Tools For The Trade

Business and clinical solutions for the home care industry

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New York State Association of Health Care Providers, Inc.

Representing home and community-based care

Free choice or no choice?

Unionization has been an important issue in the New York home care community for the past several years. In this article, two management labor lawyers and partners in HCP Associate Member Bond, Schoeneck & King, PLLC's (www.bsk.com) New York City office examine the provisions and impact of the proposed Employee Free Choice Act. Over the coming year, HCP will examine various aspects of unionization from the point of view of both unionized and non-unionized agencies. In addition, it will continue to advocate for the interests of its members at both the State and Federal level.

By David E. Prager, Esq. and Louis P. DiLorenzo, Esq.

"Hello, Employer? This is Local 1-2-3. You probably don't know this yet, but your employees have selected our Union to represent them (without an election). Your new two-year contract is in the mail. This will be our first contract, so it's very important. If you don't agree to our proposals in 120 days, an arbitrator will be setting the terms."

Shocked? This could be the phone call that many U.S. employers will soon be receiving, if the so-called "Employee Free Choice Act" ("EFCA") is signed into law next year—as every Democratic candidate has promised to do. It is regarded by observers as almost certain to pass Congress in some form next year.

H.R. 800 and its companion, S. 1041 (dubbed by opponents the "Employee No-Choice Act"), would profoundly change the unionization and contract negotiation process as it exists today. If enacted, it would represent the most sweeping union-related legislation in almost a half-century. It has already passed the House of Representatives (on March 1, 2007, by a vote of 241 to 185). The nearly-identical Senate version was supported by a narrow majority, and was blocked in June 2007 only by a filibuster. Democrats have promised to

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Much ado about FMLA redo

By Sima Asad Ali, Esq

The U.S. Department of Labor (DOL) published proposed revisions to the Family and Medical Leave Act (FMLA) regulations (29 CFR Part 825) on February 11, 2008. These regulations address a number of critical topics, including but not limited

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reintroduce it, and Senators Clinton and Obama have both publicly endorsed it.

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Much of the notoriety concerning the bill has focused on the portion that allows a union to be certified without a secret ballot election.

But the *second* portion of the bill relating to contract negotiations should warrant equal, if not greater attention by employers—especially health care and home care providers that may have significant budgetary constraints. That second section takes the ultimate control over the negotiated terms of any first contract out of the employer's (and union's) hands, and gives it to a third-party arbitration panel.

Collective bargaining in the U.S. has always given employers the ability to shape their labor contract based on their business needs, the relative bargaining power of the parties, and the employer's willingness to take risks to support its chosen bargaining position.

Under the EFCA, however, if no agreement is reached in 120 days, outside arbitrators appointed by the government will *impose* whatever terms they deem appropriate in the first, two-year agreement. To home care employers in particular, the risk of such imposed costs could threaten the viability of the enterprise. Licensed Home Care Services Agencies (LHCSAs) in New York, for example, typically work on a very narrow profit margin, as they determine their pay scales and benefits based on contract-reimbursement rates outside their control. Imposition of any significant employer-paid benefits—even those regarded as routine in other industries—may not be affordable to many such employers. Simply put, union contract terms that may be common in some industries may be wildly out of place in the health care and home care communities.

Yet, under the EFCA structure, an employer that cannot reach a first contract in 90 days (plus another 30 days of Federal mediation), must relinquish the determination of terms to an arbitration panel. The EFCA provides no standards or guidance as to how this determination will be made. Experienced labor negotiators believe that the risk of losing control over the bargaining process will force employers to make concessions, even where a union has little or no realistic bargaining leverage. A union can simply say: *"here are our proposals; if you don't agree, we'll see you at the arbitration panel."* There is, frankly, very little incentive for the union to negotiate seriously during the initial 120-day period.

Proponents of EFCA point out that more than half of union organizing drives fail at the ballot box. They assert that employer "scare tactics" and coercion are the primary cause. Even when a union wins, almost a third of the victors never achieve a union contract. EFCA is designed to redress these concerns which proponents believe have contributed to a steady decline in union membership in the private sector for the last four decades.

Under EFCA, a majority of employees can easily sign authorization cards before the employer ever knows.

Opponents counter that a secret ballot election is the time-honored and best protection against unscrupulous organizers

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Employers should begin expressing their views to employees before a campaign has begun.

who may obtain signatures on "authorization cards" by social pressure (employees are invited to union rallies where everyone is expected to sign in full view), by false promises, and sometimes even by trickery or coercion. Under EFCA, a majority of employees can easily sign authorization cards *before the employer ever knows*, and without any opportunity for the employer to communicate its point of view. The cards alone will result in certification of the union as bargaining representative. The prospect of relatively unimpeded union certification and faster negotiations will no doubt spur union organizing drives. Negotiation must commence within 10 days, and be resolved in 120, or face moving to an arbitral forum. A third section provides **triple back-pay** damages to union adherents who are discriminatorily discharged, plus a $20,000 damages penalty for each "willful" violation for repeat violators.

If enacted, EFCA will sharply diminish—and in many cases eliminate—an employer's window of opportunity to persuade employees about its position on unionization. This suggests that employers should begin expressing their views to employees ***before*** a campaign has begun, because there will be little or no opportunity after.

If an employer does not believe a union is in the best interests of the employer, employees, or the patients, those views should be addressed in a handout, orientation and by direct supervisors. Further, employers should begin emphasizing a new theme: that by signing a simple card at a union rally, an employee may soon be forfeiting any right to a secret ballot election. Counseling employees ***now***, about why they should "think twice" before they sign a card, may be the best recommendation for the future.