



Democratic Sweep To Bring Big Changes to Employment Laws

Insights

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Senator Obama has been elected President, but the Democrats did not make the gains they had hoped for in the Senate. Non-union employers who have been concerned about the Employee Free Choice Act (EFCA) may breathe a sigh of relief. It will not pass, at least in its current form. But there is still reason for concern.

Labor's Agenda

The purpose of the EFCA was to make union organizing easier. That objective is not going away, even if the Employee Free Choice Act has no hope in its current form. Labor is going to press hard for change in the election process. If Big Labor cannot do away with the secret ballot election, it will seek to change the rules governing union elections to make it easier for unions to win.

Such changes might include shortening to ten days the time between the filing of a petition and the election. This would greatly reduce the employer's opportunity to educate employees on the union issue. Unions will also likely seek the right for their paid organizers to come into the workplace for the purpose of meeting with employees to respond to company communications.

Labor's agenda extends beyond the Employee Free Choice Act. The Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers, or RESPECT Act is labor's second priority. It will change the NLRB's definition of management to exclude most front-line supervisors. Supervisors are currently considered an employer's agents, and can lawfully serve as an employer's eyes and ears in an organizing campaign. They know employees best. Winning a union campaign without the active engagement of front-line supervisors will be significantly more challenging under the RESPECT Act, and will put management at a substantial disadvantage in organizing campaigns.

This past July, Democrats in the House of Representatives introduced a bill to repeal Section 14(b) of the Taft-Hartley Act. This is the provision that gives states the ability to enact right-to-work laws if they choose. Right-to-work laws prohibit union-security clauses in collective bargaining agreements. A union-security clause requires that any employee in the bargaining unit who does not join the union within the prescribed time period must be fired. That means that in non-right-to-work states, bargaining unit employees are forced to pay union dues or agency fees whether they personally support the union or not. To the contrary, in a right-to-work state, no one can be forced to join a union.

Most states are not right-to-work states. But those that are generally put a high value on their right-to-work laws. Rather than fight battles in state houses to repeal these laws, Labor will try to strike down Section 14(b) of the Taft-Hartley Act, that authorizes states to have such laws. In a single blow, all right-to-work laws would be abolished.

Analyzing the Chances

But if the Democrats cannot muster the votes in the Senate to shut down a Republican filibuster, does any of this legislation have a chance? The answer is that it does, if the Democrats push for it. Democrats control both houses of Congress and the White House. Republicans can achieve nothing without compromise. This means that Republicans must pick their fights carefully. Will Republican Senators from Ohio, Indiana, or Kentucky, which are not right-to-work states, go to the mat to defend right-to-work laws in other states? Could some version of the Employee Free Choice Act or the RESPECT Act be passed if it were attached to a bill Republicans want badly? One can easily imagine such things happening.

It is apparent that changes are going to be made in the National Labor Relations Act and that these changes will favor organized labor. While the financial crisis and the election have been distracting, Employers need to focus on these coming changes. To help our clients prepare, Fisher Phillips will be holding webinars on the outlook for the new labor environment. You will be receiving email notification later this week with the dates and times of the webinar sessions.

In the meantime, contact your regular Fisher Phillips attorney to discuss your situation and what you need to do.

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