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HEADS UP

The Obama Presidency – Labor Relations Outlook and Analysis

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The private sector labor relations landscape will change during the Obama administration. Much has been written about the Employee Free Choice Act (card check, imposed first labor agreements and stiffer penalties for employers who discriminate against employees for union organizing), and as described below, predictions of how this legislative matter will play out are speculative at the juncture. However, some Obama initiated actions are certain.

The National Labor Relations Board will be reconstituted to full strength with three Democrats and two Republicans. (Currently, the five member NLRB panel is operating with two members and the Board's General Counsel serving as a third vote in case decisions.) The new General Counsel will also share the President's party affiliation and position on labor relations.

There is nothing unusual about this. Every president since 1935 has appointed Board members and general counsels in this manner. These appointments will, however, result in a diametric shift of the tone and tenor of the decisions and rulings of the NLRB from that during the Bush era. Either via enforcement of the National Labor Relations Act, or in reversing previous decisions or establishing new legal interpretations of the Act, this NLRB will unquestionably be friendlier to labor than to the business community.

An example of this is the *Oakwood Healthcare Trilogy* principle. This set of NLRB cases decided in 2005 lowered the bar for defining an employee as a supervisor under the National Labor Relations Act. Either via a reversal of the precedent set out in *Oakwood* or through legislative activism[1] that pro-management decision is a near certain future casualty of the Obama regime.

[1] Legislation (RESPECT Act) is proposed that would raise *Oakwood's* time performing supervisory duties standard from the current 10-15% to 51%, thereby dramatically shrinking the number of employees eligible for reclassification as §2(11) supervisors under NLRA. The current law allows employers to remove substantial numbers of employees from union membership eligibility status.

Other Regulatory Agencies Activism

As with the NLRB, it is likely that there will be an increase in harassment of employers via the federal agencies that have jurisdiction in the workplace. We can anticipate more zealous attention on matters involving wage and hour, FMLA, OSHA, ADA, EEOC, and OFCCP (Federal contracts). Unless unchecked by the courts, the cost of doing business during the Obama presidency could explode.

Litigation Reform and the Courts

Plaintiffs' lawyers can breathe a sigh of relief regarding any potential legislation to reduce litigation. That pro-Obama group can expect years of unbridled opportunities to sue employers.

Obama-appointed federal judges will legislate from the bench, and depending on who dies or retires from the Supreme Court, appointment there could marginalize the conservative, albeit not always reliable, majority of the highest court in the land. The impact of judicial review or lack thereof on the workplace could be insignificant.

The Employee Free Choice Act

Recognizing that there are potentially expensive ramifications from the developments above, the 1,000-pound gorilla in the room is still the Employee Free Choice Act.

This proposed Draconian legislation, which (1) does away with the secret ballot election for determining union representational status, (2) imposes fast-tracked bargaining and arbitrator imposed first contracts, and (3) provides for stiffer penalties and exposure to lawsuits for employers who are found to have discriminated against their employees during periods of organizing, is likely to be brought up for passage in 2009. The biggest unknown is will EFCA be proposed and passed in its current form.

This could well swing on the single vote of one man, Senator Arlen Specter (R-PA). In 2007, the House passed a version of this bill, but when it got to the Senate, it lacked the necessary super-majority of 60 votes to override a threatened veto by President Bush. Arlen Specter declared in 2007 and again recently that he would not vote to keep this bill from reaching the Senate floor. (Under an Obama presidency, that means he would vote for cloture − the action which would terminate a Filibuster by the Republicans.) With 59 seats controlled by the Democrats, his vote for cloture could mean that the full Senate could pass this bill into law with as few as 51 (and Specter could vote

against it as a twisted attempt to claim party allegiance) actual votes when it hits the Senate floor.

Even if the EFCA does not make it through in 2009, the threat is not abated. There are 19 Republican and 17 Democratic seats up for re-election in 2010. Additionally, four Republican Senators have already announced they will not be running for re-election: Mel Martinez-Florida, George Voinovich-Ohio, Kit Bond-Missouri, and Sam Brownback-Kansas. These seats are now more vulnerable without a Republican incumbent.

The Democrats, assuming Obama does anything favorable to impact America's pocketbook issues, are very likely to pick up enough to make Filibuster a fond and faint Republican memory.

The amount of business-backed lobbying against this legislation is at historical levels. Unfortunately, the U.S. Chamber of Commerce and all the other groups are engaged in a futile process. They can lobby the likes of Al Franken, Chuck Schumer and Barbara Boxer until the cows come home, but they will still vote for the bill, as will all the other perennial supporters. Democrats do not need to care what pro-business folks think.

Speculation is rampant on how the EFCA might be modified to make it more palatable in the unlikely situation where Congress would become infected with common sense or some unforeseen obstruction might arise. One scenario that has some legs is that the card check provision of the bill will be sacrificed in favor of the other two elements. This has caused some misplaced optimism among employers. The card check piece is not nearly as onerous as the imposed contract element. This element if enacted would be incredibly difficult for employers to overcome in a conventional election campaign, since the oft-used arguments against a union − bargaining forever and employees being required to strike to get a contract − would be hollow, since under EFCA, a union really could guarantee a contract in just a few months and employees would almost certainly not have to strike to get that contract. The bonanza argument is that employees who are covered by this certification would be virtually assured that their pay and benefits would be improved in that first contract. This is also missing from the union's current arsenal. Conversely, unions do not make a penny off new members until that first contract is signed, and they are then able to extort dues from members via the union shop provision and dues check-off. Thus, trading off contract imposition in favor of card check makes no sense for unions.

Given their druthers, unions would love the full Monty, all three pieces, but they have a lot of maneuvering room to somewhat assuage the politicians and still achieve a great change in their favor

to the way the law has been administered for the last 70 years.

EFCA a Couple Years Downstream

If passed as written, the Employee Free Choice Act could likely drive employers, whose businesses are portable, to far off lands. The escalating costs and cascading rise in union organizing will be too challenging for many businesses. Those who stay and fall victim to it and survive, particularly the arbitration imposed first contract, will try to get their money back after that first contract expires. The number of strikes over employer-implemented conditions and offensive lockouts will reach historic levels. Industries like healthcare, hospitality/food, transportation, and retail will be the hardest hit, and all small employers will be extremely vulnerable.

The adage of, "This too will pass," may not apply to this perfect storm. With the economy in shambles and our most sacred institutions no longer worthy of our trust, the actions of our government could nudge us into the abyss.

Even with this doomsday scenario, the NLRB would have many procedural issues to deal with in implementing this Act. Then the inevitable court challenges will follow. Will the current Supreme Court find the EFCA repugnant? Time will tell, but certainly the Court would be less likely to find it unconstitutional if card check was removed. Hopefully, enough time will be bought for sanity to return.

Action…Now!

The federal courts, NLRB, plaintiffs' attorneys, regulatory agencies and Congress will do what they are going to do regardless of how much we wring our hands. However, preparing for EFCA is an opportunity, albeit one with a window that may be quickly closing.

Union cards are good for one year. This means that a union could be covertly getting cards signed now with plans to present them under a card check procedure or as part of support for an NLRB election (under more favorable procedural terms) sometime this year. It would be unwise for a union to use the existing procedures of the NLRB now, when organizing may become so much easier shortly.

All employers can do a couple things now that cannot hurt and may help.

1. Train all managers to understand the basic rules of engagement under the Act as it is written. Include a description of warning signs of union organizing so that managers can constantly "ping" early activity. Spending too much time trying to anticipate what EFCA will look like is

untimely.

2. Assess your vulnerability to a union's appeal. It's always about the issues – Identify, Quantify, Rectify. Don't go into an organizing situation knowing about an issue that could have been remedied but was not. Prioritize your initiatives. All locations or departments are not equally at risk. There are many indices available that can be used as predictors of employee inclination toward unions. Find out where you are most vulnerable and start there.
3. Make sure your employees know how you feel about unions. Some employees will sign union cards because they do not think their employer prefers to operate without a union. A statement about unions in handbooks or as part of orientation is normally sufficient. **Do not** start campaigning against the EFCA just yet, because you really do not know what it will look like in final form or when it might become law.
4. At the first verifiable indication of organizing, roll out a counter card signing program to educate employees about the responsibilities and perils of signing a union card.
5. Be Vigilant. If you think you have a union problem, you do, and it's probably worse than you think.

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