Trading A Tax Break For Unionization: Analyzing the Patriot Corporation Act

Insights
6.01.09

Most of the current focus among pro-management advocates is on the card-check provisions of the Employee Free Choice Act (EFCA). But don't lose sight of the fact that Congress is considering several other pro-labor legislative proposals that warrant scrutiny. One such proposal is the Patriot Corporations of America Act of 2009 (PCA) which, as drafted, provides employers with a Hobson's choice. One thing is clear: if enacted, the PCA will render EFCA moot with respect to the goal of increasing the success of union-organizing drives.

A Corporate Tax Break – With Strings Attached

On its face, the PCA is packaged as a tax reduction for American corporations in exchange for certain conditions primarily designed to increase employee benefits and reduce outsourcing. Designated "Patriot Corporations" will receive a 5% reduction of their taxable income. Additionally, Patriot Corporations will receive preference in the evaluation of federal-contracting bids. So far, so good.

But achieving Patriot Corporation status does not come easily. To be designated a Patriot Corporation, a corporation must meet each of the following requirements during the taxable year:

- produce at least 90% of all goods and services sold by that corporation within the United States;
- compensate the highest paid manager no more than 10,000 percent of the amount paid to the least compensated full-time employee;
- conduct at least 50% of the corporation's research and development within the United States;
- contribute at least 5% of wages paid by the corporation to a portable pension fund;
- pay at least 70% of the cost of a standardized health insurance plan;
- maintain neutrality in employee organizing drives and have such a policy in effect;
- provide full differential salary and insurance benefits for all National Guard and Reserve employees who are called to active duty; and
- incur no violations of federal workplace regulations, including those relating to the environment, workplace safety, labor relations, and consumer protection.

The Department of Labor is charged with responsibility for implementing a certification process which will include defining key terms. Patriot Corporation certification must be renewed annually.

A Trojan Horse

You can perform a cost-benefit analysis to determine whether the health care, research and development, and outsourcing restrictions, coupled with the pension-funding requirements, justify the 5% tax break for your company. But how can you put a value on the requirement of a neutrality agreement with respect to union-organizing campaigns. This one provision alone may far outweigh any long-term benefit that flows from the Patriot Corporation designation.

With a neutrality agreement in place, management is rendered voiceless both before and during an attempt to unionize its workforce. As a result, employees are deprived of a critical source of information that might have ultimately persuaded the workforce that unionization is not in their best interests. The result is a playing field where the union has no organized opposition. Resistance will be limited to those employees who choose to speak out on their own. Without organized opposition, the union campaign is far more likely to succeed.

Statistics provide sobering confirmation. When employers maintain a neutral position with respect to union campaigns (whether by choice or by agreement), the union win rate approaches 90%, as compared to a roughly 65% win rate in contested campaigns. With a Patriot Corporation designation, the card-check provisions in EFCA will be virtually unnecessary. There will no longer be a need for the stealth campaigns anticipated under card check, and unions will be able to campaign more openly at a Patriot Corporation because they know there will be little to no opposition.

The designation as a Patriot Corporation will undoubtedly encourage unsuspecting corporations to wave the flag and use this status for marketing purposes. Small corporations looking to grow or maintain good community relations, or corporations in highly competitive industries, may see it as irresistible, even necessary, to tout their "patriot" credentials to attract customers and gain a market edge. But advertising this status is the marketing equivalent of a company placing a "Unionize Me!" sign in its storefront window. Union organizers will be watching for such advertisements, and will identify those corporations as easy targets where they can be assured that management has already agreed to present no opposition.

Even if a corporation does not advertise its patriot designation, the Labor Department may do it for them. Depending on the certification process to be formulated by DOL, expect the registry of designated Patriot Corporations to be a matter of public record. To the extent it is a public record, union organizers will be able to obtain their target list straight from the government with little effort.

Additional questions are raised by the nature of the neutrality agreement and what will constitute true neutrality. Will it be sufficient for management to simply remain silent before and during an organizing campaign? Will it require employers to allow access to its premises by union organizers? Will it require a neutrality agreement with a card check feature for determining union representation as opposed to permitting an actual secret-ballot election where employee opposition representation as opposed to permitting an actual secret-ballot election where employee opposition can be expressed in private? Since the DOL controls the certification process, it will define what constitutes neutrality. The definition will likely be construed broadly, and if it encompasses a card-check requirement then, at least with respect to Patriot Corporations, EFCA's key provision will be achieved through the regulatory process even though it could not survive the legislative process.

Beyond Neutrality

Another troubling aspect of the neutrality agreement is that, presumably, the certification process will require some sort of affirmation that the corporation has met and will meet the requirements to achieve patriot status. What, then, if a manager speaks out and violates the neutrality agreement? The corporation has not simply *agreed* to remain neutral, it has promised under oath to do so. Whether criminal prosecution for perjury is realistic may depend on the circumstances and the extent to which the neutrality agreement was violated, but the mere prospect or threat of prosecution may lead some corporations to make concessions and avoid negative publicity or the possibility of a legal proceeding.

If the Patriot Corporation designation is forfeited, the neutrality agreement still leaves the entity exposed to a higher risk of unionization. For example, if a corporation loses its patriot status because it relies too heavily on overseas production of goods and services, the neutrality agreement – by virtue of the PCA-mandated written policy – will remain in effect unless and until the corporation formally changes its position. Corporations that choose to withdraw the neutrality policy upon losing patriot status will need to move quickly to avoid remaining a union target without the benefit of the tax break and contracting preferences conferred by the PCA.

Supporters of the PCA may point out that by agreeing to neutrality in advance, corporate campaigns designed to coerce a neutrality agreement by subjecting corporations to public, economic, political, legal, and regulatory pressure will be a thing of the past, at least for Patriot Corporations. For a corporation that may see unionization of any part of its workforce as inevitable, this argument may be persuasive. But for those corporations that wish to remain union free, the argument not only rings hollow, it can plausibly be viewed as circular blackmail: accept a tax break and contracting preferences in return for virtual certainty that you will be unionized without the troubles that accompany a corporate campaign; or be subjected to the troubles that accompany a corporate campaign that may well lead to unionization while you are at the same time deprived of a tax break and contracting preferences.

A Need For Clarity

Apart from the neutrality requirement, the PCA as currently worded contains several puzzling provisions. First, does the PCA apply only to corporations? Prior incarnations of the bill, known previously as the Patriot Employer Act, applied to any taxpayer designated a Patriot Employer. The language of the PCA, however, refers only to corporations, suggesting that other business forms, such as partnerships and sole proprietorships, are not covered. If the PCA only applies to corporations, non-corporate entities potentially stand on an unequal footing in federal-contracting preferences simply because of the nature of their non-corporate identity.

Another question relates to the funding requirement for a "standardized health insurance plan." No definition is provided. Previous versions of the bill simply obligated the employer to pay a percentage of the employee's health care premiums. Clarification is needed as to what constitutes a standardized plan, what standards are required, and whether certain types of coverage are mandated. This clarity will be essential for any corporation to properly analyze whether it can afford to pay 70% of the required premium.

The requirement to steer clear of regulatory violations is another question mark. Clarification is needed as to what constitutes a "violation." If a violation is defined as an administrative cause finding or the mere issuance of a citation, patriot status will be far more difficult to maintain than if some type of evidentiary process is required.

Finally, germane to nothing else in the bill, the PCA contains a so-called "millionaire tax" provision for certain families. For joint returns, the tax rate increases by 4.6% for any amount of adjusted gross income that exceeds the threshold amount of $1,000,000. For all other returns, the threshold amount is $500,000.

Conclusion

While the PCA might otherwise be viewed as a fair and honorable exchange – tax relief in exchange for providing needed domestic jobs and employee benefits – the neutrality obligation should be approached with extreme caution by any corporation that wishes to remain union free. The short term benefit of a tax break will be palatable, perhaps irresistible, to many corporations, particularly if they see their tax rate begin to rise. The long term effect of a unionized workforce, which could be an inevitable result of a patriot designation, is a burden that corporations may be neither willing nor able to bear.

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