

“EFCA” LEGISLATION WILL INCREASE CORPORATE COSTS AND LIABILITY

By Allan M. Dabrow, Martin F. Payson and James J. LaRocca

The Conference Board recently asked top executives from around the world what it takes for a company to succeed in today’s economic climate. “Speed, flexibility and adaptability to change” were among the three most frequently named tenets.

Unfortunately for executives, a proposed labor law will significantly hinder an organization’s speed, flexibility and adaptability to change. The dubiously-named Employee Free Choice Act (“EFCA”) would greatly help unions organize workers. Last March, the House of Representatives passed the EFCA. The bill failed to become law last Congressional session because of an anticipated filibuster in the Senate.

With union membership at its lowest point in years (7.5% of the private-sector workforce is unionized), Labor is determined to pass the bill in the new Congress. Unions contributed hundreds of millions of dollars to elect pro-EFCA politicians last month. Their efforts appear to have paid off, literally: President-elect Barack Obama has vowed to sign the act into law and EFCA is close to securing a filibuster-proof majority in the Senate (with two seats still outstanding at the time of this writing).

Labor is creatively packaging EFCA as part of President-elect Obama’s economic stimulus package. In reality, the bill amounts to a union “bailout,” which corporate America will pay for dearly.

EFCA would increase the cost of operations dramatically. Unionized companies often pay their employees higher compensation than non-unionized companies. Also, they frequently fall victim to union-imposed inefficiencies, which further places them at a competitive disadvantage. The Big Three Detroit automakers are an example of this story.

Notably, EFCA would allow a government-appointed arbitrator to dictate *all* of a company’s labor costs, without limitation. This would include all wages, benefits and work rules. In addition, an arbitrator could compel a company to participate in an underfunded multiemployer union pension and health care plans similar to those in the auto industry. Subsequently, should there be a withdrawal event – such as the workers deciding to decertify the union – the company may have to assume some of the unfunded obligations under the plans. Additionally, the legislation would establish high monetary penalties for corporate violations of EFCA.

Companies that ignore EFCA today may face legal liability for failing to address EFCA diligently and proactively, particularly where preventable unionization leads to diminished profitability or corporate bankruptcy. The case of In re Caremark Int’l, 698 A.2d 959 (Del. Chan. 1996) provides valuable insight on which this assertion is based. In the case, the court examined a board of directors’ legal “obligation to supervise or monitor corporate

performance.” The plaintiffs based their claim upon the theory that “the directors allowed a situation to develop and continue which exposed the corporation to enormous legal liability and that in so doing they violated a duty to be active monitors of corporate performance.” The court said that “[d]irector liability for a breach of the duty to exercise appropriate attention may, in theory, . . . arise from an ***unconsidered failure of the board to act*** in circumstances in which due attention would, arguably have prevented the loss.”

Executives must act now and educate their organizations about the full implications of EFCA so the company can protect itself proactively. The readers are invited to contact the authors should they have any questions about EFCA and the appropriate actions to take in anticipation of its possible enactment.

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