

## LABOR & EMPLOYMENT LAW UPDATE

CLIENT ALERT

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### Employers And Employees Threatened By Proposed Employee “Free Choice” Act

**Now that the 2008 presidential election is over, there is a real danger that new labor laws will be passed that would for all practical purposes make it almost impossible for employers to effectively campaign against a union.** Indeed, if this new law, the Employee Free Choice Act (“EFCA”) were to pass, employers would not even know that a union was trying to organize its employees until it was too late to do anything.

#### **What is EFCA?**

The Employee Free Choice Act of 2007, would require the National Labor Relations Board (NLRB) to certify a union if a majority of employees sign authorization cards. If enacted, unions would no longer be required to win a secret ballot election before certification.

#### **What is current NLRB law?**

Under current law, the employer and employees have a right to demand that a secret ballot election is held when a union files a recognition petition. A petition can be filed by any union, worker, or employer. Employees or a union may petition the NLRB for an election if at least 30% of employees have signed a petition or authorization cards. If a majority of employees voting (i.e., not a majority of employees in the bargaining unit) in an NLRB-conducted election choose to be represented by a union, the union is certified by the NLRB as the employees’ bargaining representative.

#### **Why is a secret ballot election so important to the workplace?**

First, because there are elections, employers have time to convince employees not to vote

for the union, so long as they are not threatening them or making promises in exchange for their votes. Second, employees have the right to vote in privacy. They vote behind a curtain free from coercion or intimidation. No one knows how they voted.



#### **How does the EFCA change the law?**

The EFCA would: (1) require the NLRB to certify a union if a majority of employees in a bargaining unit sign authorization cards designating the union as their bargaining representative. Secret ballot elections would no longer be required; (2) establish procedures for reaching an initial contract agreement. If a union and employer cannot reach an initial agreement within 90 days after bargaining has begun (or a longer period if agreed to by both the union and employer), either party could request mediation by the Federal Mediation and Conciliation Service (FMCS). If an agreement cannot be reached within 30 days through mediation (or a longer period if agreed to by both parties), the dispute would be subject to binding arbitration; and (3) stiffen remedial measures for certain employer unfair labor practices in several important ways.

#### **Why is a card check bad for employees?**

Eliminating the secret ballot election in favor of card checks is good for unions but bad for employees. Employees lose their right to privacy and are subjected to threats, intimidation, and peer pressure; many employees who sign cards

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don't really want a union but sign just to be rid of the organizer. Even the U.S. Supreme Court, in *NLRB v. Gissell Parking Co.*, has called card checks an unreliable method of determining the true wishes of employees.

### **Why is binding arbitration a bad idea?**

The EFCA would force government mandated contracts on employers who do not give in to union demands. The government arbitrator would impose a two year contract specifying wages and working conditions. The employer could not appeal the arbitrator's decision. Binding arbitration would actually undermine collective bargaining because it encourages labor unions to take unreasonable positions during initial bargaining in the hope that they would win them in arbitration. Worse, an employer would have no choice but to raise its prices or

layoff employees if a government arbitrator imposed an unreasonable contract upon it. That would mean lost customers, layoffs, and even bankruptcy.

### **What should employers do?**

The EFCA virtually eliminates NLRB supervised secret ballot elections in favor of card checks, thereby enabling unions to organize employees merely by convincing or coercing a majority of them to sign representation cards.

We urge you to prepare for the EFCA now. Review policies and develop supervisory training programs to educate supervisors and managers about the EFCA, company and employee rights, early warning signs, and how to legally but effectively respond to a

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## **New Jersey Department of Labor Issues Proposed Regulations on New Jersey's Paid Family Leave Act**

### **The New Jersey Department of Labor and Workforce Development (NJLWD) issued proposed regulations aimed at implementing New Jersey's Paid Family Leave legislation.**

As previously noted in earlier editions of this Update, this new law gives all employees up to six weeks of paid leave to care for a newborn, a newly adopted child or a sick relative. Benefits under the law will be provided through the State Disability Fund or private insurance plans. Payment under the new law does not start until July 1, 2009, although payroll taxes will

be deducted starting in January 2009. The proposed regulations mainly deal with the size of benefits, as well as their taxability. Here is the summary:

### **What is the minimum weekly benefit?**

The proposed regulations raise the maximum weekly benefit for State Disability Benefits from \$524 per week to \$546 per week.

### **What is the taxable wage base?**

The proposed regulations raise the taxable wage base for purposes of employer contributions under the Unemployment Compensation law (and Temporary Disability Benefits law) from the first \$27,700 of an employee's annual wages to the first \$28,900.

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### **Are benefits considered wages for purposes of unemployment insurance?**

Yes. Family leave benefits received by employees will be considered taxable wages under New Jersey's Unemployment Compensation law and the State Disability Fund. That is, these benefits are considered earnings, and as such, will be used to determine whether an individual is eligible for unemployment compensation as well as the amount of unemployment compensation payments to which the individual may be eligible.

### **Are benefits taxable to the employee?**

That depends. The proposed regulations make clear that family leave law benefits paid under the state plan, by an insurance carrier under an approved private plan, or by either a union or employer under an approved self-insured private plan are considered "benefits," and therefore would be non-taxable. Family leave law benefits paid to employees under an approved private plan (as opposed to those paid under the state plan) will be taxable if the payments are for a period of seven or less consecutive days following the first day that the individual establishes a claim, but are then considered non-taxable following the seventh consecutive day. If the leave extends to 22 consecutive days, or the employee is eligible for at least one day

of family leave law benefits in three separate subsequent weeks, the initial seven-day period will be considered non-taxable remuneration.

### **Are voluntary payments made by employers taxable?**

Yes. Any voluntary payments made by an employer to an employee taking family leave would be considered wages within the meaning of the Unemployment Compensation and Temporary Disability Benefits laws, for both tax and benefit entitlement purposes. Likewise, an employer's payment to an employee of the difference between family leave law benefits paid under the state plan (or an approved private plan), and the employee's full salary, also would be considered wages within the meaning of the Unemployment Compensation and Temporary Disability Benefits laws, for both tax and benefit entitlement purposes, in accordance with the proposed regulations.

There are, of course, many other issues related to the New Jersey Paid Family Leave Act. Please be sure to call us if you have any questions or need our assistance. ■

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