

THE EFCA NEVER WENT AWAY – But Its Form May Be Changing

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Presented by:

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Employee Free Choice Act (“EFCA”)



- Failed to pass Congress in 2007 & 2009
- Would have required union recognition based on simple authorization card majority
- In other words, no election needed
- Died in the Senate – fear of Republican filibuster

EFCA Highlights



- Would have required initial CBA within 120 days
- Otherwise, submit to binding interest arbitration
- Would have increased employer penalties for discriminating against union supporters
- No reason to believe EFCA will be revived anytime soon

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Enter the “Ambush Election” Rules



- NLRB to exercise its rulemaking power
- Proposed on 02/06/14
- Would overrule several decades of precedent & radically alter union election procedures
- Would allow almost no time to respond to union representation petition
 - Or to educate employees about unions

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“Ambush Election” Rules (cont’d)



- Applied for a short time in 2011, but Board lacked a quorum
- This time around, Board refused to extend public comment past 04/07/14
- Best guess: finalized before December
 - But after mid-term elections

Overview of Proposed Rules



- Significantly shorten the time between petition-filing and election
- Impose onerous filing requirements on employer
- Severely limit employer's ability to influence the size and scope of the proposed bargaining unit
- Delay most voter eligibility disputes until after the election

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#1 – Expedited Election Process



- Current Rule: election not sooner than 25 days after election directed
 - But normally within 42 days from petition-filing
- Current average time from petition to election = 38 days
- Under proposed rules, election could be held 10 days after petition
 - And not more than 25 days after

Expedited Election Process (cont'd)



- Currently, pre-election hearing scheduled within 14 days after petition
- Proposed: cut that time in half, “absent special circumstances”
- Currently, post-hearing briefs 7 days after pre-election hearing
 - Proposed: RD decides whether briefs will even be allowed

Expedited Election Process (cont'd)



- Current: *Excelsior* list filed within 7 days after election ordered
- Proposed: file *Excelsior* list within 2 days after election ordered
 - If union waives the list, election could be held 10 days after petition
- Even without a waiver, election within about 25 days after petition
- Net result: time from petition to election cut in half, to 21 days

Proposed Change #2: Onerous Filing Requirements

- Within 7 days after petition, employer must file written position statement addressing –
 - NLRB jurisdiction
 - Appropriateness of the petitioned-for unit
 - Any legally recognized bar to the election
 - In-person vs. mail-in balloting
 - Proposed date, time, location of the election



Filing Requirements (cont'd)



- Failure to cite issue in position statement = waiver of the issue
- No similar submission required of the union
- Unless petition has obvious flaw or proof of union misconduct gathering signatures, hearing will be short
- Individual voter eligibility issues deferred to post-election

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Filing Requirements (cont'd)



- Employer must provide 2 lists *at time of hearing*
 - Employees in the petitioned-for unit
 - Employees in the unit the employer proposes
- 2 days after election agreed or ordered, must submit voter names, home addresses, tel. nos., email addresses, work locations, shifts & classifications

Proposed Change #3: Almost No Input on Bargaining Unit Size



- Currently, voter eligibility issues resolved before election
- 20% Rule: hearing officer may refuse voter eligibility issues affecting less than 20% of potential voters
- Result: eligibility issues decided *after* the election
- Could result in a re-run election

Proposed Rules + *Specialty Healthcare* = Hard to Challenge B/U Scope, Size



- NLRB's *Specialty Healthcare* (2011) decision overturned 20 years of precedent
- Encourages small, fragmented units of employees ("micro" units)
- To avoid this, employer must show "overwhelming" community of interest
- Would be even harder under the proposed rules

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Proposed Change #4: Review by Board Itself Limited



- Currently, a party has 14 days to request Board review of the direction of election
 - Adds 25-30 days to pre-election period
- Review would be postponed until *after* the election
 - Heightens the risk of a re-run
- Even then, rules would allow the Board to decline review altogether

Preparing for the New Rules



- If implemented, time will be of the essence once petition filed
- Try to anticipate what bargaining units a union may seek
- And start gathering your evidence now

Evidence on Potential Bargaining Units

“Community of Interest” is the key.

Factors:

- Similarities in wages, bonuses, performance evaluations
- Similarities in benefits (health, 401(k), vacations, parties, uniforms)
- Similar shift schedules, shared facilities (break/restrooms, entrances, parking)



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“Community of Interest” Factors



- Common supervision and labor-relations policies, particularly disciplinary rules
- Similarity of skills & qualifications for the work
- Proximity of departments/work sites
- Frequency of contact or interchange among employees

“Community of Interest” Factors (cont’d)



- Integration/continuity of production processes
- Similarities in job functions, length of shifts
- Job progression from one section/department to another
- History of collective bargaining, if any

Decide Who Are Your “Supervisors” Under the NLRA



- And be ready to prove their status if a petition is filed
- Will control whether the individual is eligible to vote
- Can also have legal consequences = employer answerable for supervisor's conduct

Preparing Proof of Supervisory Status



- Participation in the screening, hiring process
- Authority to approve/disapprove transfers in/out of work unit
- Authority to recommend or decide disciplinary actions, suspensions
- Participation in layoff & recall decisions

Preparing Proof of Supervisory Status (cont'd)



- Authority to affect employee promotions, pay raises
- Power to (recommend) disciplinary discharges
- Use of independent judgment when assigning work

Preparing Proof of Supervisory Status (cont'd)



- Authority to resolve employee grievances without prior approval by a superior
- Held accountable for the work of others
- Significant discretion directing the activities of the work unit (“In Charge”)

Other Advance Planning to Consider



- Develop and communicate company's position on unionization
- Create a “rapid response” team to develop campaign theme & reporting structure
- Train “rapid response” team members on communicating effectively with employees without violating the law
- Consider preparing campaign materials before any election petition is filed (“campaign in a box”)

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