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Don't Be Caught Off Guard by the Employee Free Choice Act

By Allen Smith

Employers that wait for the **Employee Free Choice Act (EFCA)** to be enacted before preparing to comply with it will be caught off guard, Carolyn Fisher, director, global labor & employee relations with Ingersoll Rand Co., said on Oct. 21, 2008, at the Association of Corporate Counsel annual conference here.

She predicted that unions will start seeking employee signatures on authorization card drives in November in anticipation of the law's enactment, which she expects early in 2009. Once signed, the union authorization cards are good for a year. After the EFCA is enacted, assuming that it passes in 2009, Fisher thinks that many employers will discover that a majority of employees at many worksites have signed union cards. Suddenly, those sites would be unionized. And employers would have a mere 10 days to prepare for bargaining with the union over the first labor contract, a period that she described as “woefully deficient.”

Fisher said she didn't know whether the United States has enough lawyers or arbitrators to deal with the coming “tsunami” if the EFCA is enacted, saying that it would be “the most important labor legislation in decades.” She urged employers to educate their leaders about the legislation, in particular its mandatory arbitration requirement, which Fisher described as “the most dangerous component from a business standpoint.”

Fisher has been surprised that many business leaders have, like the news media, focused their discussion of the EFCA up to this point on card checks and in effect doing away with the secret-ballot election.

“The scariest part of the EFCA is on the back end,” she remarked, referring to the proposed requirement that the first union contract negotiations be subject to mandatory arbitration if a contract is not reached after 120 days of negotiations with unions. That would mean that employers' wage rates, health insurance, retirement benefits and key language about flexibility would be “in the hands of an arbitrator with no vested interest in the success of the company. That's shocking,” Fisher remarked. “Even more shocking is that it's not in the headlines for business.”

[Arbitrators' Proposed Role]

For Manesh Rath, an attorney with Keller and Heckman, another troubling aspect of the EFCA is how it would alter collective bargaining.

Currently, if an employer and labor representative reach a genuine impasse after good-faith negotiations, the employer does not have to reach a collective bargaining agreement with the union, Rath noted. An employer can inform the union that its representation was “ineffective to get a deal,” he explained—a choice that may result in a change of mind or a strike.

The EFCA, by contrast, would force an arbitrator to write an agreement when an employer and union cannot reach a deal after 120 days—90 days of negotiations and 30 days of mediation on a first contract. An arbitrator would wind up deciding such things as how to discipline employees and health care benefits, and the arbitrator's decision would be binding.

“This is big stuff,” Rath remarked. “Business leaders have to stay on top of this issue when it comes up.” He urged businesses to “let your elected officials know how you feel” about the EFCA, cautioning that if they are silent, officials might assume that they are OK with the proposal when it resurfaces. Businesses need to be aware of this legislation and why, in his view, it would “put your company in danger.”]

Educate

Fisher has conducted numerous presentations to her company’s field leaders to prepare them for the EFCA. She has been surprised by how many heads of different business units have not heard about the proposed mandatory arbitration provisions. When they’ve heard her describe the legislation, she’s watched their jaws hit the table.

“That’s worse than Europe,” the head of a business unit in Europe told her. She agreed, remarking that in Europe there has to be mutual agreement to form labor contracts, not forced arbitration.

Although Fisher urged general counsel to inform business leaders about the EFCA, she cautioned that employers “have to be careful” about how they communicate. **Employers have to be careful not to sound anti-union in these conversations**, she cautioned.

Communications with Employees

But Fisher said that business leaders need to realize that after the election in November, unions are likely to start getting cards signed in anticipation of the law’s enactment.

Fisher recommended that employers consider alerting employees about the EFCA and the effect signing cards might have on them. Employers might encourage employees to think twice before signing union authorization cards, as signing could wind up being, in effect, their vote for a union if the EFCA is enacted.

At Ingersoll Rand, there are thousands of nonunion hourly workers. The company is planning instead to send letters to employees that are signed by plant and district managers and that talk about card signing.

The tone will “not be anti-union,” Fisher said, but instead will describe what is on the horizon. She encouraged others to consider similar steps, ensuring that the communications highlight positive employee relations.

In addition, Fisher urged each labor attorney to start analyzing what the attorney would propose as a labor contract if the EFCA passes and the employer is presented with union card authorizations from a majority of workers at a worksite. She said employers should look at the labor contracts of any unionized competitors to help them form an opening proposal, just in case—a proposal that the employer could live with and that would satisfy the 10-day requirement to negotiate.

The time to act is now, Fisher emphasized. If employers wait for enactment of the EFCA, “it may be too late.”