



CUE Legal Alert

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The Storm Builds As EFCA Drama Continues: Favorable Union Changes Likely By Other Means

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Organized labor is constantly on the lookout for opportunities to increase its ranks. However, its dues paying members in the private sector continue to steadily decline. During the years of The New Deal, as much as 35% of the private work force was organized; recently, the official percentage is 7.2%.

On March 1, 2007, the first version of the Employee Free Choice Act (“EFCA”) introduced in 110th Congress was passed in the House of Representatives. However, it soon met its demise when the Republican-controlled Senate successfully filibustered the bill. Nevertheless, in 2008, with the prospect of Candidate Obama being elected and the possibility of Democratic control of both the House and Senate, labor’s hopes were once again revived; strategies were rethought; plans were redrafted; budgeting priorities were reestablished; and renewed spirits and hopes surged. Depending on the sources one reads and believes, organized labor is said to have given 2008 campaign contributions of between \$400 million and \$1 billion. The elections resulted with a new Democratic, pro-labor President and with Democratic majorities controlling both Chambers of Congress. Candidate Obama’s promises for a brighter future for unions in America were a clear and unambiguous beacon of bright light showing the way into a safe harbor in labor’s stormy navigation of rough waters.

Since the 2008 elections, much has been going on (and going off) in labor’s efforts. Clear evidence of these efforts has been present for all to see.

On March 10, 2009, EFCA was reintroduced. During 2009, President Obama’s first year in the White House, Service Employees International



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For over 40 years, he has had an extensive practice in collective bargaining, labor relations, and employment law counseling and litigation in both local and federal courts. He also counsels employers extensively on, and negotiates, separation agreements of high corporate executives.

Among his many published decisions is the February 2010 opinion of the Puerto Rico Supreme Court in María Ramos v. Univision de Puerto Rico, Inc. This precedent-setting opinion changed a 20-year legal doctrine that disfavored the use of summary judgments in employment cases in Puerto Rico courts.

In the early 1960’s, he served in the Vietnam War as a sergeant with the 1st Special Forces Group (Airborne), the Green Berets. In his free time, Mr. Torruella is an avid snow skier, SCUBA diver, star gazer, and fisherman. He holds an FCC Amateur Extra Radio License with the call sign KP4RAT.

Union’s (“SEIU”) former President Andy Stern, according to the White House’s visitors’ log book, was reported to be the second most frequent visitor with 36 visits. (Mr. Stern retired on May 8, 2010, and the new President of the SEIU is Ms. Mary Kay Henry.) The Gold Medal Winner, with 39 visits, was SEIU’s Treasurer, Ms. Anna Burger, Mr. Stern’s right-hand person; she is known as “The Queen of Labor.” The SEIU’s influence in the White House is well imbedded in other ways. Before being named in 2009 as President

Obama's White House political advisor, Patrick Gaspard was a top congressional lobbyist for the SEIU.

With 14 recorded visits, AFL-CIO President Richard Trumka easily qualifies as another Gold Card frequent visitor to the White House. Mr. Trumka made one particularly important visit on March 17 of this year. At that time, health-reform legislation was being hotly debated in Congress and throughout the Nation. In order for his health reform to have a chance to pass Congress, the President was in dire need of support from major sectors of the country. The day after Mr. Trumka's visit to the White House, the Associated Press reported that "the nation's largest labor federation is strongly endorsing the Obama administration's health care overhaul bill and plans to push wavering lawmakers for support."

Back on September 14, 2009, The Wall Street Journal had reported that Secretary of Labor Hilda Solis, speaking to the AFL-CIO convention in Pittsburg, had significantly shifted her position as to EFCA: from "passive support" to one of actively working with the White House to "make the strongest case possible for passage of EFCA." Seven months later, Secretary Solis showed she was consistent, at least in her support for getting EFCA approved. During the California Democratic convention on April 17, 2010, she stated that the reversing of the prior administration's anti-worker policies had begun; among the measures contributing to this reversal, she predicted EFCA would become law.

Of course, it hasn't all been smooth sailing for labor's legislative and regulatory efforts. Some unexpected storms have created set backs, at least as far as EFCA passage is concerned. These strong head winds have ripped some sails and headed labor's vessel dangerously close to the lee shore. Predictions as to EFCA's passage, and its eventual form if it does pass, have been all over the place. Thus, labor has been forced to set a new course, dusting off other contingency plans, but never abandoning its main ship: EFCA.

Other tidbits have added to the stormy drama. Arkansas Democratic Senator Blanche Lincoln, a

strong critic of EFCA, faced a strong challenge to her 2010 re-election from Lieutenant Governor Bill Halter, who received significant support from labor. Yet, Senator Lincoln defeated Lieutenant Governor Halter in the June 8, 2010 primary election.

Also, by March of this year, it was a well-known fact that Pennsylvania Democratic Senator Arlen Specter was the beneficiary of SEIU backing, curiously, in spite of his position against EFCA. Coincidentally, as reported in "EFCA Report" on March 17, 2010, back in September of 2009, Senator Specter had raised hopes of softening his opposition to EFCA when he announced to the AFL-CIO that "the Senate would pass a bill providing for quicker elections, mandatory interest arbitration and increase penalties against employers." These are three of the main changes that EFCA would provide to the present state of the law.

But probably the most significant event, and a noticeable setback for labor, at least on Capital Hill, was the Democratic Party's February 2010 loss of Senator Edward Kennedy's Senate seat to a Republican. The election of Massachusetts Republican Scott Brown gave the GOP the 41st Senate seat and handed the Democrats the loss of the 60th vote they needed to make the Senate filibuster proof. Needless to say, Senator Brown opposes EFCA.

After the election of Senator Brown, the thought of a repeat of the 2007 successful EFCA filibuster was now a real possibility that caused Republicans' mouths to salivate. Nevertheless, even before, when the Democrats still had the needed 60 votes to potentially stop a filibuster, they could not get EFCA passed; they could not convince a number of moderate Democratic Senators to overcome a threatened Republican filibuster on this pro-labor bill. Thus, even without Senator Brown, the EFCA bill, introduced in March of 2009, had remained in limbo. Seating Senator Brown in the upper chamber merely gave the GOP a certain margin of safety and provided Republicans with some peace of mind.

In the meantime, interest and focus on EFCA has faded. Resources were moved to the Administration's number one priority: passage of the Presi-

dent's health-reform legislation.

The AFL-CIO's 57 affiliated unions quickly huddled to discuss options and decide on new strategies. We all know that pro-union labor reform may come in many shapes, forms, sizes, and varied packaging. Legislation is one very important way. However, tools which range from Executive Orders to reversal of NLRB precedent and rule-making can be just as effective, and often times easier for organized labor to accomplish. Nevertheless, labor must have its ducks lined up and key players in the right places.

As the health-reform drama played out, on another stage efforts to fill three vacancies on the National Labor Relations Board gained momentum. The Board had long been operating without its full, statutory contingency of five members. The two members still on the Board, one a Democrat and the other a Republican, although resolving many cases of secondary importance, were at deadlocks, impeded from deciding many sensitive, policy-setting cases.

Last December, the Senate had rejected one of President Obama's NLRB nominees, Craig Becker. In addition to having been counsel to the SEIU and the AFL-CIO, Mr. Becker had proved to be a staunch proponent of radical shifts in employee-employer labor relations; his goal was to facilitate the unionization of workplaces. Mr. Becker joined the other two NLRB Obama nominees on whom the Senate had not yet voted on: Republican Senate staffer Brian Hayes and Democrat union lawyer Mark Pearce.

Time passed and the drama continued to play out. Days after the health-reform bill was finally approved in the Congress and President Obama signed it into law, the Chief Executive made good on his threat to use his executive prerogative on the pending NLRB nominees. On March 27, 2010, the President recess-appointed both Democratic nominees Becker and Pearce. Not surprisingly, the President pulled his "leave the Republican behind" move and did not appoint the third nominee, Republican Brian Hayes. The pro-union, Washington-based Americans Rights At Work group accurately described it as "a very good start" leading to the procurement of pro-

union changes in labor law.

Members Becker and Pearce now join Board Chair Wilma Liebman, a former Teamsters' and Bricklayers' union attorney. This now gives the Democrats a 3 to 1 margin on the NLRB, with Republican Peter C. Schaumberg's term ending on August 7, 2010. As recess appointments, both Members Becker's and Pearce's nominations last only until the end of 2011. Nevertheless, a lot can be accomplished in the time available to them, modifying existing Board regulations and legal doctrines to facilitate the unionization of American workers. Some have characterized the two recess appointments as the President's "payback to unions for its [organized labor's] help in pushing health-care reform across the finish line." Now it is the unions that are starting to salivate.

Employers need to be aware of the various means that labor has, in addition to EFCA, to reach their goals. Much will be changed through amendments to Board precedent and regulation, as well as by other bills presently pending, or soon to be introduced, in Congress. Employers need to plan accordingly. Among the many probable topics for change, either through the Board or through Congress, are: (1) changes in the definition of supervisors; (2) expansion of paid leave and rules related to plant closures; (3) liberalization of rules related to union access to private property; (4) the establishment of rules that would allow supervisors to solicit on behalf of unions; (5) alterations in the definition of temporary employees so that they may be included in appropriate bargaining units; (6) establishing rules to allow salting; (7) approving rules that would allow employees and union organizers to use electronic means, including social media, for pro-union campaigning and solicitation; and (8) changing existing rules to speed up the election process.

In short, employers cannot let their guard down, even if the unions' efforts to pass EFCA seem to be stalled. Unions will not let their guard down. With the help of friendly Executive and Legislative branches, labor will continue to use their resources to push through their agendas. Management must do the same, with or without the backing of the government.

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