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## A Minute of News and Views – The Employee Free Choice Act and the New Administration

November 4, 2008 concluded the longest and most expensive presidential cycle in the history of America. There is no disputing that the election of Barack Obama as the 44th President of the United States represents a significant event in our nation's history. The stark contrast between the Democratic and Republican platforms made clear that a new administration and legislature can bring about a significant change when it comes to employer-employee relations.

### Employee Free Choice Act

Beginning in 2009 we can expect to see a dramatic push for final passage of the Employee Free Choice Act. The Employee Free Choice Act (EFCA) was first introduced in both the House of Representatives and the United States Senate during the 110th Congress (2007). The Act passed the House of Representatives on March 1, 2007 and remains pending in the Senate. While it is not clear when, if, and in what form the Act will become law, President-Elect Obama made it clear during the campaign that he was in favor of the Act and that he would make it a priority of his administration. So, should employers be concerned? In a word: **YES!**

### Easier for Employees to Unionize

The EFCA, as currently drafted, makes it much easier for employees to unionize and forces employers to recognize the union as a collective bargaining unit. First, the EFCA requires the National Labor Relations Board ("NLRB") to certify a union after a majority of the company's workers sign union cards, effectively putting an end to almost all organizing elections. The Act states, "if the [National Labor Relations] Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations...the Board shall not direct an election but shall certify the individual or labor organization." What this means is a group of employees only need to have 50%, plus one more employee, sign union cards and they have effectively formed a union that the NLRB must certify and recognize! No election. No opportunity for employers to oppose the union. No secret ballot.

### Arbitration is Required and Binding

Not only does the EFCA make it much easier for employees to organize, it also requires companies and newly certified unions to enter arbitration if they cannot reach agreement on an initial collective bargaining agreement after 90 days of negotiations. The arbitration process and results are binding. The arbitrator would set all the terms of the initial contract between an employer and a union, including wages and benefits, but also other provisions generally included in collective bargaining agreements, such as outsourcing and union security clauses. Neither companies nor employees could appeal the arbitrator's ruling, and the contract would last for two years. While sometimes used in the public sector, binding interest arbitration is completely unprecedented in the private sector.

### Increased Penalties for Unfair Labor Practices

Third, the EFCA would dramatically increase the penalties for unfair labor practices committed by employers - but not unions - during an organizing drive or during first contract negotiations. While union activists contend that the EFCA would protect workers' freedom to freely choose a union, the truth is that the best defense against harassment and intimidation by either a union or an employer is a secret-ballot election in which neither knows how any individual worker has voted. The EFCA removes the privacy and individuality of secret-ballot elections that are the hallmark of American democracy.

To add insult to injury, under the currently proposed EFCA, the NLRB would be required to seek a federal court injunction against an employer whenever there is reasonable cause to believe that the employer has committed unfair labor practices during the critical time period. The EFCA also authorizes the courts to grant temporary restraining orders or other appropriate injunctive relief. The EFCA allows employees discharged or discriminated against during an organizing campaign or first contract drive to recover two times back pay as liquidated damages, in addition to the back pay owed, for a total of three times the back pay. Finally, the EFCA allows the Board to order civil fines of up to \$20,000 per violation against employers found to have willfully or repeatedly violated employees' rights during the critical time period.

### Employers Versus Labor Unions

It should come as no surprise that the American business community has come together to oppose the EFCA and its proposals to radically alter labor-management relations. The labor movement's frustration with the NLRB, coupled with its dwindling membership numbers, has no doubt fueled its push for the EFCA; and this frustration has found support in congress and in what will be President Obama's administration.

Employers may naturally ask, "Why should I be concerned about the EFCA? My employees are all happy." A "happy" employee can easily become unhappy or disgruntled with the right amount of influence from organized labor. Union organizers have been known to use all manner of tactics to convince employees that they would be better off in a unionized workplace. The EFCA casts an ominous cloud over employers because it provides a mechanism and means for just a few employees to hold great sway and influence over a union drive that effectively suppresses the will of the those employees who may oppose the union, but are too afraid to admit it publicly.

### Organizational Activity Warning Signs

What are the warning signs for organizational activity? Employers should be concerned if they witness any of the following:

- Employees start making "new friends"
- Change in employee demeanor
- Employees stop talking when supervisors approach
- Employees make a list of names
- Employees stay late after their shift
- Employees spend time outside their department
- Employees are less friendly to management
- Employees try to create confrontations with management
- Marginal or problem employees suddenly become model employees

The EFCA is not yet the law of the land. It is, however, on the horizon and steaming toward passage in 2009. If the Act is signed into law, employers can expect to see a lot more organizing activity in the workplace – and that will mean "real change" coming to America.

Every month, Schiff Hardin's Labor and Employment Group will be sharing some news and views to consider. For previous notes and comments, please visit our Web site at [www.schiffhardin.com/LE-Labor\\_and\\_Employment.htm](http://www.schiffhardin.com/LE-Labor_and_Employment.htm)

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