SHULMAN ROGERS GANDAL PORDY & ECKER, P.A.
Employment Law Alert

THE EMPLOYEE FREE CHOICE ACT

You Don't Think About Unions? Think Again!

You may soon be hearing a lot more about the "Employee Free Choice Act" ("EFCA"), proposed legislation that is at the top of organized labor's "wish list." Employers who until now never considered themselves to be potential targets of a union-organizing drive (or who have defeated such drives in the past) may soon have to think again. Not only may the EFCA make it far easier for a union to organize an employer's workforce, but it may fundamentally restrict the rights an employer now has when dealing with a union that organizes the employer's workforce.

The EFCA was passed by the House of Representatives last year but did not make it through the Senate. Because of the gains by the Democrats in the Senate and President-elect Obama's support of EFCA, it is likely EFCA will be reintroduced in the Senate early in 2009, and almost all observers expect it to be passed in some form by Congress.

As proposed, EFCA will significantly change the National Labor Relations Act ("NLRA") and dramatically alter the landscape with respect to unions and union organizing activities that have been in place since the NLRA was passed in 1935. Nonunion employers that want to remain nonunion should pay careful attention to EFCA and be prepared to take certain steps when passage becomes likely.

What EFCA Does

The principal changes to the NLRA would be as follows:

1. *EFCA permits "card-check" certification of unions.* Under current law, an employer faced with a union organizing drive can insist that its employees have the opportunity to vote in a secret-ballot election conducted by the National Labor Relations Board ("NLRB"). In addition to permitting each employee to cast his/her vote in secret, the NLRB's election rules and procedures allow a period of time prior to the election for both the employer and the union to present their views to the employees concerning union

representation. Under the EFCA, the secret ballot election – a fundamental tenet of the NLRB since 1935 – is no longer required. Instead, a union can become the bargaining representative of an employer's employees merely by getting a majority of the employees (i.e., more than 50%) to sign a union "authorization card," which are often obtained by pressure from the union or its supporters and do not necessarily reflect the employee's desire (as often evidenced by a union's loss of secret ballot elections despite having earlier obtained authorization cards from more than 50% of the workforce). To make matters worse, the employer will normally not have the opportunity to present its views to its employees (or to respond to union promises, misstatements or threats to employees), since employers often are not aware of union authorization card activity. The bottom line is that if this aspect of EFCA becomes law, there is little doubt that it will be much easier for a union to organize an employer's workforce. Indeed, organized labor predicts that millions of more workers will be unionized.

2. *EFCA allows a third party arbitrator to impose contract terms on an employer.* The NLRA currently requires an employer to bargain in good faith with a union that represents its employees. Nonetheless, since the earliest days of the NLRA, a fundamental principal of the law was that an employer could not be compelled to agree to any union proposal. EFCA overturns this fundamental principal. Under EFCA, if an agreement cannot be reached (after 120 days) an arbitrator can decide and impose on the parties the terms of a binding two-year contract.

3. *EFCA substantially increases the penalties for violations of the NLRA.* The following remedies currently unavailable under the NLRA would become available under EFCA:

   - Payment of ***triple back pay*** to an employee who is found to have been discharged or discriminated against for engaging in union organizing activities (currently only back pay is available);

   - Fines of up to $20,000 per violation for willfully or repeatedly committing unfair labor practices during a union organizing drive or first contract negotiations (currently the NLRA does not provide for fines); and

   - Requiring the NLRB to seek an injunction against employers when there is reasonable cause to believe they have interfered with a union organization drive or first contract negotiations (currently seeking injunctive relief is at the discretion of the NLRB).

If passed in its current form, EFCA would have a dramatic impact on union organizing as well as the consequences for employers. Employers who wish to remain nonunion will need to take a far more proactive approach than may be necessary under current law. We will be monitoring the proposed legislation and will report periodically on significant developments. In the meantime, for further information regarding EFCA, contact a member of the Shulman Rogers Employment Law Group.