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E-Flash Update

Employee Free Choice Act Update

"*The news of my demise is greatly exaggerated*." ~ Mark Twain

When Senator Arlen Specter announced on March 24th that he would oppose passage of the Employee Free Choice Act in its current form and at the present time, he dealt a serious blow to the prospect that organized labor's favorite piece of legislation would become law anytime soon. That has not deterred supporters of the EFCA who continue to push for passage of the bill and to lobby legislators mining for support. Senator Harkin continues to say that he intends to move the EFCA forward in committee this month.

Senator Specter did not, however, abandon the goal of labor law reform. In an appendix to his statement on the floor of the Senate, he listed twelve proposed changes to existing labor law that should be considered. Those twelve items can be boiled down to four general principles:

1. preserve the secret ballot process but schedule elections more quickly, generally seven to fourteen days after the petition is filed;
2. provide union representatives with equal time and equal access to employees in the workplace if employers hold "captive audience" programs;
3. eliminate the concept of "interest arbitration" but require a more accelerated timetable for negotiations with the involvement of federal mediators; and
4. impose fines and penalties on employers who unlawfully discipline union supporters during a union organizing drive.

Shortly after the EFCA was proposed, two other competing bills hit the hopper. The first by Senate Republicans guaranteeing secret ballot elections, followed by one from Congressman Joe Sestak, a Democrat from Delaware County Pennsylvania, that is very similar to Senator Specter's four principles. On April 1st, Senator Pryor (D-Ark.) indicated that he intends to approach Senator Specter to see if a compromise bill can be reached. This statement comes in the wake of the comments by Senator Feinstein (D-Calif.) and Senator Carper (D-Del) expressing doubts about the EFCA as currently written. That brings to seven the number of Democratic Senators who are considered "fence-riders" on the EFCA.

This process must be watched very carefully. It is our view that a compromise bill structured along the lines of Senator Specter's four principles has a very good chance of passage. While such a compromise avoids the major problems of "card check certification" and "binding interest arbitration" it will still place employers in the situation where elections will happen quickly. Very quickly! Employers would be well advised to complete policy review and supervisory training in the near future in order to be ready for a rapid election process that could occur within the next six months.

Another area that needs to be watched is the advancement of the concept of "minority unionization." As the EFCA stalls, supporters of increased unionization, like Professor Charles Morris of SMU, a leading labor law scholar, are resurrecting the concept of minority unionization, a development we have not seen since the pre-World War II era. Under this theory, employers would be required to bargain with any group of employees who designate a union as their representative whether the group makes up a majority or not. This concept could be adopted by the Obama NLRB without any action by Congress.

To prepare your organization for an Employee Free Choice Act environment, it is essential that policy review, workforce analysis and supervisory training begin immediately. If you have any questions about the EFCA, minority

unionization, or the development of a proactive union free strategy, please feel free to contact Post & Schell, P.C. labor attorneys Bill Flannery at 717-612-6022, or wflannery@postschell.com, Vince Candiello at 717-612-6024 or vcandiello@postschell.com, or Andrew Allison at 215-587-1161 or aallison@postschell.com.

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