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THE EMPLOYEE FREE CHOICE ACT AND THE IMPORTANCE OF ADDRESSING UNION CAMPAIGNS BEFORE THEY START¹

What if the pundits are correct and there is a political change in Washington this November, leading to passage of some version of the Employee Free Choice Act (“EFCA”) in early 2009? What if they are wrong, and it does not become law? The fact is that EFCA is a major part of organized labor’s legislative agenda, that we will have a new (most likely Democratic-controlled) Congress next year, and that we will have a new President — perhaps, Sen. Barack Obama, a co-sponsor of EFCA, who has publicly stated that, if elected President, he will sign the bill. Knowing this, it is not prudent simply to sit back and hope that the most significant change ever made to the National Labor Relations Act will not happen. There are important lawful steps that employers that wish to remain union free can take *now* to prepare for an environment that may well include EFCA.

Today, many employers talk about proactive union avoidance, but most do not heed their own advice. That must change given the meaningful odds that EFCA will become law. The reality is that under the current version of EFCA, an employer could end up with a union before it becomes aware that a union campaign has even started and before it has had any opportunity to present the other side of the picture to employees. Consequently, absent a proactive strategy, an employer may be left with no strategy at all.

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What does a proactive strategy include? In short, it combines many factors, ranging from **auditing** to **planning** to **training**. Comprehensive human resources **auditing**, with an eye on critical workplace issues, is the starting point to assessing your vulnerability to union organizing. From the audit, employers can then begin **planning** how to minimize their exposure to unionization through enhancements in communications, effective policies and practices, competitive pay and benefits, and solid leadership. As part of achieving those goals, a proactive strategy must also include **training**.

In a sense, none of this proactive strategy is new. This type of plan has been the methodology of choice for many years for those employers seeking to better their workplace and remain union free. However, as the threat (perceived or otherwise) of organizing activity has diminished over the past decades, many employers have lost focus of the importance of such steps. The risks attendant to EFCA, however, dramatically change all that. Employers can no longer afford to rely on a weakened labor movement as their primary defense to unionization. Instead, they need to embark on a comprehensive plan and follow it virtually every day, year after year.

STEP 1

AUDITING — THE ONLY VIABLE WAY TO ASSESS YOUR VULNERABILITY

Comprehensive human resources auditing is the only effective methodology for assessing an employer's true vulnerability to unionization. In this context, auditing involves a detailed review of the circumstances that create employee frustration and related union interest. Evaluating communication systems, employee morale, supervisory competence, policies and procedures, compensation and benefit structures, working conditions, respect for leadership, and union activity in the geographic area and the industry are just some of the necessary components of an audit geared to assessing an employer's potential exposure to unionization.

Little Mendelson has developed an in-depth audit tool that is a cornerstone in helping employers begin to understand the risks imbedded in their workplace. Whether supervised directly by one of our labor attorneys or supported by our oversight, conducting such an audit will provide you with the crucial information needed to structure your proactive plan.

STEP 2

PLANNING: IDENTIFYING AND MAKING NECESSARY CHANGES TO MINIMIZE YOUR RISK

Once the audit is complete, your next step is to analyze the results, identify opportunities for improvement, and formulate changes to the organization that should minimize your risk to unionization, without unduly burdening operations. This is the planning stage of the proactive strategy. Such planning generally involves identifying, and then making, necessary changes to your communications systems, policies and procedures, pay and benefits, and leadership methodologies, among other areas.

Drilling down one step further, planning should focus on the following:

Communications

- Creating appropriate forums for communicating with employees about all work-related issues. A good communication system lets information sharing occur — consider small group meetings, focus groups, town hall meetings, etc., all with a two-way information flow.
- Informing employees accurately and quickly. Engaged and educated employees tend to be more loyal and understanding of problems that arise. Don't just communicate bad news or good news, disseminate all the news, and do so fairly, consistently and through a variety of tools. Large group meetings are just a start - develop your Intranet as a means to educate workers. Use technology to provide video news about the organization. In appropriate environments, social networking systems may be effective as such technology tends to broaden information to all levels of the organization.
- Avoiding fatal communication failures. The most common mistakes in employee communications are failure by managers to listen, not knowing your employees and managing by email - those problems effectively eliminate the chance that employees will communicate a problem or the

existence of union activity. Under EFCA, the only way you will know of a union risk is if employees are comfortable enough with managers to tell them about the campaign. Face to face communication, “management by walking around” and enhancement of individual relationships lead to reciprocal communication about many issues, including employee dissatisfaction and union activity.

Policies and Practices

- Implement good hiring practices. Train managers on how to hire. Have an aggressive selection plan and use sources for workers that lead to good hires. Employees with good work records and positive outlooks tend to be less easily swayed by union appeals. Look for positive individuals rather than those who are prone to unhappiness and negative influences.
- Create understandable (plain language) policies — not overly complex or so detailed as to remove common sense from the equation, and translate them for relevant languages. Too many handbooks and policies are too complicated. Granted, increased legal compliance has a tendency to cause complexity, but handbooks should be readily understandable to all employees.
- Establish an effective performance management and appraisal system. Borderline or poor (“C-”) employees tend to be unhappy, and unhappy employees seek third party protection to offset their poor performance. Create a system through which you can address performance concerns of borderline employees, either improving their performance or managing them out of the system.
- Administer a system of discipline that includes progressive steps, with checks and balances on employee due process. The perception of fairness means a lot to workers and, remember, no one should ever be surprised to be fired if your system is working properly.
- Empower employees to foster positive change in the workplace. Empowered workers are less likely to seek outside help. How far you want to go in that regard depends upon strategy and culture, but employee involvement in appropriate planning and tasks can make a

considerable difference.

- Consider incentive systems. If effective work and good behavior can lead to rewards, employees tend to be more positive and work harder.
- Offer a meaningful advancement system. Most employees want to achieve something — where possible, give them the opportunity to do that.
- Create employee recognition systems, but ensure they are fair. Developed poorly, recognition can lead to unjustified favoritism.
- Change in the workplace is inevitable and it often leads to employee unhappiness. Develop change management tools to help employees process change.

Pay and Benefits

- You do not necessarily have to be the highest-paying employer in your industry or area, but you must consider your competition, i.e., those employers with whom you are competing for employees. This is not always limited by industry and it requires an examination of the source of your employees and an understanding of your geography. You must also consider internal pay equity. Are your employees in your organization, with similar skills, experience and responsibilities being paid similar wages? Nothing makes an employee more discontent than seeing similar employees, inside or outside his/her company, receiving better pay or benefits.
- Paid time off is even more important today than ever before - strive for flexibility that does not compromise operations, understanding what your workforce values should be, and respecting the need for time off.
- Beware of perceived reductions that can accompany changed benefits plans. Many times, employers make positive changes to benefits plans, but lose the support of their audience by making a mistake on a somewhat trivial detail. In addition, if a benefit reduction is required, educate employees about the reasons for that change.

- Follow your audit trail to determine what is around you. Learn the market, seek out information from applicants who worked for nearby operations, and develop relationships with local human resource professionals.

Leadership

- Poor leadership alienates employees more than any other issue and this leads to unionization. The campaign that an employer is most likely to lose is the “campaign of frustration.” In such campaigns, the unhappy workforce, alienated by poor management, isn’t looking for a union but is looking for help. This type of campaign is an absolute gift to any union that gets the call asking “is there anything you can do for us? We hate our boss because he won’t listen to us.”
- Effective leadership leads to greater employee job satisfaction. Statistically, the number one reason why people leave a particular job is dissatisfaction with their manager. Recognize that and develop your managers as leaders. For some people, leadership comes naturally — for many, training needs to be part of the process.
- Intimidation is the hallmark of a poor communicator and leader. Companies often protect managers who intimidate merely because they often “make their numbers.” Good managers also have good people skills.

And, finally — a word about planning. The above actions don’t happen naturally. They have to be planned. Focus is required. Someone needs to be guiding the plan, or the plan won’t be carried out.

Planning also involves acting before an organizing drive surfaces. Because EFCA would effectively eliminate the ability to campaign against a union once a petition is filed, your only window period to defeat a union drive will be from the time you hear about card signing or union activity until the time that the union secures more than 50% of the cards. With EFCA, an employer simply cannot wait to hear about card signing to begin preparing a communications plan focused on card signing and unionization. This means that employers that are concerned about union organizing must develop and implement perennial campaign strategies.

STEP 3

TRAINING — ARMING LEADERS AND SUPERVISORS WITH THE NECESSARY TOOLS

The final step of the proactive strategy is to provide positive employee relations training to all leaders and supervisory personnel. Experience shows that, because poor supervision is often the primary reason that employees chose a union, management training is one of the most effective methods to minimize the risks. The primary objective of this critical training is (1) to educate your supervision on the impact unionization would have on your organization, factors that contribute to unionization and actions that will minimize the risks; and (2) to help managers understand the signs of unionization. Necessary components of union avoidance training include education on the following:

Background and History of Unions in the U.S.

- Yesterday and Today in the Labor Movement
- Your Company's History with Unions
- Company Philosophy

Facts about Unions

- Union Business/Finances
- Union "democracy" and discipline
- Union Promises
- What a Union Would Mean . . .
 - (1) To the Company
 - (2) To Supervisors
 - (3) To Employees

Causes of Unionization

- Communications/Supervisory Treatment
- Job Security
- Working Conditions
- Wages and Benefits

Effective Employee Relations

- Fostering Positive Environment
- Effective Communication
- Fair and Consistent Treatment
- Effective Administration of Discipline
- Effective Performance Management

Institutional Protections against Unionization

- Complaint Procedures
- Communication Programs
- Merit Rewards
- Employee Relations Programs

Signs of Unionization

Union Organizing Tactics

- Union Authorization Cards
- Union Access to Employees

- Properly Limiting Organizing on Company Property
- What Union Organizers Look For
- New Organizing Tactics

Legal Pitfalls

- What Supervisors Can Do and Say
- What Supervisors Can't Do or Say
- Typical Questions Asked of Supervisors
- Common Activities Supervisors May Be Required to Handle
- Obviously, a necessary component of this training will be updating the segments above to account for the then-current status of EFCA and the impact it has on the organizing process as it then exists. We also recommend the use of interactive training, where managers are asked to respond to scenarios and deal with reality-based hypotheticals. Theoretical training helps. Reality-based training is more likely to make a difference if a real campaign occurs.

One Final Consideration Due to EFCA

As previously noted, the biggest problem with EFCA is that it could result in the formation of a union without the employer ever having been aware of the campaign that led to the majority of its employees signing cards. As a result of this concern, employers must specifically ask themselves if they should educate employees about EFCA even though the employer has no particular reason to believe that a union campaign is imminent. To employers faced with the meaningful risk of a campaign, the answer should be "don't wait to educate."

Virtually any non-union employer is at risk. However, the employers that are most at risk are:

- employers in health care, hospitality, restaurant and other service industries, because fast-growing and aggressive unions (such as SEIU and

UNITE-HERE) are concentrating their efforts in those industries;

- employers in geographic areas with high percentages of organized employees;
- employers in industries that have been traditional union strongholds, such as manufacturing, construction, transportation, distribution, utilities and communication;
- employers whose employees deal with federal, state or local government, because of the ever-increasing unionization of the public sector; and
- employers who have experienced recent campaigns.

In reality, with the passage of EFCA likely, virtually any private sector employer will be a tempting target for the unions. The specific question is whether employers should actually explain to their employees how card checks would operate under EFCA? We believe that the answer is “yes.” Many employees will likely be offended by EFCA, if they understand it. While unions rave about the alleged “fairness” of EFCA, employees living in a democratic environment who are not interested in unionism will be astounded by the fact that the law eliminates a secret ballot election, the ability to hear the other side of the story and the ability to vote on a first contract.

Simply put, because card signing could lead to certification rather than just an election, under EFCA, the rules could change dramatically when it comes to educating employees. As a result, education of employees concerning EFCA should not be restricted to the benefits of operating on a non-union basis and the hazards of unionization. Employees should also be advised of the dangers of card signing and a card check, issues such as falsification, intimidation, or coercion, and how they can lead to near-instantaneous unionization.

CONCLUSION

The looming status of EFCA as organized labor's top legislative priority, with the support of a Democratic-controlled Congress and a potential Democrat in the White House, requires that employers act now. EFCA may well become law as early as mid-2009. Because there is already a sense of giddiness among labor organizations about EFCA, it is wise to assume that unions are already targeting specific businesses. Thus, employers that are interested in remaining union free should implement their proactive union avoidance plans well before the 2009 Congressional legislative session begins.

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