PUTNEY, TWOMBLY, HALL & HIRSON LLP
ESTABLISHED 1866
COUNSELORS AT LAW
521 FIFTH AVENUE
NEW YORK, NEW YORK 10175
(212) 682-0020
TELEFAX: (212) 682-9380
PUTNEYLAW.COM

DANIEL F. MURPHY, JR.
MICHAEL T. McGRATH
THOMAS A. MARTIN
WILLIAM M. POLLAK
JAMES E. McGRATH, III
CHRISTOPHER M. HOULIHAN
THOMAS M. LAMBERTI
STEPHEN J. MACRI
HARVEY I. SCHNEIDER
MARY ELLEN DONNELLY
JOSEPH B. CARTAFALSA
GEOFFREY H. WARD
ANDREA HYDE
E. PARKER NEAVE
MARK A. HERNANDEZ
JAMES M. STRAUSS
PHILIP H. KALBAN
SEAN H. CLOSE
LANSING R. PALMER
JEROME P. COLEMAN

120 WOOD AVENUE SOUTH
SUITE 600
ISELIN, NEW JERSEY 08830
(732) 632-2505
TELEFAX: (732) 632-2506

1205 FRANKLIN AVENUE
GARDEN CITY, NY 11530
(516) 746-0070
TELEFAX: (516) 746-0599

2500 NORTH MILITARY TRAIL
SUITE 200
BOCA RATON, FLORIDA 33431
(800) 935-8480
TELEFAX: (561) 393-9707

COUNSEL
CHARLES J. GROPPE
ALEXANDER NEAVE
DUSTAN T. SMITH

SPECIAL COUNSEL
JUDITH M. BANDLER

November 12, 2008

CLIENT ALERT

The Employee Free Choice Act

The "Employee Free Choice Act" ("EFCA") (H.R. 800) is a bill before Congress that amends the National Labor Relations Act ("NLRA"). If enacted, it will be the most significant labor law reform of the past fifty years and will transform the way unions attempt to organize.

On March 1, 2007, the House passed the EFCA, by a vote of 241-185. However, in the Senate, supporters fell nine votes short of the 60 needed to end a filibuster and initiate a vote on the bill. In light of the recent elections, many experts predict that there will be sufficient support to enact some version of the EFCA sometime next year. Therefore, employers should familiarize themselves with the EFCA and understand the possible consequences of its enactment.

Analysis

We begin our analysis with the EFCA as it existed when it stalled in the Senate. It is quite possible, perhaps even likely, that the bill will undergo significant substantive changes before it becomes law.

The EFCA proposes three key amendments to the National Labor Relations Act ("NLRA"): (1) it permits union certification without a secret-ballot election, through a procedure known as "majority sign-up;" (2) it mandates binding interest arbitration to establish an initial two-year collective bargaining agreement when a newly certified or recognized union and an employer cannot reach an agreement; and (3) it strengthens enforcement of employer unfair labor practices during organizing drives.

1. Majority Sign-Up

Since the inception of the NLRA, employees have expressed their votes for or against unionization through a secret ballot election conducted by the National Labor Relations Board ("NLRB"). The EFCA permits employees to organize through a process know as majority sign-up. Under this process, the NLRB will immediately certify a union as the exclusive bargaining representative of a unit of employees when the union submits signed authorizations of a majority of the employees in the unit.

Under current law, if a union seeks to represent employees it must petition the National Labor Relations Board ("NLRB") to conduct and supervise a secret-ballot election. It must submit cards signed by at least 30% of the employees authorizing the union to represent them in a particular unit of the employer. If there are no issues, the NLRB holds a secret-ballot election, typically thirty to forty days thereafter. If the majority of the votes cast are for the union, the NLRB will certify the union as the exclusive bargaining representative for all employees in the unit.

Under the EFCA, the union only needs to submit authorization cards from a majority of the employees in a unit to be certified by the NLRB. Although a union obtaining authorizations for between 30 and 50 percent of employees could still seek a secret ballot election, it is highly likely that most unions will attempt to obtain authorization cards from a majority rather than risk a secret ballot election.

2. Binding Arbitration for Initial Collective Bargaining

The EFCA will also require employers and unions to submit to binding interest arbitration if the parties cannot reach agreement on an initial contract after 90 days of bargaining and 30 days of mediation with the Federal Mediation and Conciliation Service (FMCS). These time limits may be extended by mutual agreement of the parties.

Under current law, management and labor have a duty to bargain in good faith but are not obligated to reach an agreement. According to a study cited by the Office of the Committee on Education and Labor, 34% of union elected victories did not result in a first contract.

Under the EFCA, if the parties cannot reach an agreement through bargaining, an arbitrator will impose a contract.

3. Enhanced Enforcement of Employer ULPs During Organizing Campaigns

The EFCA will also increase the penalties for, and enforcement of, *employer* unfair labor practices ("ULPs") during times when unions are engaged in an organizing campaign or attempting to negotiate their first contract. The heightened penalties do not apply to unions.

Under current law, if there is reasonable cause to believe that the employer has committed a ULP, the NLRB will proceed to a hearing. Typically, the NLRB does not seek to enjoin an employer's alleged ULPs pending the hearing. Remedies are generally limited to paying backpay to any employee unlawfully discharged or discriminated against.

The EFCA will amend the NLRA to include the following remedies: (1) the NLRB *must* seek a federal court injunction against an employer whenever there is reasonable cause to believe that the employer has committed a ULP; (2) an employer must pay three times backpay to any employee the employer unlawfully discharged or discriminated against; and (3) civil fines of up to $20,000 per violation against employers found to have willfully or repeatedly violated employees' rights.

Conclusion

The EFCA, in its current or modified form, is likely to be introduced in Congress in 2009. Employers should familiarize themselves with the EFCA and understand the possible consequences of its enactment on their workplace.

If you should have any questions regarding the Employee Free Choice Act, please contact us.

PUTNEY, TWOMBLY, HALL & HIRSON LLP