

CLIENT ALERT

Is "Card Check" In Your Future?

November 6, 2008

On Tuesday the nation elected a new president. On Wednesday organized labor took credit. Union leaders used the election results to renew their call for legislation that would dramatically change the rules of engagement in U.S. labor-management relations. Some version of what we call "card check" legislation is likely to be the principal labor/employment legislative priority of President Obama's administration. Unions, which strongly support legislation to transform the process by which U.S. companies can be organized, want to jettison the secret ballot election procedure that has been the cornerstone of federal labor law since the 1930s. They would replace it with a system by which an employer would be required to bargain with a union after it gets a majority of employees to sign union authorization cards. Unions would also impose dramatic changes in the rules governing private sector collective bargaining.

The most recent version of card check legislation is The Employee Free Choice Act (EFCA). In the last Congress, EFCA (H.R. 800) passed the House by a vote of 241-185. A companion bill in the Senate (S. 1041) did not survive a cloture vote. The most critical features of the EFCA are:

- Union Representation Procedures -- If a majority of employees in a designated work group sign union authorization cards, the NLRB would be required to certify the union as the employees' exclusive bargaining representative. The NLRB's traditional secret ballot election process would be bypassed in these circumstances.
- First Contract Bargaining - If the parties do not reach agreement on a contract in the first 90 days after the union is certified, either party may invoke mediation by the Federal Mediation and Conciliation Service (FMCS). If no agreement is reached in the first 30 days of FMCS mediation, the parties' positions on the contract terms are submitted to binding interest arbitration. In interest arbitration, common in public sector labor relations in some parts of the country, the arbitrator sets the terms of the collective bargaining agreement.
- Duration of the First Contract - The first contract imposed by the arbitrator remains in place for two years; there is no opportunity for the employer to withdraw recognition of the union during that period, or for employees to decertify.
- Additional Legal Penalties Against Employers - EFCA would impose significant new remedies for unfair labor practices committed by employers, including trebling of monetary damages (back pay) and a \$20,000 civil fine for every violation. The law also would increase the availability of injunctive relief against employers alleged to have committed unfair labor practices in opposing union organizing drives.

These provisions would bring profound changes to labor management relations in this country. Union organizing campaigns would be dramatically different. Unions would find it much easier to organize employers. Once organized, employers would face significant new pressure to agree to union demands made in first contract negotiations. Compulsory interest arbitration would

invariably result in more costly collective bargaining agreements. Increased penalties would further hamstring employers attempting to stay non-union in the face of an organizing drive.

The legal issues implicated by these changes are complex. Sophisticated companies wishing to remain non-union should be thinking creatively about appropriate adjustments to their human resources policies and practices. Staying non-union in a world with card check would be a major challenge for many employers. Getting an early indication of organizing activity may be even harder for companies that have reduced their human resources management staffs in response to the economy.

On the policy front, some believe that the Obama administration might be willing to compromise on some features of the EFCA, perhaps by substituting some sort of "quickie election" procedure (used in some Canadian provinces) for card check certification. The first contract provisions are understood to be non-negotiable by card check supporters. Such a compromise might include a longer list of labor/employment legislative proposals to be offered in the early days of the administration. That list includes paid sick leave, changes to the Equal Pay Act, prohibitions on sexual orientation discrimination, and longer statutes of limitations for bringing discrimination claims. As it was with the debate over labor law reform in the first year of the Carter administration, card check is a hot button issue. Card check is rightly opposed by almost all in the business community. The new administration's approach to this issue, in difficult economic times, will tell us a lot.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Thomas P. Gies

Partner – Washington, D.C.

Phone: +1.202.624.2690

Email: tgies@crowell.com