

On March 10, 2009, the Employee Free Choice Act (“EFCA”) was introduced in both the House of Representatives and the Senate. As we previously have reported to you, EFCA would force an employer to recognize and bargain with a union if the union obtained authorization cards from a majority of employees in an appropriate bargaining unit. While theoretically a secret ballot election still could be held in instances where authorization cards had been signed by 30% to 50% of employees in the bargaining unit, in practice unions nearly always obtain authorization cards from a majority of employees before filing a petition with the NLRB. If EFCA becomes law, there would be no reason for a union to risk losing an election when it can be certified as the bargaining representative upon obtaining signed authorization cards from a majority of the employees.

EFCA also would create major restrictions on bargaining for a first contract. Contractual terms would be imposed through arbitration if a contract were not reached within 120 days. This would be a major change from current law under which neither party can be forced to agree to any contract provision. On top of everything else, EFCA would impose a penalty of up to \$20,000 per violation for “willful” or “repeated” violations of the National Labor Relations Act.

Passage of EFCA in the House of Representatives is virtually certain. (EFCA was passed by the House in 2007 by a sizeable majority and support for it has increased as a result of the 2008 election.) Passage of EFCA in the Senate is a bit more problematic where 60 votes are needed for cloture, and in addition to most Republicans, five or six Democrats have expressed opposition to the bill.

Unfortunately, however, even if enough votes can be mustered in the Senate to defeat EFCA in its present form, maintaining the current union election system appears to be extremely unlikely. While no specific compromise legislation has been proposed, the possible compromises we have heard about – “quickie” elections within five days plus “card check” recognition if the union has signed cards from a “super majority” (e.g., 60%) – would not provide much cover for employers.

We are counseling employers to act now to bolster their human relations and union prevention programs. In anticipation of EFCA’s passage in some form, many of our clients have decided to conduct an employee opinion survey, which is probably the best means of uncovering issues and providing an action plan. We also have developed a basic union prevention plan at a fixed fee.

Our firm has conducted a series of seminars about EFCA and preventive strategies for dealing with its likely passage in some form. We will be conducting another such seminar the morning of March 20, 2009. If you are interested in attending this free seminar, please contact Amy Avon ([aavon@millisor.com](mailto:aavon@millisor.com); or 440-838-8800).

One of the cornerstones of our firm’s approach to labor relations is that unionization is preventable. With the decline of unions in recent years, however, that notion may have been taken for granted. With the introduction of EFCA in a Congress which has sizeable majorities in favor of its passage, if remaining union-free is one of your priorities, your organization should enhance its union prevention strategies as soon as possible.