THE PERFECT STORM IS COMING -- THE EMPLOYEE FREE CHOICE ACT

A new era of unionization

by Marta Fernandez

December 2008

Thirty years of downturn in the number of unionized employees in the American workforce is about to end as two powerful forces converge to form the perfect climate for unionization: a global financial crisis affecting workers nationwide and pending Federal legislation known as the Employee Free Choice Act ("EFCA").

It is no coincidence that Senator Obama's "Yes We Can" election night acceptance speech used the same phrase chanted by the union, UNITE-HERE, when its members are on a picket line. The new President Elect has vowed to pass the law he originally co-sponsored, saying, "We will pass the Employee Free Choice Act. It's not a matter of if -- it's a matter of when." In light of this promise, employers across the United States must brace themselves for a new era of unionization.

UNIONS THRIVE WHEN WORKERS FEAR ECONOMIC HARDSHIP

Historically, workers turn to unions for security in an economic crisis. Unions thrive on employee fears during a difficult economy. With job losses, wage and benefit reductions, and declining retirement plans, it is easy for unions to successfully pitch their services to a workforce ready to believe anyone who will promise better times. The economy alone is enough to give unions a significant edge in union organizing efforts. But coupled with the pending passage of the Employee Free Choice Act, the labor movement is likely to see unprecedented success in the increase of its membership.

UNIONIZATION BY 'CARD CHECK'

The Employee Free Choice Act eviscerates the current law which provides for secret ballot elections in which employees democratically choose union representation through an election which is supervised and conducted by the National Labor Relations Board ("NLRB"). Once the new legislation passes, unions will be able to penetrate the workforce by merely obtaining a simple majority of employee signatures on authorization cards -- known as a process -- which substitutes a signature for a secret ballot vote.

Once a majority of signed "authorization" cards are obtained and presented to the employer, the union will be entitled to legal recognition as the employees' exclusive bargaining representative. While organized labor, which has spent millions lobbying for the passage of the law, touts the law as a fairer system designed to avoid delays created by legal barriers during a union campaign, the new law in fact removes the employee's "free choice" by permitting a system inherently ripe for coerced signatures.

AN ENVIRONMENT RIPE FOR COERCION

Without secrecy or NLRB supervision, unions are able to pressure employees on the basis

that they "will know" who supported them or not, once they are the representative. Co-workers will know who has signed and who has not, thereby allowing for significant peer-pressure. Since unions can press employees for their signatures before and after work, during their breaks and even at their homes, signatures will be given just to "get the union off my back."

Those of us who have represented employers that have agreed to the card-check used in the neutrality agreement context can tell you that unionization is a foregone conclusion whenever signed cards are used instead of the secret ballot process.

UNDER EFCA, AN ARBITRATION PANEL CAN SET THE TERMS OF EMPLOYMENT

But there is an even more onerous component to EFCA. In its current form, the proposed legislation contains a section entitled "Facilitating Initial Collective Bargaining Agreement." Under this section, a collective bargaining agreement must be reached within 90 days after a demand is made by the union to commence negotiations following a successful card-count. If an agreement is not reached, the parties must submit the negotiation process to mediation and thereafter, if there is still no agreement, to a federal arbitration panel. That arbitration panel settles the negotiations by determining the terms of a binding two year agreement, setting wages, benefits, hours, work-rules and all the other terms of employment.

Unlike current law, which permits the parties to reach an impasse in bargaining, which triggers various options for both parties (upon declaration of an impasse, the employer may implement its last, best and final offer and the union in turn may live with those terms or call a strike depending on its bargaining power), the new law would wipe out those options by requiring this third party to decide wages, benefits and working conditions and effectively decide the fate of your business.

EMPLOYERS SHOULD GET PREPARED NOW

How aggressively an employer will be permitted to respond to union organizing efforts is still unclear. The new legislation would significantly reduce the legal challenges available to the employer, and increases monetary penalties for engaging in unfair labor practices. How far the arbitration panel will exercise its right to write the collective bargaining agreement for the parties is also unclear. What is clear is that employers must prepare NOW for the storm that approaches.

Employers who have been fortunate enough to have no unionization experience need to educate their executives and top management on the relevant legal do's and don'ts, the warning signs, and what preventative measures they can take. Employers with a mix of union and non-union properties need to evaluate which properties may be at risk and understand how the unionized properties will target the non-union properties.

There are many legal measures that can be taken now, such as identifying and addressing

THE PERFECT STORM IS COMING -- THE EMPLOYEE FREE CHOICE ACT
by Marta Fernandez

key union issues for vulnerabilities in the areas of wages, benefits and work rules. Employers may want to educate the union-targeted workforce on what the card-check process means, putting systems and policies in place to limit unionization efforts on the property, and introducing employee-friendly programs and employer public relations forums.

Union prevention audits can identify areas of vulnerabilities and the steps that can be taken now to reduce the unionizing risks. Having a plan in place rather than reacting to an organizing campaign once it has started can save valuable time in the race to win the hearts and minds of employees while a union is rapidly sprinting for signatures.

Finally, employers must remember that once a union organizing campaign is underway, labor laws significantly limit the types of actions they may take with their workforce. Thus, the cost of doing nothing is too great. Act now!

Marta Fernandez is a labor and employment partner at Jeffer Mangels Butler & Marmaro LLP. For more than 20 years she has represented employers in a wide range of matters including union issues such as collective bargaining, union prevention, neutrality agreements, union representation and decertification elections. Contact her at 310.201.3534 or MFernandez@jmbm.com.