PUBLICATION

Employers Beware: Free Choice Act Not What It Sounds Like

January 25, 2007

Organized labor is pressuring members of Congress to pass legislation that would make it easier for unions to organize non-union employers. Known as the Employee Free Choice Act, the legislation would make it possible for unions to obtain bargaining rights by simply securing employee signatures on cards authorizing unions to represent employees in collective bargaining. Under the legislation, unions would no longer be compelled to use the election processes of the National Labor Relations Board (NLRB) as a means of securing the right to bargain with employers over employees' wages, benefits and other terms and conditions of employment.

Companion bills (H.R. 1696, S. 842) were introduced in the last Congress by Rep. George Miller (D-Calif.) in the House and by Sen. Edward Kennedy (D-Mass.) in the Senate. The House bill had 215 bipartisan co-sponsors while the measure in the Senate had the backing of 44 Senators. This was before the recent elections which changed the composition of Congress. The prior Congressional leadership failed to give either bill a hearing or a vote.

In a two-day organizing summit held in early December, labor leaders announced that they would give the bills top priority in the next Congress and would be counting on the support of newly-elected Senators and Congressmen. The business community is openly opposing the legislation, noting that workers would lose the right they currently have to vote in a secret-ballot election supervised by the NLRB.

Under present federal law, an employer can insist on a secret-ballot election conducted by the NLRB. Typically, employers conduct anti-union campaigns in advance of elections and can use the appeal processes of the Board and the federal courts of appeal to contest unfavorable election results.

The bills now being backed by labor could reduce the time required for unions to be declared the bargaining agent of groups of workers. Under a process called a "card check," unions could establish bargaining rights simply by presenting valid cards signed by a majority of employees employed in a particular unit or group. Opponents point out that this process would deny employees an opportunity to express their wishes concerning unionization through a government-controlled election which would provide safeguards against intimidation and coercion and would better reflect the true wishes of those voting.

The new Congressional leadership has indicated that their first priority will be to push legislation to increase the federal minimum wage. They expect the Employee Free Choice Act to be offered again in the Spring.

Additional provisions in the proposed legislation as described by the AFL-CIO are also troubling for management.

If an employer and a union are engaged in bargaining for their first contract and are unable to reach an agreement within 90 days, either party may refer the dispute to the Federal Mediation and Conciliation Service (FMCS) for mediation. If the FMCS has been unable to bring the parties to agreement after 30 days of mediation, the dispute would be referred to arbitration and the results of the arbitration would be binding on the parties for two years. As a result, a third party could dictate the economic terms of a collective bargaining agreement after a relatively short time for bargaining without a third party.

Further, the Act provides that the NLRB must seek a federal court injunction against an employer whenever there is reasonable cause to believe that the company has discharged or discriminated against employees, threatened to discharge or discriminate against employees, or engaged in conduct that significantly interferes with employee rights during organizing or a first contract drive. Finally, the Act increases to three times back pay the amount the employer is required to pay when an employee is unlawfully fired or discriminated against during an organizing campaign. It also provides for civil fines up to $20,000 for violation against employers found to have willfully and repeatedly violated an employee's rights during an organizing campaign or first contract drive.

Much attention has been directed toward the card check provisions of the statute. However, during the give and take of debate and compromise on legislation, it is conceivable that some of the "lesser" provisions of the statute could be adopted, or modified and adopted. Baker Donelson thinks it is imperative that employers who are non-union today begin a self-assessment of their union vulnerability in order to prepare for and potentially thwart any increased union activity in view of the possible passage of all or parts of the Employee Free Choice Act.