
  - FMLA/Military Family Leave
  - Other legislation



## Employee Free Choice Act

- 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 create bigger penalties and fines for unfair labor practices, like triple back pay and fines up to \$20,000
  - Would establish tight timelines for first CBA and authorize a government-appointed arbitrator to bind parties to a two-year deal



## Employee Free Choice Act - Status

- Passed the House of Representatives in March 2007 (H.R. 800)
- Had support to pass in Senate, but stalled on veto threat
- Obama Website:
  - “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.”
- What many in the know are saying about the prospects of passage in the new administration



## Employee Free Choice Act

- 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 union to define the group although how the new process would work with the existing NLRB bargaining unit determination principles, or its bargaining unit rules is unclear
  - No meaningful campaign opportunity for employers
  - No secret ballot to counterbalance “peer” pressure
  - Frequently no employer knowledge this card signing is happening in time to communicate effectively concerning the employer’s position or the cons of organizing



## Employee Free Choice Act

- Would create bigger 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 the NLRA despite the greater potential for coercing workers in a card signing campaign where there is no anonymity
  - Greatly increased and mandated use of injunction proceedings against employers



## Employee Free Choice Act

- 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 impose on the employer



## The EFCA May Not Accomplish its Stated Goals

- 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 420 days, or nearly 14 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 provision (from an operational, productivity and/or economic standpoint) bargain to undo those provisions when the 2 year agreement imposed upon them expires



## Employee Free Choice Act

- The EFCA will likely 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, and if enforcement is not stayed pending the challenge process, it would force individual employers to make difficult decisions if their workforce is organized through the new process and they are forced into mediation/arbitration while the legal challenges are still pending



## EFCA: What You Should Be Doing NOW!



## What Should You Be Doing Now?

- Voicing Opposition to the EFCA
  - Industry Groups
  - Media
  - Senators/Representatives
  - National Chamber of Commerce
  - Local Business Associations
  - Your Supervisors and Workforce



## What Should You Be Doing Now?

- Toolkit to Union Proof Your Employees
  - **E**ducate
    - Leadership
    - All supervisors
    - Employees
    - New hires
  - **F**ix policies, problem areas and problem supervisors now
  - **C**ommunicate with employees
    - Culture of employee engagement
  - **A**nalyze
    - Vulnerability audits
    - Industry/area union activity
    - Wage/benefit levels



## What Should You Be Doing Now?

- Educate leadership and supervisors
  - Union Free philosophy
  - Why and how employees organize
  - Signs of organizing
  - What authorization cards look like and can do
  - Do's and don'ts (TIPS/PITS)
  - Supervisor's role
  - NLRB process
  - Solicitation/distribution rights of employees and outsiders
  - Union organizing tactics
  - Impact of unionization



## What Should You Be Doing Now?

- Educate employees and new hires
  - Consider whether to speak to employees about union organizing – even before organizing takes place
  - No one approach correct
    - Each organization needs to make an individual analysis based on its own particular circumstances
      - Concern that discussing unionization prematurely may cause employees to consider organizing
      - Union organizing will be more prevalent if EFCA passes, so perhaps better to “get in front of” organizing



## What Should You Be Doing Now?

- Educate employees and new hires
  - Topics could include:
    - Organization's philosophy and approach towards unionization
    - What cards looks like and the effect of signing a card
    - The NLRB election process
    - Solicitation/distribution rights and obligations
    - Realities of collective bargaining
      - Particularly if arbitrator able to impose a contract under current EFCA guidelines



## What Should You Be Doing Now?

- Fix *problem areas*, practices and supervisors NOW
  - Practice good employee relations
    - Ensure that employees are treated fairly, dealt with consistently, communicated with constantly, and listened to effectively
    - Much of the effort to avoid unionization has less to do with union specific issues, and more to do with insuring that employees feel they don't need to go outside for help
    - Know and address the employee sore spots
      - Examples: Overtime, training, promotions, work schedules, attendance policy, inconsistent enforcement, understaffing, production issues, problems with leadership/management



## What Should You Be Doing Now?

- Fix problem areas, *practices* and supervisors now
  - Review solicitation/distribution policy and practices
    - Critically important to analyze current practices. Policy as written is without value if not enforced consistently and uniformly
    - Ensure that written policy is lawful and reflective of how organization wants solicitation/ distribution issues dealt with
    - Educate supervisors, and security staff, on solicitation/ distribution rules, how they are to be enforced, do's and don'ts for both employees and non-employees
    - Evaluate related policies such as dress code for consistency



## What Should You Be Doing Now?

- Fix problem areas, practices and *supervisors* now
  - The “my way or the highway” supervisor
  - The insecure/passive supervisor
  - The inconsistent supervisor
  - The abusive supervisor
  - The incompetent supervisor
  - The non-supportive supervisor
  - The playing favorites supervisor



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## What Should You Be Doing Now?

- **Communicate with employees**
  - Consider development of ongoing information sources for employees/supervisors relating to union organizing issues
    - Employer developed web sites
    - Information related to web sites maintained by other organizations
    - Ongoing information on wage/benefit improvements

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## What Should You Be Doing Now?

- **Analyze Vulnerability**
  - Employee relations
    - Consistency, supervisors, operations issues.
  - Communication tools
  - Wage/benefit levels, issues
  - Community stakeholders support and mobilization

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## What Should You Be Doing Now?

- Analyze vulnerability
  - Consider use of "focus groups" or other means to obtain employee feedback in order to get clear perception of employee attitudes.
  - Deal with problem areas identified promptly and proactively.
    - Consider changes if needed
    - Develop means for employees to have sufficient feedback/involvement in issues that impact their daily working activities.



## Questions & Answers



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