

WHAT'S GOING ON WITH THE EMPLOYEE FREE CHOICE ACT?

In our December 2008 edition of this Bulletin, we alerted you that one of President Obama's priorities would be passage of the Employee Free Choice Act, which he sponsored as a Senator. The EFCA has gotten a lot of publicity since President Obama's election. The key provisions of the EFCA are its elimination of secret ballot elections as the primary means for employees to select a union to represent them and mandatory arbitration to set the terms of a first contract between an employer and a newly-selected union. These provisions, if enacted into law, would bring about drastic changes for employers. In a nutshell, they would shift the balance of power in favor of organized labor.

The EFCA has lost some momentum since its formal introduction earlier this year. Senator Arlen Specter, who was the only Republican to vote in favor of the bill in 2007, announced his opposition to the EFCA a couple of weeks after it was introduced. Specter's change in position is a severe blow to the effort of supporters to garner 60 votes in the Senate, which is needed to overcome a Republican filibuster. Specter cited the recession as the main reason for his switch. If there is any silver lining for employers in the recent economic downturn, it may be that it has put the brakes on the effort to pass the EFCA.

Compromise legislation has been introduced, in particular a bill known as the National Labor Relations Modernization Act. On the positive side, this bill maintains the secret ballot election as the means for employees to choose a union. However, the NLRMA, like the EFCA, includes a mandatory arbitration provision and adds a requirement that unions be given "equal time" to advocate their position during a union election. In other words, if an employer conducts a meeting with its employees to express its opposition to a union, the employer must invite union representatives to come on site and hold similar meetings to convey the pro-union message. These provisions would be bad for employers.

At this time, we still believe that Congress is likely to pass, and President Obama will sign, some form of legislation that will make it easier for unions to organize and represent your employees. Therefore, we recommend that you conduct training for your employees, particularly managers and supervisors, that will inform them of the company's position on unions and the potential ramifications of signing a card indicating support of a union. Our labor and employment attorneys are available to advise and assist you with such training.

-- Trip Umbach

DISTINCTION WITH A DIFFERENCE:

U.S. SUPREME COURT REDEFINES PLAINTIFF'S BURDEN IN FEDERAL AGE DISCRIMINATION CASES

On June 18, 2009, the United States Supreme Court heralded a new era of analysis under the federal Age Discrimination in Employment Act (ADEA) with its decision in *Gross v. FBL Financial Services, Inc.* The sharply divided 5-4 decision establishes that plaintiffs pursuing claims of age discrimination will be held to the more stringent “but for” standard of proof than plaintiffs pursuing claims under other federal anti-discrimination statutes such as Title VII. Simply put, a plaintiff must now show by a preponderance of the evidence that age was the “but for” cause of the challenged adverse employment action. By contrast, under Title VII, if a plaintiff can prove that the protected status (race, gender, etc.) was a “motivating factor” in the adverse employment action, the plaintiff has established a *prima facie* case. The “motivating factor” analysis employed in Title VII cases was explicitly rejected by the Court in ADEA cases.

In addition, the Court further refined the complex “burden-shifting” framework which previously applied to ADEA claims. The Court held that under the ADEA the burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age. This is true even when a plaintiff has produced some evidence that age was one motivating factor in the employment decision. Thus, the burden-shifting framework applicable in mixed-motive Title VII cases no longer applies to age discrimination claims under the ADEA.

The Court’s reasoning stemmed primarily from the plain language of the ADEA, which differs from the language of Title VII. The Court noted that while Congress chose to amend Title VII in 1991 to incorporate “motivating factor” language into the statute, no similar amendment was made to the ADEA. As such, the text of the ADEA still reads that it is unlawful for an employer to discriminate against an individual “because of” age. As interpreted by the Court, “because of” age means that age was the “reason” upon which the employer made its decision.

The net effect of the Court’s holding in *Gross* is likely to make it more difficult for plaintiffs to prove age discrimination claims under the ADEA. Not only do plaintiffs now have to meet a more exacting “but for” standard, they also must carry the burden of persuasion in all age cases, including mixed motive cases. The high hurdles a plaintiff must meet under the federal ADEA may lead plaintiffs to seek relief under state age statutes instead.

The *Gross* case does not specifically prescribe how state courts will interpret their parallel age discrimination statutes. However, because the Alabama Age Discrimination in Employment Act (AADEA) contains the same “because of” language found in the federal statute, a fair argument exists that the holdings of *Gross* should apply to the AADEA as well. Unfortunately, before the courts in Alabama have a chance to make this determination, Congress may attempt to set forth legislation to modify the language in the ADEA, much like it did with Title VII in 1991. Only time will tell how Congress perceives the *Gross* decision and whether it will ultimately elect to reconcile the federal anti-discrimination statutes by broadening the language of the ADEA.

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