Shook, Hardy & Bacon L.L.P.
National Employment Litigation & Policy Practice Group
Representing Corporate Employers Exclusively
national employment PERSPECTIVE
FOCUS ON LABOR RELATIONS

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CLIENT ALERT

EMPLOYEE FREE CHOICE ACT

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As recently passed by the U.S. House of Representatives by a vote of 241-85, the Employee Free Choice Act of 2007 (H.R. 800) may pose a threat to your labor relations. Now on its way to the Senate, the proposed legislation would make major changes to the National Labor Relations Act ("NLRA"), which has governed relations between employers and unions since 1935. The proposal includes two major changes to the NLRA: elimination of National Labor Relations Board ("NLRB" or "Board")-sponsored elections and mandatory arbitration of bargaining disputes.

Elimination of Board-Sponsored Elections

To represent a group of employees ("appropriate bargaining unit"), a union currently must do two things. First, the union must provide a "showing of interest" signed by at least 30 percent of the proposed bargaining unit. As a practical matter, unions rarely seek an election unless they have signatures from at least 50 percent of their potential members. Second, the union must then win by majority vote a secret ballot election conducted by the Board.

The Employee Free Choice Act would eliminate the second step: Board-supervised elections. Instead, a union would need only to present signatures from a majority of the unit to be certified. The alleged "evil" addressed in this legislation is the Board's secret ballot election process. Unions argue that requiring an election after the showing of interest gives employers the opportunity to intimidate and coerce employees into dropping their support for the union and voting against representation. As proof, they note that union numbers have drastically decreased over the last 40 years from having represented 35 percent of the private industry workforce then to roughly 8 percent today. Even in cases with showings of interest well in excess of 50 percent, unions nevertheless lose most Board-conducted elections.

Blaming election losses and overall loss of support on employer intimidation and coercion is not the answer. In many cases, management has no idea that a union campaign is underway until the union appears with a handful of cards. The Board-conducted election thus provides an opportunity for *both* sides to present their case to the workforce and discuss the pros and cons of union representation. The reality may be that a given union doesn't have as good a story to tell as management does. Strikes, dues, fines and corruption, to name a few issues. The proposed legislation would take away the opportunity for workers to hear both sides of the issue.

Further, procedures exist to protect against coercion and intimidation. First, as compared with showings of interest, elections are secret. Neither the union nor the company knows how an

employee votes. Second, the NLRB has a well-established policy of overturning election results and certifying a union if it is shown that (a) the union had a showing of interest from a majority of the workforce and (b) the company engaged in seriously unfair labor practices that could reasonably be expected to have affected the election results. Thus, if the reason for the Free Choice amendment is to avoid employer coercion or intimidation, an effective remedy already exists.

Mandatory Arbitration of Initial Collective Bargaining Agreement

A lesser known, but perhaps more dangerous provision, in the proposed legislation concerns the obligation to bargain with the union once it is certified as the collective bargaining agent. Under the NLRA, the employer's obligation has always been to meet with the union and bargain in "good faith" over the terms and conditions of employment. Neither the union nor the employer is obligated to agree on any issue so long as they negotiate in good faith. Both sides can resort to job actions – strikes, picketing, lockouts – to bring pressure on the other side. This approach makes sense. Telling an employer what it must provide goes to the very heart of its right to run its own business.

The Employee Free Choice Act would change that. As currently written, it provides that if during initial contract negotiations between an employer and a newly certified union, the parties cannot come to terms within 120 days and at least 30 days after a federal mediator has been assigned, the Federal Mediation and Conciliation Service must refer the dispute to an arbitration panel. That panel's decision on terms and conditions would bind the parties for two years unless they agreed otherwise.

While voluntary arbitration can be a good way to settle disputes, it is a bad way to negotiate a labor contract. As an employer, you could have strangers, who don't know the business or who have their own ideas of what constitutes fair pay and benefits, spending your money for two years. In most situations, the union would have no reason to reach agreement, instead letting the waiting period pass and taking their chances with a generous arbitrator. And employers would have a greater incentive to use any legal means available to defeat the union and avoid a bargaining order.

What You Can Do

The proposed Employee Free Choice Act raises new concerns for America's corporate employers. In essence, the proposed legislation would lower the bar dramatically in favor of union organizing efforts. As a result, America's employers are ever more encouraged to provide a work environment where people believe third-party representation by a union is unnecessary. The most effective way to have people believe that a third-party representative is unnecessary is to have a workplace that is inclusive, professional, and competitive with appropriate marketplace considerations.

▲ Top

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Attorneys in the Employment Litigation & Policy Practice Group represent corporate employers throughout the United States in all types of employment matters. To learn more about the SHB employment group, please see SHB.com.