WHAT IS THE EMPLOYEE FREE CHOICE ACT?
Employee Education Is Vital

by: Laura K. Sitar, Esq.

On March 10, 2009 the latest version of the Employee Free Choice Act was introduced in both chambers of the United States Congress. A similar bill was blocked by Senate Republicans in 2007. The future of the current bill remains uncertain as well. That said, employers should not ignore arguably the most significant proposed changes to the National Labor Relations Act and union organizing over the last 40 years. While the vote for the Employee Free Choice Act in Congress remains close, there is powerful support for the changes embodied in the bill. In fact, President Obama was a co-sponsor of the bill introduced in 2007 and has indicated he supports the current bill and will sign it into law if presented to him by Congress. The question may not be "if", but "when" this or a compromise bill is enacted into law.

What is the Employee Free Choice Act? Its text states it would "amend the National Labor Relations Act to establish an efficient system to enable employees to form, join, or assist labor organizations, to provide for mandatory injunctions for unfair labor practices during organizing efforts and for other purposes". The act in its current form would require the National Labor Relations Board (NLRB) to certify a union after a majority of a company's workers have signed authorization cards. That is in sharp contrast to the current system which requires an election with secret ballots unless a company voluntarily agrees to recognize an organizing unit. While union organizers can request and organizing election once 30% of a company's workers sign union authorization cards, most unions do not seek elections until they have received union authorization cards for 65-70% of a company's employees, presumably because many employees who sign authorization cards ultimately decide not to vote for union representation. The Employee Free Choice Act will eliminate elections by secret ballet when union organizers collect signed union authorization cards from a majority of a company's employees.

In addition to virtually eliminating elections by secret ballot, the Act will require companies and newly certified unions to enter mediation followed by binding arbitration if they are unable to reach agreement on an initial contract after 90 days of negotiations. That may result in important issues regarding working conditions, wages and benefits being decided by an arbitrator with little knowledge of the needs of the employees or company.

Finally penalties for most unfair labor practices committed by employers during an organizing drive will be significantly increased. Even unintentional practices will be subject to staggering penalties. Interestingly, the act does not include any such enhanced penalties for unfair labor practices committed by union organizers.

Admittedly, the Employee Free Choice Act's future is uncertain, but there is nothing to be lost if employers begin preparing for the possibility, even the likelihood of its eventual passage. The best defense to union organizing activities likely to be spurred on by the Act will always be the creation of a positive work culture for all employees. That is where many companies focus their efforts, as they

should; however, what is most often overlooked is the education of employees regarding union organization and representation, including special education about the significance of signing authorization cards. If the Employee Free Choice Act is passed, by the time the company hears rumors regarding union organization, such education might be too late. Once 50% of the company's employees sign authorization cards, the union may seek immediate certification. It is usually very difficult for employers to challenge the validity of authorization cards unless the employer can show serious misconduct or intimidation.

All employees should be informed that a signed union authorization card provides a legal power of attorney authorizing a union to act as a collective bargaining agent for the employee in negotiation with an employer. Because authorization cards appear to be innocuous forms similar to magazine subscriptions, it is easy to anticipate employees can and will misinterpret their significance. Additionally, an employee who may feel pressured by fellow employees to sign an authorization card may not know or understand the significance of his or her actions.

Employees should be educated regarding the following points:

- Employees have the right under the National Labor Relations Act to sign or not to sign an authorization card and to support or not to support a union organizing drive.
- A signed union authorization card provides a legal power of attorney authorizing a union to act as a collective bargaining agent for the employee in negotiations with an employer.
- Once an employee signs an authorization card, the employee may not be able to get it back.
- Signing a card provides union personnel with personal information that may not be used to contact the employee at home.
- If, or when, the Employee Free Choice Act passes, signing a union authorization card may result in unionization of the company without a secret ballot election.
- If a union is certified, the union will have the right to act for all employees, whether or not the employees signed authorization cards.

Employers may avoid discussions with employees about unions for fear of running afoul of unfair labor practice laws. While seeking legal advice regarding particular questions is always recommended, an employer should keep some key points in mind while discussing unionization issues with employees.

The National Labor Relations Act (NLRA) makes it unlawful for an employer to do the following:

- Interfere with, restrain or coerce employees in the exercise of their right to engage in concerted or union activities. Concerted activity involves two or more employees acting in concert to protect a right in the Act, whether or not a union exists;
- To interfere with the formation or administration of a labor organization; and
- To discriminate or retaliate against employees for engaging in concerted or union activity, or from refraining from doing so.

The National Labor Relations Act protects employees' rights to engage in protected concerted activities with or without a union. Concerted activities are usually groups in which two or more employees acting together are attempting to improve working conditions, wages or benefits. Some examples of such activities include: two or more employees addressing their employer about improving their working conditions and pay; one employee speaking to his/her employer on behalf of him/herself and one or more co-worker about improving workplace conditions; or two or more employees discussing pay or other work-related issues with each other.

The National Labor Relations Act protects any individual employee's right to engage in union support, membership, and activities, however, it also protects an individual employee's right not to engage in union activities or in other protected, concerted activities. Employees should be educated

regarding their options. It would certainly be better to begin the process now, rather than wait until the Employee Free Choice Act is enacted and organizers are energized by their new organizing opportunities.

More information regarding the National Labor Relations Act and frequent questions asked regarding employee/ employer rights is available at www.nlrb.gov.

About the Author:
A shareholder at Wroten & Associates, Laura Sitar defends medical malpractice, employment, and elder abuse cases. She litigates cases on behalf of doctors, dentists and long-term care facilities involving all types of employment actions including sexual harassment, wrongful termination, retaliation and wage and hour claims. She also provides employment related risk management services to help clients avoid litigation.

Ms. Sitar became an attorney after a 15-year career in corporate management where she directed the human resource function of a 2000 employee, $100 million region. Since commencing a second career in law 10 years ago, she was a senior associate with a prestigious healthcare defense firm before joining Wroten & Associates, where she is a shareholder.

Ms. Sitar graduated cum laude from Tufts University, in Boston Massachusetts in 1979. She attended Western State University, College of Law, were she graduated summa cum laude and valedictorian of her class in 1998. While at Western State she clerked for Justice William Rylaarsdam on the California Court of Appeals and successfully argued a sexual harassment and retaliation claim before the Ninth Circuit Court of Appeals. She was a recipient of the 1998 Fellowship of the American Board of Trial Advocates. Ms. Sitar has been a member of the California State Bar since 1998 and is admitted to practice in the U.S. District Court for the Central District of California.