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Focus

Labor Gains Ahead?

By Robert G. Lian, Jr.

The 2008 elections are now in the record books. With the election of Barack Obama to the presidency, and Democrats picking up as many as 20 seats in the House and at least five seats in the Senate, the new balance of power in Washington is likely to bring dramatic change in various areas of American life. One area that is certain to be especially active is legislation and regulation affecting the workplace. When Congress changed hands in 2006, a cascade of bills was introduced by Democrats on various labor and employment issues. Over the intervening two years, Democrats prodded the Bush administration — through hearings, investigations and reports — to enforce various workplace laws more aggressively.

The 2008 election created an entirely new landscape that is substantially more favorable to supporters of the Employee Free Choice Act.

Changes in the executive and legislative branches of government could very well impact U.S. labor and employment law and workplace regulation in the next few years. Based on the various legislative efforts by the Democrats over the past two years and the many promises and pledges that President-elect Obama and others made on the campaign trail, we estimate what the next two years may hold for employers in terms of legislation, regulation and enforcement priorities affecting the workplace.

The Employee Free Choice Act

Obama told an Iowa crowd in November 2007: "We're ready to take the offense for organized labor. It's time we have a president who didn't choke saying the word 'union.' We need to strengthen our unions by letting them do what they do best — organize our workers. If a majority of workers want a union, they should get a union. It's that simple. We need to stand up to the business lobby that's been getting their friends in Congress and in the White House to block card check. That's why I was one of the leaders fighting to pass the Employee Free Choice Act. That's why I'm fighting for it in the Senate. And that's why we'll make it the law of the land when I'm president."

No single piece of labor and employment legislation has drawn as much attention in recent years as the Employee Free Choice Act (H.R. 800, S. 1041). Passed by the House in 2007, the legislation stalled in the Senate when supporters failed to garner the necessary 60 votes to invoke cloture. As a senator, Obama was one of the original supporters of the Employee Free Choice Act. The bill has the fervent support of organized labor and, with the strengthening of Democratic majorities in both the House and Senate, there is good reason to believe that it will be among the earliest priorities for the 111th Congress.

The Employee Free Choice Act would fundamentally change the rules in labor-management relations in the United States in two critical ways. First, it would allow unions to bypass a secret-ballot election supervised by the National Labor Relations Board and, instead, become the certified bargaining representative of employees through a "card-check" recognition procedure. Second, if the parties to a new collective bargaining relationship cannot agree on an agreement within a specified time, they must submit their disagreement to a federally appointed arbitration panel, who will then dictate the terms of the first collective bargaining agreement. The Employee Free Choice Act also would significantly increase the penalties on employers who violate provisions of the National Labor Relations Act in connection with union organizing efforts.

Card-Check Certification

Under current law, a union can become the certified bargaining representative of a group of employees only if it prevails in a secret-ballot election supervised by the National Labor Relations Board, or if the employer agrees to recognize the union voluntarily after the union shows that it has support from more than 50 percent of the employees. Many employers insist on a secret-ballot election before they will recognize a union. Under the Employee Free Choice Act, a union would become the certified bargaining representative by demonstrating that it collected authorization cards from a majority of the employees. It would no longer need to seek an election or obtain the employer's consent to voluntary recognition.

Unions typically gather authorization cards without the employer's knowledge. Giving unions the unilateral right to obtain certification without an election or employer consent would effectively deprive employees of the opportunity to hear the full range of arguments for and against unionization. In effect, unions would be able to gather signatures discreetly, giving employees a pro-union argument without an opportunity for rebuttal from the employer.

The Employee Free Choice Act also would remove the range of protections that the National Labor Relations Board has developed over the past 50 years to ensure that employees are not subject to undue influence or interference in the selection of a bargaining representative. Unlike union elections, which must take place in "laboratory conditions," the Employee Free Choice Act contains no restrictions or limitations on what unions can do to persuade employees to sign an authorization card. Because authorization cards are valid for one year, it is conceivable that union organizers are already collecting cards in anticipation of passage of the Employee Free Choice Act.

Mandatory Arbitration

In addition to facilitating the certification process, the Employee Free Choice Act expedites the bargaining process for a first contract by creating a mediation and arbitration process to settle bargaining disputes over first collective bargaining agreements. The Employee Free Choice Act provides 90 days for an employer and union to negotiate a first-time collective bargaining agreement. If they are unsuccessful after 90 days, either party can demand mediation before the Federal Mediation and Conciliation Service. After 30 days of mediation, a Federal Mediation and Conciliation Service-appointed arbitration panel shall render a decision resolving the dispute, with the decision binding upon the parties for a period of two years, unless amended by written consent of the parties during that period.

This binding arbitration construct represents a fundamental shift in American labor policy. Currently, employers are only required to bargain with a union but are not required to agree on any terms. Under the Employee Free Choice Act, a third party could decide the proper wages, benefits and terms and conditions of employment.

Finally, the Employee Free Choice Act would drastically increase an employer's potential liability for unfair labor practices. Currently, employers are generally only liable for back pay and reinstatement of any wrongfully terminated employees.

Under the Employee Free Choice Act, for unfair labor practices committed during elections and first contract bargaining, an employer would be subject to treble damages through a liquidated damages provision that requires payment of twice the amount owed in back pay, as well as a civil penalty of up to $20,000 for each violation. The Employee Free Choice Act has no corresponding increase in penalties for union violations.

The Road Ahead

The business community and the labor movement have girded for battle over the Employee Free Choice Act. As of Election Day, several hundred trade groups, unions and companies had registered to lobby in connection with the legislation. Web sites of many major unions feature significant sections devoted to the Employee Free Choice Act.

The business community has also formed coalitions to oppose the Employee Free Choice Act. The U.S. Chamber of Commerce and an umbrella group known as the Coalition for a Democratic Workplace have launched efforts to fight or limit the Employee Free Choice Act.

The fight over the Employee Free Choice Act is likely to become pitched in early 2009. The Employee Free Choice Act passed the House in 2007 by a margin of 241-185. Supporters failed by just nine votes to obtain the necessary margin to obtain cloture in the Senate, and Sen. Tim Johnson, a co-sponsor of the legislation, missed the cloture vote due to illness.

The only Republican who voted in favor of cloture was Sen. Arlen Specter. However, in his floor statement, Specter made clear that while he supported imposing cloture, he was not expressing a conclusion on the underlying merits of the bill, and voiced his support for a bipartisan compromise solution to the problems. Specter noted his concern over improper activities by both unions and employers in the organizing process, and expressed misgivings about the slow process to remedy violations. He cited favorably the Canadian procedure by which elections are held within five to 10 days after petitions are filed, as well as the major labor law reform legislation that failed to pass Congress in 1977, which included such a provision.

The 2008 elections created an entirely new landscape that is substantially more favorable to supporters of the Employee Free Choice Act. Democrats in Congress will likely reintroduce the legislation early in the 111th Congress and attempt to deliver a bill to the new president's desk soon after inauguration. At this time, there remains uncertainty in a few remaining Senate races. In the event that the cloture vote is close, Specter might be able to play some compromise role in shaping a final bill that would pass the Senate.

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