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Why "Card Check" Has Not Completely Checked Out

By Carl Rizzo, Partner, Cole, Schotz, Meisel, Forman & Leonard, P.A.

Mr. Rizzo

Co-authored by Michael Yellin, Associate, Cole, Schotz, Meisel, Forman & Leonard, P.A.

The Continued Viability and Implications of the Employee Free Choice Act

For the hotel industry, few if any of the hot-button political issues that have dominated the talk show circuit have the potential to cause as immediate an impact on the industry as the Employee Free Choice Act ("EFCA"), the most notable provision of which is "card check." Indeed, it is important for any industry executive to understand the implications of the EFCA, as it most certainly will remain a part of the political debate in this country for years to come.

In summary, the EFCA, as considered by Congress thus far, would make three key amendments to the National Labor Relations Act:

1. Card Check Provision

The most hotly-debated provision of the EFCA is known as the "card check" provision. Card check provides that if more than 50% of a company's employees sign authorization cards requesting representation by a particular union, the National Labor Relations Board ("NLRB") will certify that union as the employee's exclusive representative. Following such certification, management must recognize that union for the purposes of collective bargaining with the employees.

This is a substantial change from the current law. Presently, if a company refuses to recognize the union, it is incumbent on the union to obtain the authorization cards from the company's employees. Even if such support is obtained, however, management can still refuse to recognize the union. In those circumstances, the employees must then petition the NLRB to organize and conduct a secret ballot vote on whether to certify the union. Without NLRB certification, the employer is under no obligation to recognize the union.

Proponents of card check contend that the current system allows management to overtly coerce employees prior to the secret ballot vote. They argue that because the secret ballot is not conducted by the employees, it gives management another opportunity to interfere with the democratic process. Opponents, however, counter that the secret ballot provides more than adequate protection against undue influence by union organizers. They maintain that the most fair and democratic way for employees to unionize and avoid undue outside influences, is to do so by secret ballot, as in the case of political elections.

2. National Labor Relations Act

Next the EFCA, as written, would alter the time frame for negotiating initial employment agreements under the National Labor Relations Act. Specifically, the EFCA provides that following a union's certification, the union can compel the employer to begin negotiations for a collective agreement within 10 days. If the employer and union are unable to reach agreement within 90 days, either side may seek to have the matter referred to the Federal Mediation and Conciliation Service to attempt to mediate the dispute and bring the parties to an agreement. If another 30 days pass with no resolution, the Federal Mediation and Conciliation Service must refer the dispute to an arbitration board for a binding adjudication of the matter.

Currently, no such time requirement is in effect. This has proved to be a substantial bargaining chip for employers since, under the current law, a union has only one year following certification to negotiate an initial agreement with management. If a year elapses without reaching an agreement, current law requires the employees to vote again on unionization. This additional step can be a time consuming and arduous process which further tests the resolve of the union.

Proponents of the EFCA argue the time change is necessary to eliminate the employers' incentive to delay the bargaining process in an effort to force the union to reorganize -- potentially demoralizing employees. On the other the hand, opponents contend that the government should have no part in the negotiation process. They argue that government mediation and arbitration is a time consuming and expensive process that will, in effect, lead to government wage-setting for hundreds of companies. This, opponents maintain, will force businesses into contracts that make them less competitive and less able to innovate.

3. Non-Complying Companies

Finally, if passed the EFCA would strengthen the NLRB's enforcement power over non-complying companies. Specifically, the EFCA would allow the NLRB to obtain injunctive relief against an employer whenever it can be proven that an employer threatened to, or did, discharge or discriminate against an employee who sought representation by a union. This injunctive relief would also be available if the employer "engaged in any other unfair labor practice" that would restrain the employee's rights.

Furthermore, the EFCA would also increase the monetary penalties assessed against employers for violations of the National Labor Relations Act. Employers would be required to pay for illegally discharging an employee or for discrimination during union organization campaigns at the rate of two times back pay as liquidated damages, in addition to the actual back pay owed. Moreover, the NLRB will also be authorized to impose a $20,000 penalty against employers for each willful violation of the employees' statutory rights.

Under the current scheme, such injunctive relief is available only for violations by the union. No injunctive remedy exists for unlawful acts committed by employers in violation of workers' rights. Moreover, there are also no civil fines currently in place for such violations.

While there is less debate about the increased penalties, business leaders are obviously concerned about the increased costs (including

those associated with implementing preventative measures) that may be incurred should the EFCA be enacted.

In 2010, EFCA, and thus the aforementioned proposed changes to the law, came literally to the brink of passage before collapsing amid the abrupt shift in the political climate. Before speculating as to the EFCA's potential passage in the future, a brief history of the EFCA is necessary.

The story of the EFCA really begins at 1:30 PM on February 14, 2007 when the House of Representatives' Committee on Education and Labor, by a vote of 26-19, ordered the EFCA reported to the full House for consideration. Riding the momentum of the 2006 mid-term elections, the Democratic leadership in the House was quick to bring the EFCA to the floor, and just 15 days later the bill passed by a vote of 241 to 185.

Defying a veto threat from the then Bush White House, Senator Ted Kennedy, Chairman of the Senate Committee on Health, Employment, Labor, and Pensions, introduced the Senate version of the EFCA. These efforts, however, fell short, as the Senate voted 51 to 48 on a motion to end debate and proceed to consider the bill, 9 votes short of the 60 needed to overcome a Republican filibuster. As a result, the bill failed to pass during the 110th United States Congress.

Despite this failure, the strong showing made by the Democratic Party (historically pro-union) during the 2008 election, including the installment of Barack Obama as the 45th President, gave supporters hope of imminent passage. Adding to this optimism was the President's fervent support as demonstrated by his comment that "we will pass the Employee Free Choice Act. It's not a matter of if, it's a matter of when."

By January 2010, however, passage of the EFCA went from almost inevitable to virtually impossible. The final demise seems to have been sounded by Scott Brown's come from behind victory in the race to fill the late Ted Kennedy's Senate seat Having lost the assurance of a filibuster-proof majority in the Senate, the Obama administration shifted all of its political capital to the passage of healthcare reform legislation. This investment undoubtedly cost the administration substantial support for any further policy initiatives. With Congress now having adjourned until after the next election (which recent polling suggests will result in substantial Republican gains) the EFCA in its current form stands little chance of passage.

Regardless, hotel owners/managers should be cognizant of the significant support that remains for the EFCA. The prospect for further unionization of a hotel's employees will almost inevitably result in increased costs, both in terms of employee benefits and legal fees should protracted disagreements ensue. To avoid such a result, employers should be proactive and recognize and address, through compromise, their employees' most significant concerns. In this way, hotel owners can not only give due consideration to their short-term cost-cutting objectives, but also manage the long-term risk associated with the continued undercurrent of support for the EFCA-type legislation and the enhanced cost of doing business similar type enactments may pose.

This article was co-authored by Michael Yellin. Mr. Yellin is an Associate in Cole Schotz's Litigation Group. His practice focuses on all aspects of litigation in a wide variety of practice areas including commercial, education, employment, and construction law. Mr. Yellin has experience in both federal and state court in New York and New Jersey, representing a myriad of clients in a wide variety of industries.

Carl Rizzo's broad and diverse practice includes concentration in commercial litigation matters and chancery practice relating to contractual disputes involving such matters as surety, construction and construction liens, real estate transactions, commercial tenancy, employment covenants and partnership/shareholder discord. He also concentrates his practice in tax court ad valorem proceedings, where he has successfully negotiated and litigated numerous matters involving millions of dollars in tax reductions for his commercial property owner clients. Mr. Rizzo can be contacted at 201-525-6350 or crizzo@coleschotz.com