The Perfect Storm
Navigating Through the Turbulence of Risk and Change

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Hyatt Lost Pines Resort
Bastrop, Texas
Labor Law Changes: Impact on Engineering and Construction

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Steve Hoech  
Sr. VP Employee Relations  
Zachry Industrial, Inc.
“After making millions of phone calls and knocking on millions of doors [during the 2008 elections], the nation’s labor unions have begun a new campaign: to get the new president and Congress to pass legislation that would make it easier for workers to unionize.”

November 8, 2008, New York Times
Who will be driving the new phase of labor policy?
Hilda Solis —
Secretary of Labor

- “We’re **thrilled** at the prospect of having Representative Hilda Solis as our nation’s next labor secretary”
  
  *John J. Sweeney,*
  
  *president of the AFL-CIO*

- “Sided with the AFL-CIO in 97% of the votes that she has cast on the Hill”
  
  *U.S. Chamber of Commerce*
“Make no mistake about it: The Department of Labor is back in the enforcement business.”

Secretary Solis’ Statement at the 2009 American Society of Safety Engineers’ Annual Conference
U.S. Department of Labor

- **2010 DOL Budget Increases:**
  - Overall, DOL’s budget - $400 million increase
  - Promise to hire 670 new investigators
    - **OSHA** - $51 million increase – plan to hire 160 new in enforcement staff
    - **Wage & Hour Division** - $35 million increase – plan to hire 250 new field investigators.
    - **OFCCP** - $27 million increase – plan to add 213 new employees
Wilma Liebman – Chair

“America’s working men and women will finally have the fair and committed leader they deserve….What a refreshing change.”

John Sweeney
AFL-CIO President

- Teamsters Counsel (1974-1980)
- Bricklayers and Allied Craftsmen Union Counsel (1990-1993)
Union Membership
Total PRIVATE Workforce

[Bar chart showing the percentage of union membership in the total private workforce from 1983 to 2008. The percentage decreases over the years, starting at 16.8% in 1983 and ending at 7.6% in 2008.]
TOTAL CONSTRUCTION EMPLOYMENT
( Employment In Thousands)

“EFCA”
(Employee Free Choice Act)
What does the EFCA do?

It would amend the National Labor Relations Act in 3 crucial respects:

1. Streamline the union certification process (Card Check)
2. Expedite Initial Collective Bargaining (Mandatory First Contract)
3. Stricter enforcement of violations of the National Labor Relations Act
The “New” EFCA

What does the EFCA “alternative” do?

Most Likely Compromise Legislation

1. Replaces “Card Check” with “Quickie Elections”:
   • Quickie elections
   • Card check only for a “super majority” (e.g. 60% or 70%)
2. Grants union access to employees at work
3. Bans employer “Captive Audience Meetings”
4. Retains “Mandatory First Contract”
5. Retains stricter enforcement for unfair labor practices and bad faith bargaining delays
The “New” EFCA

Quickie Elections

- Elections must be held within 5-10 days of the filing of a petition
  - Replaces the current 40-day time frame
  - Gives companies hardly any time to develop strategy and deliver the company’s message
The “New” EFCA

Union Access

- Unions have access to employees on company property
  - Opens the door for confrontation and disruption
  - Potential for more frequent legal challenges
The “New” EFCA

Ban on Captive Audience Meetings

- Substantially limits companies’ ability to message to employees
  - Limits the important impact of “face time” with employees
  - Forces companies to use less effective, more expensive and more impersonal communication tools
The “New” EFCA

Bargaining Obligations

- Bargaining must commence within 10 days of written request by the Union
  - “Duty to bargain in good faith” supplemented by obligation to “make every reasonable effort to conclude and sign a collective bargaining agreement.”
The “New” EFCA

Mandatory Arbitration

- MANDATORY, binding interest arbitration of first union contracts after 90 days bargaining and 30 days mediation
- Result: Government-imposed wages, benefits, and other terms & conditions of employment for 2 years
The “New” EFCA

Problems Presented By Mandatory Arbitration

• Provides union excuse for failure to deliver on promises
• Not likely to benefit employers
  – Terms could put company at competitive disadvantage
• Guarantees contract
  – Good faith bargaining no longer the standard
  – Effectively extends certification bar
The “New” EFCA

Arbitrator’s Power?

- Dues check-off
- Union security
- Successor language
- Limit sub-contracting
- Overtime after 8 hours
- Limitations on work schedules, scheduling of overtime
- Arbitration clause – “final” (no appeal)
- Pension Plan (Defined Benefit)
- 401(k), increased match
- Health Insurance – impose union plan?
- Shift differential amounts
- Grievance time paid for by Company
- Superseniority for Stewards
- Much more…
The “New” EFCA

Stricter Enforcement Against Employers

- Priority Investigation
  - Mandatory Injunctions

- Back Pay plus liquidated damages of **Double** back pay (triple back pay)

- Plus Civil Penalties of $20,000 for willful or repeat violations
The “New” EFCA

Stricter Enforcement Against Employers

- Will increase the number of charges filed
  - May make doing so a campaign tactic

- Will distract employer with obligation to expedite response and to defend injunction action
  - Risk reinstatement order from federal court

- Will incite frivolous claims

- Will make charges more difficult and costly to settle
“RESPECT Act”
(Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers Act)
“RESPECT ACT”

- Significantly amends NLRA Section 2(11) definition of “supervisor”
  - Requires that employee spend majority of time in a supervisory capacity
  - Deletes the terms “assign” and “responsibly to direct” from definition of supervisor under the Act
Supervisor Defined

The term “supervisor” means an individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.
Why is supervisor classification important?

- Legal liability
- Scope of unit
- Early detection of problems and activity
- Communication
- Shaping employee perceptions
  - Fair treatment
  - Management credibility
PROACTIVE STEPS TO START NOW
Proactive Steps

- Review and establish proper evidence to create the “optimal unit”

- Review the supervisory structure and revise as necessary to properly exclude “supervisors” from the employee unit
Proactive Steps

- Conduct periodic surveys to detect and resolve employee relations issues

- Conduct vulnerability assessments to gauge the company’s exposure to unionization at “hot spots”

- Conduct legal audits to ensure compliance with EEO, FLSA, OSHA and other legal standards
Proactive Steps

- Establish appropriate policies to limit exposure to outside union organizing efforts and internal use of company email and resources for organizing purposes

- Assess campaign resources (management, PR, etc.)

- Establish meaningful community relationships

- Establish a culture of fairness from the top down
Proactive Steps

- Maximize employee involvement in workplace decisions, hiring and termination reviews
- Establish a written positive employee relations program with assignments, calendared dates of execution and accountability
- Communicate accomplishments
Thank You!