



LABOR ALERT

Anticipated Passage Of Employee Free Choice Act

November 2008

As a result of the victory by the Democratic Party in the November 4 election, employers can expect a renewed effort by Congress to pass a version of the Employee Free Choice Act of 2007, Senate Bill 1041 (the "New Act"), that was sponsored by 44 Senators. If passed, this bill will introduce the most comprehensive revisions to the National Labor Relations Act (the "NLRA") since at least 1959. If the New Act passes in its present form, for the first time since the inception of the NLRA in 1935, a union could become the designated collective bargaining representative of an employer's employees notwithstanding a request by the employees or the employer for a secret ballot election conducted by the National Labor Relations Board (the "NLRB"). Moreover, under the New Act, for the first time in NLRA history, an initial collective bargaining agreement may be imposed on an employer by an arbitrator if the employer and union have reached an impasse in negotiations. Also for the first time, the NLRB would be granted authority, under certain circumstances, to impose fines and other substantial penalties on employers found to have committed certain unfair labor practices.

At present, Section 9(c) of the NLRA permits a union that purports to represent a majority of employees in an appropriate bargaining unit to file a petition for a secret ballot election with the NLRB to permit employees to vote on the issue of union representation. An employer is not required to recognize and bargain with a union purporting to represent a majority of its employees unless the NLRB certifies, after an election, that a majority of employees in the bargaining unit have voted for union representation. The New Act would amend Section 9(c) to permit not only a union, but also an individual, to file a petition with the NLRB asserting that a majority of employees in an appropriate bargaining unit wish to be represented by a union or an

individual. If the NLRB concludes the employees have signed proper authorizations to have a union or an individual represent them, the NLRB would be required to certify the union or the individual as bargaining representative of the employees without a secret ballot election.

The precise contours of the new procedure for certifying an individual or a union without an election have not yet been articulated in the Employee Free Choice Act. The Senate draft of the New Act directs the NLRB to develop guidelines and procedures for implementation of the New Act. However, the amendments to Section 9(c) of the NLRA, if passed, could reduce or even eliminate an employer's ability to campaign against union representation of its employees, since the employer may not be aware its employees are signing authorizations for the union until the union has already obtained signatures from a majority of employees. The employer's disadvantage will be compounded by the NLRA's strict limitations on an employer's ability to question its employees concerning their union sympathies or activities. Moreover, the elimination of an employer's right to demand an election increases the likelihood that a union could, through misinformation, coercion or other improper means, inappropriately obtain signed authorizations from employees.

The Senate Bill would also amend Section 8 of the NLRA by adding a new procedure to break an impasse in negotiations for an initial collective bargaining agreement. Under existing law, an employer must bargain in good faith with the newly elected bargaining representative of its employees, but it need not agree to terms it believes are unsatisfactory or detrimental to its business. If the parties reach a legitimate impasse in negotiations, an employer can implement its final offer to the union or

continue applying the existing terms of employment. The union has the right to strike. The amendments to Section 8 proposed in the Senate bill would permit the parties 90 days to negotiate an initial collective bargaining agreement. If the parties fail to reach agreement, either party may submit a request for a mediator to the Federal Mediation and Conciliation Service (the "FMCS"). If, within 30 days of either party's request for mediation, the parties still have not reached agreement, the New Act requires the FMCS to refer the dispute to an arbitration board. The arbitration panel will then impose a collective bargaining agreement (and all of its terms) on the parties effective for a period of up to two years.

The New Act may also deprive an employer of the right to collaterally challenge the NLRB's determination of an appropriate bargaining unit in the Federal Courts of Appeals. At present, if the NLRB certifies a union as representative of a unit of employees the employer believes is inappropriate (for any number of reasons), it may refuse to bargain with the union and force the NLRB to justify its unit determination in the Federal Court of Appeals in a collateral unfair labor practice proceeding. The so-called "test of certification" procedure appears to be supplanted by the arbitration procedure contained in the proposed amendments to Section 8 of the NLRA. If so, the amendments deprive employers of their right to challenge the NLRB's definition of an appropriate bargaining unit through the federal court system.

Section 4 of the Employee Free Choice Act would drastically increase the NLRB's enforcement power in two ways. First, the Act would require the NLRB to obtain a prompt injunction in federal court

against an employer who has allegedly discharged or discriminated against an employee due to that employee's activities on behalf of a union in the period from the inception of a union organizing campaign until an initial collective bargaining agreement is signed by the parties. Second, the Act would alter the NLRB's current practice of awarding only actual back pay to employees found to have been discharged because of their union activities. Since its inception the remedies afforded by the NLRA have been limited to "make whole" remedies." The New Act would supplement the traditional make whole remedy with liquidated damages in the amount of twice the back pay owed (in addition to the actual back pay) if the discharge occurred between the inception of the organizing campaign and execution of an initial collective bargaining agreement. The New Act would also permit the NLRB to impose a fine of up to \$20,000 per violation for any employer who willfully or repeatedly engages in any of a broad range of possible unfair labor practices (including improper statements even if employees experience no loss of pay as a result) during the period between the inception of the organizing campaign and the execution of an initial collective bargaining agreement.

If passed, the Employee Free Choice Act will present a host of legal issues. The implementing regulations issued by the NLRB may also have an impact on the manner in which the Act is administered and enforced. Employers interested in developing a strategy for addressing the anticipated increase in union organizing efforts should contact us for further information.

This Labor Alert was prepared by Bradley G. Kafka and Robert S. Seigel of the Labor and Employment Law Department of Gallop, Johnson & Neuman. Mr. Kafka is Chair of the Labor and Employment Law Department; and Mr. Seigel is a member of the Department. If you wish to obtain further information regarding these matters, please contact either the Gallop, Johnson & Neuman attorney who normally provides or manages your legal services or an attorney in the Firm's Labor and Employment Law Department. Attorneys include:

Bradley G. Kafka, Dept. Chair
Jon A. Bierman

Stuart I. Cohen
Elisa Gilbert

Tiffany B. Kieffer
Robert S. Seigel

Stephen W. Skrainka
Mark W. Weisman

Copyright 2008 by Gallop, Johnson & Neuman, L.C. Permission is granted for reproduction and distribution of this newsletter in its entirety if all reproductions include this copyright notice. This publication is intended to provide the reader with general information concerning selected current legal issues and developments and is not intended to constitute or to be relied upon as legal advice or a legal opinion relating to any specific fact or circumstance.

ADVERTISING MATERIAL: COMMERCIAL SOLICITATIONS ARE PERMITTED BY THE MISSOURI RULES OF PROFESSIONAL CONDUCT BUT ARE NEITHER SUBMITTED TO NOR APPROVED BY THE MISSOURI BAR OR THE SUPREME COURT OF MISSOURI. THE CHOICE OF A LAWYER IS AN IMPORTANT DECISION AND SHOULD NOT BE BASED SOLELY ON ADVERTISEMENTS.

GJN
GALLOP, JOHNSON & NEUMAN, L.C.
Attorneys and Counselors at Law