

Kramer Rayson LLP

Employment Law Conference

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**Labor at a Crossroads - Employee Free
(No) Choice Act...Current Status...Possible
Compromise Bills...New Organizing
Tactics/Targets**

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Today's Agenda

- Today's Union Organizing Landscape
 - The Election Petition/Election Process
 - Timeline
 - Role of Management
- Employee "Free Choice" Act (EFCA)
 - Current States
 - Likely Compromise
- Important Steps to Take Now to be Ready When the Union Seeks to Organize You

**THE CURRENT UNION
ORGANIZING
LANDSCAPE**

Under NLRA § 7, Employees Have the Right To:

- *Self-organize*;
- Form, *join* or assist labor organizations;
- *Bargain collectively* through representatives of their own choosing;
- Engage in other *concerted activities* for the purpose of *collective bargaining* or other *mutual aid or protection*;
- and
- *Refrain* from any of the above activities.

Under §8, It Is An Unfair Labor Practice For An Employer To:

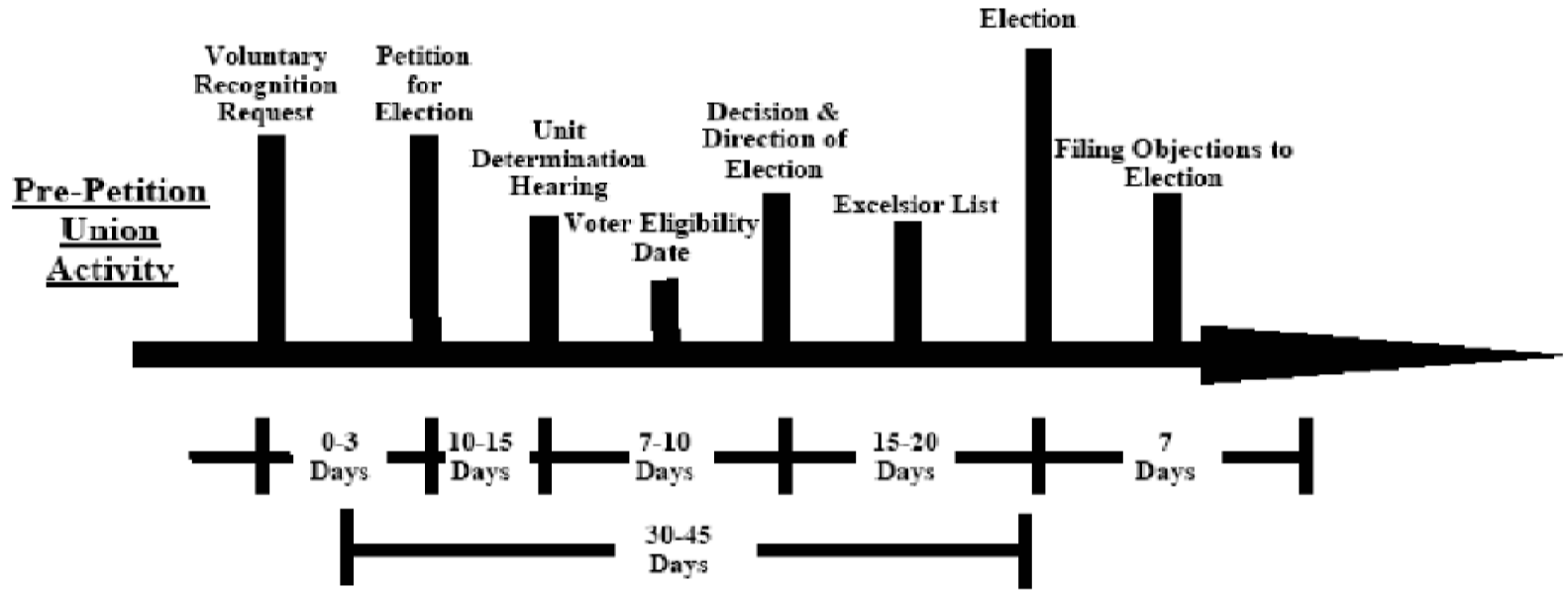
- (a)(1): Interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in § 7;
- (a)(3): Discriminate to encourage or discourage membership in a union;
- (a)(5): Refuse to bargain collectively with the majority representative of employees.

Employer Rights Under NLRA §8(c)

- Employers can express views, arguments, or opinions.
- Expressions can be in verbal, written, printed, graphic, or other visual form.
- Expressions cannot contain
 - threats of reprisal or force;
 - promises of benefits;
 - interrogate or engage in surveillance

NLRB ELECTION TIMETABLE

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How a Union Becomes The Bargaining Representative (Today)

- 1) Voluntary Recognition by the Company, a.k.a. “card check.”

OR

- 2) A Secret-Ballot Election conducted by the National Labor Relations Board (NLRB).

Secret Ballot Election Process

- The Union must first get a NLRB Petition issued by the NLRB
- To obtain a Petition the Union must present the NLRB with **SIGNED UNION CARDS** from at least 30% of the employees in an appropriate bargaining unit.
- Generally, Unions will not file for a Petition until they have at least 65% - 80% of the cards signed. Why?
 - They know they will lose support when employer tells its side of the story.

The Election Date

- The NLRB will attempt to process the Petition and schedule a secret-ballot election within *42 days* of the filing of the election petition.

The Election Campaign

- Most union campaigns are like a political campaign being waged between management and the union.
- During the campaign, management tries to convince employees to vote against union representation. The union tries to convince employees to vote against management and for representation. Standard campaign techniques include speeches, letters, handbills, group meetings, one-to-one conversations and so on, each side contends for employees' votes.

Typical Position On Unions

- Companies often believe that a union-free employer not only creates the potential for a more *positive and enjoyable work environment* for employees ... but also facilitates greater *flexibility and productivity* critical to operational and competitive viability.

Why Most Employers Prefer To Be Non-Union

- Preferring to operate “union-free” does not mean that an employer is “anti-union” or is against “worker’s rights.” However, there are many sound reasons why an employer prefers to operate without a union:

Why Employers (In General) Prefer to Operate Without a Third Party

- Unions create “*We v. They*” Environment
- Non-Union Employers Have Greater Flexibility
- A More Positive Working Environment
- Gov’t/Laws – Eliminated Need For Unions
- Employers Can Be More Efficient Without Third Party Interference
- Unions Create Internal Conflicts
- Unions = Strikes (Nobody Wins!)
- Employees Generally Don’t Benefit by Joining a Union in Today’s Environment

Campaign Issues

- *Collective Bargaining* – The Risks and Realities.
- *Job Security* – It's The Result of Success, Teamwork, Not a Union!
- *Union Membership* – What It Costs; Union Membership Rules, etc.
- *Strikes* – How Union Strikes and Violence Hurt Employees.
- *Employer Pay/Benefits* – Company Provides Competitive Pay/Benefits Without a Union.

Legal Restrictions On Supervisory Communication (“The “Don’t’s”).

- When employees are engaged in any form of *concerted activity*, you DO NOT:
 - T THREATEN employees
 - I INTERROGATE employees about union activities
 - P PROMISE things to induce them to vote against the union
 - S SPY or conduct surveillance of employees’ union activities

The DO'S

➤ REMEMBER *FOE*:

Facts – “The union cannot guarantee anything”

Opinions – “In my opinion...”

Experiences – “When I was in the union...”

➤ OBSERVE *TALK*:

Tell your opinion!

Actively communicate!

Listen to your employees!

Know your stuff!

The Election

- The election will be conducted by a National Labor Relations Board agent. Management and the union are allowed to select a bargaining unit employee to observe the election process. The union must receive 1 more than 50% of **THOSE WHO VOTE**.
- Voting is generally **ON-SITE**.

Overview of the Collective Bargaining Process

1. A majority of employees vote to be represented by a union.
2. The NLRB certifies the union.
3. An employer negotiates with the union.
4. The union may strike in order to coerce an agreement.
5. Management and union members either agree on the terms of a CBA or fail to reach an agreement.
6. Currently one-third of first-time negotiations *do not* end in a contract; the Union loses support and goes away.

Collective Bargaining

- The law only requires that both the union and the company meet at reasonable times and places;
- To Negotiate in Good Faith: Wages, Hours and Working Conditions.
- There is no legal obligation imposed on either party to ever agree to anything.

Employee Free Choice Act (EFCA)

How EFCA Tips the Balance Heavily Toward Unions

The Basic Components of EFCA

- Recognition of Unions without an election
- Expedited bargaining
- Expedited mediation
- Binding Arbitration
- Increased penalties for NLRA violations

The Secret Ballot Election

- Under EFCA:
 - If a **majority** of employees (50% + 1) signs cards or petitions, the NLRB will certify a union.
 - If a **majority** of employees signs the cards/petitions, employers will **NOT** be able to persuade employees to reject the union through a secret ballot election.

EFCA Highlights

- (h) Whenever collective bargaining is for the purpose of establishing **an initial agreement** following certification or recognition, the provisions of subsection (d) shall be modified as follows:

EFCA Highlights

- (1) **Not later than 10 days** after receiving a written request for collective bargaining from an individual or labor organization that has been newly organized or certified as a representative ...**the parties shall meet and commence to bargain collectively** and shall make every reasonable effort to conclude and sign a collective bargaining agreement.

EFCA Highlights

–(2) If after the expiration of the 90-day period the parties have failed to reach an agreement, either party may notify the Federal Mediation and Conciliation Service of the existence of a dispute and **request mediation**. Whenever such a request is received, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

EFCA Highlights

–(3) If after the expiration of the 30-day period the Service is not able to bring the parties to agreement by conciliation, the Service shall refer the dispute to an arbitration board ... The arbitration panel shall render a decision ... and such decision shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties.

EFCA Expands Penalties for NLRA Violations

- While employees are organizing or negotiating a first contract, penalties for employer violations may include:
 - **3X** the amount of back pay;
 - Civil penalties of up to **\$20,000 per violation;**
and
 - **Mandatory** federal injunctions.

Specter's “Compromise” EFCA Bill

- No card check certification **but** sharply reduces election period (probably from 42 days to *5 to 10 days* – not enough time to give company's side of the story.
- Allows unions equal access to employees on company premises if employer holds mandatory anti-union meetings on company time.
- Apply “last best offer arbitration” or “baseball arbitration” ostensibly to encourage a reasonable offer.

Proactive Steps To Get Ahead Of The EFCA Curve

EFCA Moves Battle Line Forward

- Whether it is No Election or Expedited Election, Employers “Vote No” campaign (post-petition/pre-election) is Eliminated or Sharply Limited.
- EFCA “Front-End Loads” the Employer Campaign.
- Requires Pro-Active Measures – NOW.

Why Employees Turn to Unions

- Most union campaigns are not about money. They are about:
- Management ignoring or poorly handling employee complaints/concerns.
- Perceived (or real) unfair or unequal treatment, especially discipline.
- Disrespectful treatment by executives, managers and supervisors.

Why Employees Turn to Unions

- Supervisors with poor people skills.
- Repeated last minute schedule changes or overtime.
- *Substantially* inferior wages and benefits.
- No sense that the company cares for the employee.
- Failure to convince employees their wages/ benefits are fair and competitive.

Why Employees Turn to Unions

- In short, it is usually *not* about money – it is about fair treatment, respect, consideration, and communication.
- Your objective yesterday, today and tomorrow **WITH OR WITHOUT A UNION** is to create and maintain a Positive, Productive, Pro-Employee work environment.
- So what is the key? **SUPERVISION**

A GOOD SUPERVISOR /LEADER IS “IN TOUCH”

- Treat employees as individuals with respect and dignity. As you would like to be treated:

“THE GOLDEN RULE”

- Know your people well - their names, their family names, interests, ambitions, problems.
- Keep employees informed and involved with what’s going on.
- Communicate change thoroughly and in advance.
- Explain and “sell” change in a positive manner. Don’t just announce it.
- Listen and encourage ideas and suggestions. Follow up.
- Communicate and administer all company policies consistently and fairly.

Don't Give Employees a Reason To Look Outward

- Most effective means of fighting a union is good management.
- Listen and respond to employee complaints/concerns.
- Maintain an open dialogue with employees on tough issues, e.g. high cost of health care premiums, mandated overtime, unexpected schedule changes.
- Always get back to the employee with an answer.

Don't Give Employees a Reason To Look Outward

- Provide competitive pay and benefits and educate employees on them.
- Engage daily with them.
- Identify informal leaders and be sure they understand your message.
- Follow the **GOLDEN RULE**.

How Do Union Organizers Get Cards Signed?

What You Must Do NOW to Deal With Card-Signing Activity

- **NOW** Instill a corporate understanding of the challenges posed by EFCA at all leadership levels.
- **NOW** Review and evaluate all employment related policies, especially union-related policies.
- **NOW** Begin supervisor training on EFCA, tell-tale signs of Union activity and proper response.
- **NOW** Establish and train a “Rapid Response Team” of HR, Legal and Managers.
- **NOW** Educate employees on the company’s position on unions.

Instill a Corporate Recognition, Understanding of the Challenge of EFCA

- At all levels, board members, officers, and management must be trained to understand EFCA, challenges and urgency of preparation.
- Management must allocate resources NOW to protect the organization.
- Recognize that failure to prepare NOW could result in arbitrator dictating wages, benefits, and terms and conditions of employment.

Get the Infrastructure Right - Now

- First step is to make sure your employees know exactly where you stand re: a third party union.
- If you believe it is not in company's or employee's best interest you should say so – NOW.
- Do so via a policy statement in the handbook or policy memo – NOW.
- Implement lawful “no-solicitation,” “no-distribution” rules NOW and enforce them.
- Implement lawful policy restricting use of e-mail to business-related e-mail NOW and enforce it.

Train Managers and Front Line Supervisors

- Success rate is organizing time directly to how early you spot Union activities, especially with EFCA.
- Equip front line supervisors with information and tools to understand the law, with an emphasis on EFCA and the card signing process.
- Crucial to train supervisors to spot and immediately report early warning signs.
- Crucial to train supervisors on importance of good management and communication skills.

Train Supervisors On The Critical Topics

- The “Do’s” and “Don’ts,” “TIPS,” etc.
- Focus Supervisor on “FOE” (facts, opinions, experiences) and “TALK” (tell options, actively communicate, listen to employees, know your stuff).
- Tell-tale signs and how to respond.
- Employer’s desire to identify and properly resolve employee-related issues.
- Resolving problems on the floor, two-way communicate with employees, and the GOLDEN RULE.

So What Are Tell-Tale Signs?

- Not all inclusive, but they include:
 - Recognize and explain changes in employee habits (e.g. big talkers become quiet, passive employees become aggressive, use of terms such as “grievances,” “job security.”)
 - Employees who usually do not hang out now gather in groups.
 - Employees stop discussions when approached by supervisors.
 - There are “sudden wanderers.”

Establish and Train “Rapid Response Team”

- Employer response to card signing **MUST** be immediate and decisive.
- Develop a management team fully prepared to orchestrate the response (e.g. HR manager, legal counsel, and a manager or consultant).
- Formulate a “kickoff” campaign with initial letters, handouts stressing need to obtain all facts before signing Union cards, and videos on card-signing process that can be implemented *immediately*. Have it ready to go **NOW**.

Consider Communicating With Employees on EFCA

- Especially if you are vulnerable, consider communications with employees – they already know about EFCA.
- Be the first to discuss unionism and effect of card signing.
- Make clear to employees in orientation, employee handbooks, and current-employee communications the company's union-free philosophy.

Consider Communicating With Employees on EFCA

- Communicate your preference for union-free environment.
- The basics of EFCA.
- How a union solicits cards.
- Importance of obtaining all the facts before signing.
- The effect of signing a card, its irrevocable nature and its ticket straight to a union.
- The risks/disadvantages of unionization versus advantages of being union free.

QUESTIONS?