

Election of Obama Heralds Potentially Major Changes in Employment Law

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The election of Barack Obama opens the door to a new era of employment-related legislation. One major issue likely to occupy a front burner according to published reports is the passage and implementation of the Employee Free Choice Act (EFCA). As it was proposed, and defeated in the U.S. Senate last year, the EFCA would add three provisions to the National Labor Relations Act (NLRA).

First, the EFCA would allow unions to be certified by a “card check” without the need for a secret ballot election. Rather, once a union obtains signed authorization cards from a majority of an employee group, a process which may be conducted without employer knowledge, the employer will be required to recognize and bargain with the union for that unit of employees.

The EFCA also would permit arbitrators, not the parties, to decide the terms of an initial collective bargaining agreement. Unions could refer negotiations on their initial contract to binding interest arbitration after 90 days of negotiation. If the employer and union have not reached an agreement on the terms of the contract within 30 days following the initial referral, an arbitration panel will be appointed by the federal government to decide the terms of the contract. That decision is binding for two years, unless the parties both agree to amend it.

Finally, the EFCA increases penalties for employer unfair labor practices. It adds a liquidated damages provision that doubles any backpay award if an employer discriminates against an employee for union organizing or other union-related activity before the first collective bargaining agreement. Additionally,

it subjects employers to civil penalties up to \$20,000 per unfair labor practice if committed “willfully or repeatedly” during union organizing or other union-related activity before the first collective bargaining agreement.

Even if the EFCA does not pass, employers should be prepared for a renewed focus on organizing by unions. Election petition filings with the National Labor Relations Board during the Clinton Administration were higher than during the Bush Administration. Thus, pro-active employers will want to take at least the following steps:

- Educate supervisors to lawfully identify union-organizing activity and to respond appropriately within applicable legal restrictions;
- Prepare supervisors to educate employees about the potential changed significance of signing union authorization cards; and
- Review employee handbooks and other employment policies to ensure that they are compliant with the NLRA and cases interpreting it.

President-elect Obama has also indicated his support for other labor and employment legislation, including a national Healthy Families Act requiring paid sick leave, expansion of Title VII to prohibit sexual orientation discrimination, expanding the number of employers subject to the Family and Medical Leave Act, amending the Equal Pay Act to allow for class actions and expanding the remedies available for violations, and several others.

This alert contains information necessarily of such a general nature that it cannot be regarded as legal advice. Vorys, Sater, Seymour and Pease LLP is available to provide additional information and to discuss matters contained herein as they may apply to specific situations. For additional information, visit www.vorys.com.
