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HR Alert (Update on the EFCA)

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Clients and Friends:

The Employee Free Choice Act (“EFCA”) continues its journey through the legislative process. As we reported previously, the original version of the EFCA would have modified the National Labor Relations Act (“NLRA”) as follows:

- By obtaining signed authorization cards from a majority of employees (50% + 1 employee) in a bargaining unit, a union would represent all employees in that unit without an election;
- An arbitrator could determine the terms and conditions of employment for bargaining unit employees for a period of two years;
- Penalties for unfair labor practices by employers would be enhanced.

In an effort to convince the handful of Democratic Senator hold-outs to support the EFCA (the EFCA already has the support of the House and President), the Senate reportedly is considering dropping the “card check” provisions. In its place, the Senate may add language calling for expedited elections. At the present time, elections are held within approximately 42 days of the filing of a petition for an election. Any employer who has gone through this process knows that 42 days is a very brief period of time in which to effectively communicate its position to employees. An expedited process may effectively prevent an employer from providing its side of the story before the election. Bottom line: Replacing “card check” with expedited elections is no cause for celebration by employers. If these reports are true, such “compromise” may increase the likelihood that the EFCA will pass soon.

If your long term business plan calls for remaining non-union, consider immediately taking steps to prepare for the impact of the EFCA. Although there is no “one-size-fits-all” approach, the following guidelines may help.

Obtain Support of Key Players

- Educate your Board and Senior Leadership Team on the NLRA, EFCA, and the likely impact of unionization on your organization’s long term business goals. Examples of issues to discuss include:
 - ◇ A collective bargaining agreement may restrict your ability to introduce new technologies into the workplace;
 - ◇ Modifying staffing would require union approval, which may take time that you (or your customers) cannot afford;
 - ◇ Rewarding merit could be a thing of the past;
 - ◇ Subcontracting work could be restricted; and
 - ◇ An arbitrator who has no experience with your organization may ultimately set the terms and conditions of employment (wages, benefits, hours, duties, etc.) of your employees for two years.

- Educate these individuals about “corporate campaigns” (in which the union seeks to pressure an employer by pressuring others (legislators, community leaders, media, customers)) and “neutrality agreements” (agreements whereby employer must give union access to employees and is restricted in getting its message about unions to employees).
- Seek unanimous support to remain union-free.
- Identify a group responsible for establishing and implementing a long-term union prevention plan. Include individuals with expertise in operations, human resources, legal, security, and communications (both internal and external).
- Develop a persuasive statement on why you believe it is best for your company, its employees, and its customers for you to remain union-free.

Determine the Issues and Risk Areas Before Organizing Takes Place

- Be able to explain your compensation philosophy/system and how it compares (hopefully favorably) with similar employers in your area.
- Conduct meaningful employee surveys. Ensure anonymity. Hold managers accountable for following up on key issues.
- Implement a fair, effective performance review system that facilitates communication of concerns and consequence for failure to improve, assistance/re-training, monitoring, and, when reasonable efforts fail, termination.
- Consider a progressive discipline system with a grievance procedure.
- Determine which employees could or should be made “supervisors” for purposes of the NLRA. If necessary, change job requirements/written descriptions.
- Be sensitive to actions that could incite an employee to sign a card or vote for a union out of anger (for example, remodeling administrative offices while freezing salaries).
- Review policies:
 - ◇ Do you have legally-compliant, unambiguous rules regarding:
 - non-employee solicitation or distribution on employer property?
 - employee-to-employee solicitation (work time) and distribution of literature (work time, work areas)?
 - e-mail communications in the workplace?
 - any “special circumstances” that should justify a prohibition on the wearing of union buttons and other insignia in certain areas?
 - ◇ Do you enforce rules neutrally, or are you more strict when it comes to union content?
 - ◇ Is the tone of your “employment at will” statement such that it has less impact when used against you by a union?

Educate/Train

Train your front line managers and supervisors on the organization’s position on unions, the do’s and don’ts of dealing with union activity, and how to recognize union activity. Consider the following:

- Provide training on TIPS (the union will be telling employees not to permit you to SPIT on them). During a campaign, an employer may not:
 - ◇ Threaten (discharge, discipline, violence, etc.)
 - ◇ Interrogate (about union sympathies, what the issues are, etc.)
 - ◇ Promise (increased pay and benefits, to address grievances/concerns, etc.)
 - ◇ Spy (sending people to meetings, photographing lawful/peaceful activity, etc.)

- Although it is not permissible to violate “TIPS”, it generally is permissible to:
 - ◊ Inform employees that a union cannot *guarantee* better wages or working conditions.
 - ◊ Inform employees that choosing a union means employees no longer may negotiate directly with their supervisor for an exception to a rule or policy.
 - ◊ Remind employees of times where your performance review or disciplinary system resulted in the fair treatment of employees.
 - ◊ Provide historical information on union dues, and remind employees that they typically must pay dues even if the union does not secure increased wages/benefits.
 - ◊ Inform employees that, if they vote for a union, others in the bargaining unit will be represented by the union even if they do not want to be.
 - ◊ Discuss current benefits of employment.
 - ◊ Discuss how wages are determined.
 - ◊ Correct misleading union statements and respond to union criticisms.
 - ◊ Compare wages and benefits to other employers in your industry/area.
 - ◊ Prevent non-employees from coming on your property to organize.
 - ◊ LISTEN—Supervisors will often learn the issues without interrogating or spying.
- The line between what you may and may not say is not always clear. Sometimes the words matter, sometimes the context matters, and sometimes both matter. You simply must provide supervisors and managers with the tools to enable them to confidently address employee questions about unions. Any employer that lets the union do all the talking in a campaign most likely will end up with a union.
- Train a core group to *immediately* respond to any union organizing activity. If you run a third shift, keep in mind that an initial card-signing campaign may be made during the third shift when there are fewer supervisors in place. Have a team ready to respond.

Benefits of Preparation

If it is your goal to remain non-union, it is critical to be prepared before union organizing takes place. The initial investment should pay dividends. We have had the benefit of experience with a particular construction contractor who we hold as a model in how to do this. The contractor has been able to remain non-union and experience tremendous growth despite many run-ins with unions. The keys: (1) the owner makes sure all employees are treated fairly, so there is no reason for a majority of them to want a union, and (2) supervisors are periodically trained on TIPS and instantly know what to do--and what not to do--when organizing occurs, so the company is not constantly hamstrung with the time and expense of litigating unfair labor practice charges. If we can help prepare your workforce, please give us a call.

Please do not hesitate to contact either one of us, or your preferred Wooden & McLaughlin contact, with questions. On behalf of our Employment and Labor Law Group, we appreciate the opportunity to be of service to you.

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***Because different fact scenarios may create different legal obligations, this HR Alert does not constitute legal advice. Please consult an attorney for advice about any specific matter.**