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In This Issue

Employee Free Choice Act: Easing the Way for Union Organizing

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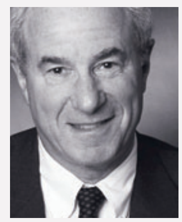
The Employee Free Choice Act (EFCA), passed by the House of Representatives in 2007, which was pending in the Senate and strongly backed by President Barack Obama, was reintroduced on March 10, 2009, as HR 1409. If passed into law, it would eliminate secret ballot elections, impose stricter penalties for various unfair labor practices, and mandate binding arbitration if initial negotiations continue beyond 120 days. Thus, the EFCA would simplify the task of union organizing, and dramatically change the face of labor law. This article explains not only the effects of the EFCA, should it pass in current form, but also how employers can prepare for its passage and work to oppose the bill.

Despite its name, the EFCA virtually eliminates the ability of employees to make an educated, unpressured decision of whether or not to unionize. The EFCA requires the National Labor Relations Board (NLRB) certify a union as the exclusive employee representative, for purposes of collective bargaining, once a majority of employees, in an appropriate bargaining unit, sign union authorization cards. Currently, unions must persuade at least 30% of employees in an appropriate bargaining unit to sign authorization cards before requesting NLRB certification. The NLRB then holds a secret ballot election approximately 40 days later. During that 40 day intermission,

▸ PAGE 2

From the Chair

"No man's life, liberty and property is safe while the legislature is in session."
—Mark Twain (1866)



This issue highlights the Employee Free Choice Act (EFCA), and the Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers Act (RESPECT), both pending before Congress. We will also discuss the COBRA Subsidization Under the American Recovery and Reinvestment Act which went into effect on March 1, 2009, as well as the Lilly Ledbetter Equal Pay Act which was signed into law on January 29, 2009; and a unanimous Supreme Court decision, *Crawford v. Metropolitan Gov't of Nashville*, which expanded employees' protection from employer retaliation.

If passed, the Employee Free Choice Act would profoundly affect employers' abilities to resist union organizing. We urge you to contact your federal elected representatives and voice your opposition to this pending legislation.

We would like to thank Law Clerk Kathleen McGinley for her assistance with these articles.

—Jerald J. Oppel
Chair, Employment & Labor Group

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Employee Free Choice Act… FROM PAGE 1

employers are free to inform employees of the reasons why a union may not be in the employees' best interest. Employer education usually does not occur before the 40 day period as union activities may be done in secret without the employer's knowledge. By allowing signatures to become the primary certification tool, unions will probably be chosen more often to represent employees since employers will not know about or have time to counter a union campaign.

Organized labor favors the EFCA because while the union frequently presents a majority of signed authorization cards, employees often subsequently vote down the union during the secret ballot election.

> *"Despite its name, the EFCA virtually eliminates the ability of employees to make an educated, unpressured decision of whether or not to unionize."*

Further, without a secret ballot, employees may find themselves without recourse if pressured by organizers or fellow employees to sign authorization cards. The secret ballot gives employees the chance to decide privately, without pressure from either the union or employer.

Another worrisome effect of the EFCA is that a little more than half of employees could bind all employees without notice to those who have not signed authorization cards. Though a majority binds all employees after a secret ballot election, current law mandates that all employees be notified of the pending election and given a chance to vote after the employer has the opportunity to present its side, which the union certainly has not presented during its authorization card campaign.

Beyond the elimination of the secret ballot, the EFCA increases financial penalties for the wrongful discharge of pro-union employees. Under the current law, a wrongfully terminated employee can be entitled to back pay and potential reinstatement. Under the EFCA, a wrongfully terminated employee could be entitled to three times the back pay, if wrongfully terminated during union organization or first contract negotiations. Employers who are found to have willfully and repetitively violated employees' rights during that time would additionally be fined $20,000 for each occurrence.

The EFCA proposes another significant change in the law by mandating a specific timeline for negotiations, ensuring all initial negotiations end with an agreement betwe[en the] union and employer. Currently, collective, good faith bargaining between the union and employer is permitted to continue indefinitely, usually ending due to economic pressures experienced by either side. Under the EFCA, the employer must begin negotiations within 10 days of receiving a request to do so from the certified union. The employer and union then have 90 days to reach an agreement before a 30 day mediation period, lead by the Federal Mediation and Conciliation Service, begins, upon referral of either party. If mediation is unsuccessful, the parties then enter binding arbitration. An external, impartial government arbitrator then chooses the amount of hours, benefits and wages the employer should provide. This arbitrated contract would bind the parties for two years. A mandated contract enforced by an external third party may have the effect of shuttering many businesses that cannot afford the terms, thus leaving both employees and employers without work.

Proponents of the EFCA argue that employees will not be pressured to join unions, if secret ballots are eliminated, because union membership is on the decline. Currently, union members make up only 7.6 percent of private labor, though last year union labor increased by its largest margin since 1983. The nation's largest confederation of unions, AFL-CIO, also is in discussions with breakaway unions to reunite, thus empowering the labor movement in time for passage of the EFCA. With increased unity, unions could work together to quickly amass workers, in turn driving up the cost of labor. The New York Times recently reported that labor leaders plan to target industries where unions have failed in the past, such as banks and big box retailers. As union membership and industrial jobs have declined, white-collar jobs and high tech jobs have increased. A new era of unionizing is primed to go into effect.

Because the EFCA has yet to pass in the Senate, cooperation between both sides is still possible. On March 5, 2009, HR 1355 was introduced as a compromise, but does not appear to be any better than the EFCA. It does not address the no vote in the EFCA, and has some convoluted verbiage regarding penalties for unfair labor practices of employers and the union's right of access to employers. Another potential compromise discussed by some, but not introduced, would be to shorten the time between a union's request for NLRB certification and the secret ballot election, rather than eliminating elections altogether. Though employers would then have less time to counter a union organizing campaign, employees would retain the right to a private vote. Further, both the employer and the union would have comparable time to present their case to an employee. Except for HB 1355 discussed above, compromises to the draconian penalties suggested and the even more startling ordered bargaining, however, have yet to be widely considered.

▸ PAGE 7

COBRA Subsidization Under the American Recovery and Reinvestment Act Effective March 1, 2009

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President Obama signed the American Recovery and Reinvestment Act of 2009 (ARRA) into law on February 17, 2009. The ARRA alters the provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) by increasing payment and notification responsibilities of employers. This article is a brief summary of the substantive changes, which went into effect on March 1, 2009.

"Under the ARRA, employees involuntarily terminated between September 1, 2008 and December 31, 2009 (other than for gross misconduct) are now responsible for only 35% of the cost of premiums. Employers are responsible for the remaining 65% but receive a refundable payroll tax credit for the cost."

Under COBRA, eligible terminated employees, employed at businesses with 20 or more employees, are entitled to at least 18 months of health coverage under their employer's group health plan. Before passage of the ARRA, employees were responsible for up to 102% of the cost of premiums associated with such a plan. Under the ARRA, employees involuntarily terminated between September 1, 2008 and December 31, 2009 (other than for gross misconduct) are now responsible for only 35% of the cost of premiums. Employers are responsible for the remaining 65% but receive a refundable payroll tax credit for the cost. Employers can also choose to offer an alternative plan to employees if the plan's premium is not more than the premium paid by the employee during employment and the plan is offered to active employees.

The ARRA applies retroactively to include employees who, before March 1, 2009, opted out of COBRA coverage, cancelled coverage, or accepted coverage with full premium payment. Employers must notify such employees by <u>April 18, 2009</u> of the right to specially elect the new COBRA coverage. Employees have 60 days from receipt of notice to consider the subsidized coverage. Employers must refund those employees who paid full premiums and issue a credit toward future premium payments within six months of the employee's election of subsidized coverage.

The subsidized coverage is available to eligible employees for only nine months, ending sooner if the employee begins coverage under another group health plan (excluding those plans with vision or dental coverage only), a flexible spending plan, an on-site medical treatment plan, or if the employee becomes eligible for Medicare. An employee who begins coverage under another plan must notify the employer in writing. If this is not done, the employee is responsible for 110% paid of the subsidy after the additional coverage began. Employees with an annual salary of between \$125,000 and \$145,000 are phased out of the subsidized coverage and may be subject to increased taxes to recapture subsidized payments. For this reason, employees with an income of \$125,000 or more can opt out of the subsidized coverage.

The ARRA went into effect on <u>March 1, 2009</u>. To comply with its provisions, employers should:

1. Collect information on employees terminated on or after September 1, 2008, including whether they were involuntarily terminated or elected/declined COBRA coverage, as well as updated contact information.

2. Notify eligible employees of the amended COBRA provisions. The Department of Labor has issued model employee notice forms which are available on its website at www.dol.gov/ebsa/COBRAmodelnotice.html. Retroactively eligible employees (terminated after September 1, 2008, but before March 1, 2009) must receive notice of their ability to specially elect the new COBRA coverage by April 18, 2009. Employees terminated after March 1, however, must be immediately aware of the right to pay the reduced cost (if an employee pays more than the required 35% for March and April 2009, employers must reimburse the employee or credit the payment towards future payments within 60 days).

3. Determine whether to offer alternative health care plans to eligible employees.

PAGE 7

Recent Developments: Changes to the ADA Take Effect; Passage of the Lilly Ledbetter Fair Pay Act

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The New Year has brought many changes to labor and employment law. On January 1st, amendments to the American Disability Act (ADA) took effect. Then, on January 29th, President Obama signed the Lilly Ledbetter Fair Pay Act ("Fair Pay Act") into law. Below is a summary of each of the new laws.

Amendments Increase the Number of Individuals Covered by the ADA

The ADA Amendments Act of 2008 (ADAAA) broadens the definition of disability, thus increasing the number of individuals covered by the ADA.

The ADAAA retains the definition of "disability" as "a physical or mental impairment that substantially limits one or more major life activities of such individual, a record of such an impairment, or being regarded as having such an impairment." However, the ADAAA overrules four Supreme Court decisions and Equal Employment Opportunity Guidance (EEOC) guidance, which have over time narrowed the scope of ADA coverage, to clarify how employers should correctly define the terms "substantially limits," "major life activities" and "regarded as having such an impairment."

The ADAAA asks the EEOC to revise its regulations in order to redefine "substantially limits" so as to be consistent with the theme of the ADAAA — broad coverage of individuals under the ADA. However, the ADAAA did not provide a deadline as to when the EEOC must release the regulations.

The definition of "major life activities" has been expanded to include two non-exhaustive lists. The first list includes, among other activities, walking, reading, bending, thinking, concentrating, and communicating. A second list of major bodily functions was also added.

In addition, an individual who is discriminated against because of an actual or perceived impairment is "regarded as having such an impairment" whether or not it limits or impairs a major life activity, unless the impairment is transitory (lasting <6 months) and minor. Employers however, have no duty to accommodate such a regarded individual.

Two other substantial changes have occurred. An episodic condition or condition in remission is now a disability if it will affect a major life activity during relapse or when active. Further, mitigating factors, other than eyeglasses or contacts, cannot be considered when determining whether an individual is disabled. Therefore, medication and other corrective devices cannot be taken into account to determine if the individual's disability substantially limits her major life activities.

As a result of the ADAAA, employers should expect an increased number of individuals requesting accommodations and more filings of ADA complaints. Employers should also expect more changes to ADA law once the EEOC releases its guidance.

Passage of the Lilly Ledbetter Fair Pay Act

On his eighth day in office, President Barack Obama signed the Fair Pay Act into law, following passage by the Senate two days before. The new law extends the time employees have to file unequal pay claims with the Equal Employment Opportunity Commission (EEOC).

The Fair Pay Act overturns the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). In *Ledbetter*, the Court struck down Lilly Ledbetter's ("Ledbetter") claim of gender discrimination and unequal pay because she did not file her claim with the EEOC within 180 days of her boss' decision to pay her less than her male counterparts. The Fair Pay Act, which applies retroactively to all claims pending on or filed after May 28, 2007, corrected Ledbetter's perceived injustice because she could not know when the decision to pay her less was made.

Now, under the Fair Pay Act, each time an employee receives a paycheck, benefits, or other compensation that is the product of discrimination the statute of limitations resets in regard to claims brought under Title VII, the American with Disabilities Act, the Rehabilitation Act, and the Age Discrimination in Employment Act. Under the Fair Pay Act, an unlawful employment practice occurs "when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice; or when an individual is affected by application of the discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or practice."

PAGE 5

Additional Pro-Union Legislation: Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers (RESPECT) Act

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The RESPECT Act, heavily backed by organized labor, if passed into law, would undermine the National Labor Relations Board's (NLRB) decision in In re Oakwood Healthcare, Inc., 348 NLRB No. 37 (Sept. 29, 2006), by redefining the term supervisor to expand the collective bargaining unit. The Act, introduced in 2007 and co-sponsored by President Obama as a senator, is expected to be considered by Congress this term.

Under current law, a supervisor, as defined by the National Labor Relations Act (NLRA), is excluded from the collective bargaining unit and pro-union organizing. Section 2(11) of the NLRA defines a supervisor as an employee with the power and independent judgment to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to responsibly direct them, or to adjust their grievances, or effectively to recommend such action." The NLRB decision of In re Oakwood clarified the definition of supervisor, specifically addressing the terms "assign" and "responsibly direct." In the decision, the NLRB included as supervisors those employees who assign overall duties, and those who direct employees to specific tasks under independent judgment and accountability, thus removing low-level supervisors from union activities.

The RESPECT Act deletes the terms "assign" and "or to responsibly direct them" from the NLRA definition of supervisor, consequently overturning the Oakwood decision. Further, the RESPECT Act would add an additional requirement to the supervisor definition – that a majority of work time be spent completing supervisory tasks. Currently, a supervisor, as explained in Oakwood, must spend only a regular and substantial portion of time, which can be as little as 10-15% of total work time, completing such tasks.

The divide between supervisor and employee is made because supervisors act as the face of an employer. By including low level supervisors in collective bargaining units, as the RESPECT Act would, loyalty would be split between the union and the employer, rather than completely aligned with the employer the supervisors represent. Further, low level supervisors are frequently used by employers to pass on management's messages to employees during union campaigns. Under the RESPECT Act employers would lose the first line of defense against union organization.

For assistance in determining how this legislation may affect your organization please contact the author or any member of the Ober|Kaler Employment & Labor Group. ■

Passage of Lilly Ledbetter Fair Pay Act… FROM PAGE 4

Payment discrimination claims will likely increase due to the newly relaxed statute of limitations. To prepare, employers should review their record retention policy in regard to payment decisions.

For questions or concerns about how your organization will be affected please contact the author or any member of Ober|Kaler's Employment & Labor Group. ■

What an Employer Should Know About Retaliation: *Crawford v. Metropolitan Gov't of Nashville*, 2009 WL 160424 (U.S. Jan. 26, 2009)

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In a unanimous decision, the Supreme Court recently expanded the opposition clause of Title VII, which protects employees from employer retaliation, to include those employees who express discrimination complaints when asked as part of an internal investigation.

In *Crawford*, the Metropolitan Government of Nashville and Davidson County, Tennessee's Human Resources Department (Metro), investigated claims of sexual harassment against Gene Hughes ("Hughes"). As part of the investigation, many female employees were interviewed, including Vicky Crawford ("Crawford"), who complained on many occasions of sexual harassment by Hughes. In the end, Metro did not take any formal action against Hughes. Simultaneously, Metro began a fraud investigation and found Crawford to be engaged in embezzlement, a claim she denies. She was subsequently fired for this reason. Two other women who voiced complaints were also fired following the harassment investigation.

Crawford claimed her termination was a retaliatory act actionable under the Title VII opposition and participation clauses. The opposition and participation clauses of section 2000e-3(a) state, respectively, "it shall be an unlawful employment practice for an employer to discriminate against any of his employees…[1] because he has opposed any practice made an unlawful employment practice by this subchapter or [2] because he has…participated in any manner in an investigation, proceeding or heating under this subchapter." The District Court for the Middle District of Tennessee ("District Court") granted summary judgment for Metro on the grounds that the opposition clause requires an employee to initiate a claim of discrimination rather than simply answer questions pursuant to an investigation. Further, the District Court ruled the participation clause requires an active investigation into a pending Equal Employment Opportunity Commission (EEOC) claim. Here, no EEOC claim was pending. The Court of Appeals for the Sixth Circuit affirmed. The Supreme Court, however, overruled both courts and remanded the case to the District Court.

The Supreme Court held that an employee who formally complains about discrimination on her own initiative is no different that the employee who complains when asked during an investigation. Both employees are protected by the Title VII opposition clause. The Court went on to explain that opposition does not have to be active. For example, those who oppose capital punishment without protesting on the streets still oppose the practice, though they do not provoke discussion on the topic. Because Crawford's actions were protected under the opposition clause, the Court did not consider whether her actions were also protected by the participation clause.

In a concurring opinion, Justice Alito, joined by Justice Thomas, opined that the Court's ruling includes only those employees who testify during an internal investigation or the equivalent. He specifically suggested that silent or informal opposition be excluded from Title VII coverage because an employee who files an EEOC discrimination claim would then be able to assert her complaints were voiced to her employer while she talked with a colleague informally at or outside the office.

Justice Alito's concurrence raises questions as to the types of cases that may now arise under Title VII based on the expanded definition of opposition. Therefore, employers should be sensitive as to what actions could be interpreted by the courts as retaliatory, especially regarding those employees involved in an internal investigation.

For assistance in determining how this ruling will affect your organization please contact the author or any member of the Ober|Kaler Employment & Labor Group. ■

Employee Free Choice Act... FROM PAGE 2

While passage of the EFCA in its current form is not guaranteed due to wide opposition by employers, the passage of a bill changing labor law in some way is likely. Employers should therefore take preliminary action to prepare their organizations and workforce.

First, it is prudent to communicate to employees the significance of authorization card signatures and the right to decide whether or not to sign. This cannot be done too early; reaching out to employees at the hiring or orientation stage of employment ensures that employees are aware of the effects of union organizing before a campaign begins.

Second, implement effective preventative policies now because implementing such policies during a union campaign may be interpreted by a court to be an unfair labor practice. For example, limiting visitors to the workplace may eliminate the ability of union organizers to campaign on site. Non-solicitation and appropriate e-mail policies can also help to discourage on site campaigning. Employers should further, ensure that employees are encouraged to approach management with concerns and questions. If managers openly communicate and actively seek and respond to concerns, employees may not see a need for union representation.

Finally, train management to be aware of and respond quickly, but lawfully, to signs that a union campaign is taking place. Responding early to warning signs of a campaign will be vital if the EFCA is passed since employers will not have a designated opportunity to counter a union campaign.

As a senator, President Obama co-sponsored the the EFCA and during his presidential campaign he promised to fight for its passage. If you are concerned about the passage of the EFCA, then by all means, we urge you and your company leaders, to work with your trade groups, chambers of commerce, and to contact your senator and representative to oppose the EFCA or lobby for alterations to its form. Email your senator and representative by:

1. Navigating to the United States Senate website at: www.senate.gov/general/contact_information/senators_cfm.cfm

2. Navigating to the United States House of Representatives website at: https://writerep.house.gov/writerep/welcome.shtml

3. Searching for your senator/representative by name, state, and

4. Filling out the corresponding Web Form, mentioning your concerns over the passage of the EFCA.

For more information please contact the author or any member of the Ober|Kaler Employment & Labor Group. ■

COBRA Subsidization... FROM PAGE 3

4. Alter administrative procedures and policies to allow for:
   - reduced COBRA payment by employees for nine months;
   - payment of the remaining COBRA balance by the employer to the health care provider;
   - reimbursement (or credit towards future payments) of employees who paid more than the reduced payment;
   - calculations to determine timeframe of COBRA coverage period since the ARRA does not extend employee coverage (if an employee elects COBRA on March 1, but was terminated on October 1, 2008, coverage ends 18 months from October 1, 2008); and
   - high income individuals to opt out of the subsidized coverage.

For compliance assistance please contact the author or any member of the Ober|Kaler Employment & Labor Group. ■

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