



If You Build It . . .

Insights

12.01.10

[Labor Letter, December 2010]

It comes as no surprise that employers in the last several years have been forced to focus on survival in an extremely difficult environment. There have been sharply decreased (or nonexistent) profit margins, falling sales, reorganizations, reductions in force, retrenchment and reversion to the mean. Overall business conditions aren't really much better now than they were three years ago and nobody really knows when they will improve.

With all of these business challenges, who needs another? It is with great trepidation that we suggest the imminent arrival of yet another challenge for the employers of America – unionization. The normal battle-weary, overstressed manager might say in response, "Haven't you read the newspapers? EFCA is dead and is not likely to come back anytime soon."

We agree it is highly unlikely that EFCA (Employee Free Choice Act) will be the challenge employers face at least in the next year. However, the focus on EFCA is likely to obscure the next big challenge – Son of EFCA.

Okay, It's Not Really Son Of EFCA

It's more like a stealth attack on the employers of America. Except it won't be completely stealthy because you are hearing about it here and you have already read about it in the October Labor Letter. [*"EFCA, Schmefca," by Christina Kotowski, Labor Letter, October 2010*]. We're referring to our expectation that the National Labor Relations Board will engage in rulemaking to strongly tilt the field in the unions' favor.

It's not our intent to repeat our earlier predictions but we believe it very likely that the current Board will engage in significant legislative rulemaking before Member Craig Becker's recess appointment expires in December, 2011. Rulemaking permits the Board to modify procedural rules without the requirement for notice or public comment. Having edged out onto the thin prognostication limb, our crystal ball does not suggest precisely what rules might be changed, although any changes in rules would undoubtedly be focused in part on easing a union's burden of winning NLRB-conducted elections.

A primary obstacle to more union election wins is the length of time between the union's filing of a petition for election and the holding of that election. The current time between the initial petition and

the actual election is approximately 42 days, which unions feel gives the employer far too long to communicate its views on unionization to its workforce. We expect that the anticipated rulemaking will almost certainly make changes to the current pre-election period of time and procedures with a significant reduction in the amount of time permitted between the filing of the initial petition and the actual voting on the question of representation.

If the period between the filing of a petition and the holding of an election is to be drastically reduced, how is an employer to win an election where the union has been communicating its message to employees in an underground organizing campaign perhaps for months? If the Board engages in rulemaking to streamline election procedures and shortens the time, as we believe it may, the only way you can counter the union's appeal to employees is to be proactive about your relationship with your employees. It will be highly unlikely that a company without a robust employee relations program can effectively communicate its never-before-heard views on the perils of unionization in a ten-to-fifteen day period before a union election.

This Is Not Your Father's HR Department

Now is the time to evaluate your human resources/employee relations programs. Some of the questions employers should be asking include the following:

- What is important to my employees?
- Are we currently addressing these needs?
- How, and how often, do we communicate with employees?
- How do employees communicate with us?
- How do we actually deal with employee problems? (We hope it's more than an Open Door that nobody ever comes through, as described in the Employee Handbook that nobody ever reads.)
- What part of the business do employees understand; what parts of the business do we want them to understand?
- Do supervisors interact with employees effectively?

Any one of these questions can lead to a number of related concerns and fixes. The point to be taken away is that now is the time to consider these issues, not on the day you receive a union petition for election.

What If You Prepare, But Nothing Bad Happens?

Admittedly the prediction about the NLRB's switching into the rule-making mode in order to carry out the very strong philosophical commitment of three of four of the present members is not a foregone outcome. While unlikely, something else could happen between now and December, 2011 to forestall this outcome. But we urge employers to consider what they have to lose if they evaluate their human resources programs, and make changes in preparation for a union organizing effort but one never comes.

If an employer prepares carefully, it will know what issues are separating it from its workers, it will have in place mechanisms to address and resolve difficulties before they become festering sores, it will have a better understanding of its employees and may have established mechanisms to ensure that it is listening to what moves its workforce. The prudent employer will have considered ways to encourage and recognize employee input and contribution. The prepared employer will have carefully considered issues important to its employees and will be considering ways to deal with reasonable employee requests or at least to respond to those requests.

None of these actions or outcomes will be wasted if a union does not come knocking on your door. Your company will be stronger and will have a more committed and involved workforce as you face the challenges of operating in an extremely challenging business environment filled with gaps where former employers used to be and closed facilities. You and your employees will not be in the ranks of the missing.

In fact, with these measures in effect, it is less likely that a union will target you in the first place. And if it does, you will be in a much better position to defend against the union's sales pitch, no matter how little time remains between the union's filing of a representation petition and election day.