



Wimberly Lawson
Scale Wright & Daves, PLLC

Attorneys & Counselors at Law

Middle Tennessee Society of Human Resources Managers

August 6, 2009

Presented by Gary W. Wright
www.wimberlylawson.com

Knoxville Morristown Cookeville Nashville

1955 35% of American Workforce
Organized

2009 8% of American Workforce
Organized



... Just 8%?

WHY WORRY?



... because we have been here before

1900 - 8%

2009 - 8%

- But between 1900 and 1955 there was a 27% increase
- And from 1935 to 1955 there was the most dynamic period of union organizing in the nation's history

WHAT HAPPENED?



1900

8%

2009

8%



1900

8%

- Shift in the economy

2009

8%



1900

2009

8%

8%

- Shift in the economy
- Union revolt



1900

2009

8%

8%

- Shift in the economy
- Union revolt
- Depression



1900

2009

8%

8%

- Shift in the economy
- Union revolt
- Depression
- New labor legislation



1900

2009

8%

8%

- Shift in the economy
- Union revolt
- Depression
- New labor legislation

√



1900

2009

8%

8%

- Shift in the economy
- Union revolt
- Depression
- New labor legislation

√

√



1900

2009

8%

8%

- Shift in the economy
- Union revolt
- Depression
- New labor legislation

√

√

√



1900

2009

8%

8%

- | | |
|-------------------------|---|
| - Shift in the economy | √ |
| - Union revolt | √ |
| - Depression | √ |
| - New labor legislation | √ |



The most radical legislation since the passage of the National Labor Relations Act in 1935.



- Passed the House of Representatives 241 to 185
- Passed the Senate 51 to 48 (but not by the margin required to evoke cloture).



Current Legal Requirements for Organizing

- Minimum Showing of Interest – 30%
- Secret Ballot Election – Majority
- Negotiations – Good Faith



Proposed Change - EFCA

- Showing of Interest – Majority
- Automatic Recognition - No election
- Negotiations – then arbitration



- 1) Requires the National Labor Relations Board to review petitions filed by employees for the purpose of creating a labor organization for collective bargaining, and to determine whether or not a majority of employees have signed the petition. Sec. 2(a)(6)



2) Requires the National Labor Relations Board to **not** hold an election, but to certify the bargaining representative if a majority of employees have signed the petition. Sec. 2(a)(6)



3) Requires the parties to begin bargaining within 10 days of the receipt of the petition, or within a longer time frame acknowledged by both parties. Sec. 3(h)(1)



4) States that if the parties are unable to agree in the bargaining after 90 days, either party may contact the Federal Mediation and Conciliation Service, which will mediate and attempt to facilitate an agreement. Sec. 3(h)(2)



5) States that if an agreement has not been reached within 30 days of the request for mediation, the Federal Mediation and Conciliation Service may refer the matter to an arbitration board which in turn will render a decision binding on both parties for two years, unless both parties agree to amend the terms within that two years. Sec. 3(h)(3)



6) Provides civil penalties for employers who engage in unfair labor practices in violation of the National Labor Relations Act to affect the formation of a union including back pay and liquidated damages for employees, and a penalty to be determined by the National Labor Relations Board not to exceed \$20,000 per infraction. Sec. 4(b)(1)(2)



NLRA AFTER EFCA

UNION CERTIFICATION

- Mandatory certification based *solely* on majority of employees signing cards or petition

CONTRACT NEGOTIATIONS

- 90 days to negotiate a first contract
- 30 days of FMCS mediation
- Mandatory interest arbitration for a two-year contract

EMPLOYER PENALTIES

- Treble back pay
- \$20,000 civil damages
- Injunctions



IMPACT OF EFCA
Employees would lose...

- Secret ballot election
- Access to information *both* sides before committing
- Input on certification (employees who are not approached to sign cards get **no** input at all)
- Ratification vote on arbitrated contracts
- Chance to decertify the union for at least 28 months
- Right to strike for better contract



IMPACT OF EFCA
On Employers...

- Little or no communication with employees about union
- No opportunity to truly bargain over first contract
- Possible arbitrator-imposed labor costs, productivity standards, multi-employer benefit funds
- Mandates NLRB to seek injunctions in discharge cases during organizing
- Treble back pay and interest
- Up to \$20,000 civil penalty per violation – even for §8(a)(1) – discourages any communication with employees at all



IMPLICATIONS OF EFCA
Likely outcomes...

- Vast increase in union market share
- Huge increase in union dues collected
- Labor political war chest greatly expanded
- Effective elimination of secret ballot elections
- Silence employers – stifle employees
- Guarantee a first contract
- Cement the union's position



IMPLICATIONS OF EFCA
Likely outcomes (cont'd)...

- Increased union coercion and employee peer pressure to secure signed union cards
- Bounty programs for securing employee signatures
- *In terroram* effect of ULPs: employer silence, non-enforcement of work rules
- Excessive contract demands by unions
- Employers unable to exercise bargaining power
- No incentive for unions to bargain: 120 days of posturing, pre-arbitration



IMPLICATIONS OF EFCA
Likely outcomes (cont'd)...

- Cottage industry for attorneys and economists
- Contracts written by unaccountable arbitrators
- Arbitrator decides employer's ability to compete
- One size-fits-all contracts
- Arbitrators likely to impose risky underfunded multi-employer benefit plans
- One contract will serve as a floor for the next: Davis-Bacon II
- Effective elimination of the right to strike



What to do NOW:

- 1) Make known and educate your managers and employees about the company's desire to remain union free.
- 2) Understand and be able to articulate why your company wants to remain union free.
- 3) Develop employee-involvement processes whereby employees have real opportunities to understand and contribute to company decision making.
- 4) Develop the leadership and communication skills of your front line managers.
- 5) Continually explain the significance of signing union authorization cards to both your managers and your employees.
- 6) Train your managers to be able to identify the early signs of union organizing, and the need to respond appropriately immediately.



No discussion

No understanding



**Educate yourself
Educate your managers
Educate your employees
and
Call your representatives**



**RANK THESE JOB FACTORS FROM
MOST IMPORTANT TO LEAST
IMPORTANT**

- Appreciation of work
- Feeling "in" on things
- Help in personal problems
- Job security
- Wages
- Interesting work
- Promotion, growth
- Personal loyalty
- Working conditions
- Tactful discipline



THIS IS HOW EMPLOYEES RANK THESE FACTORS:

1. Appreciation of work
2. Feeling "in" on things
3. Help in personal problems
4. Job security
5. Wages
6. Interesting work
7. Promotion, growth
8. Personal loyalty
9. Working conditions
10. Tactful discipline



THIS IS HOW YOU THINK EMPLOYEES RANK THESE FACTORS:

1. Good wages
2. Job security
3. Promotion and growth opportunities
4. Good working conditions
5. Interesting work
6. Personal loyalty to workers
7. Tactful discipline
8. Appreciation for work
9. Help with personal problems
10. Feeling "in" on things



Common Failings of Management

- Poor Supervision
- Inconsistent Treatment
- Verbal Abuse
- Lack of Written Rules
- Lack of Recognition
- Poor Benefits and Compensation
- Failure to Use Seniority
- Lack of Grievance Procedure
- Lack of Job Security



What You Can Expect With A Union

- Decisions “second-guessed”
- Longer hours-grievance meetings
- Performing jobs during strikes
- Rigid work rules on seniority, job classifications
- Union gets credit for wages and benefits
- Decline in influence



What You Can Expect With A Union (cont'd)

- Inability to deal with employees individually
- Inability to perform work in emergency
- Confrontations with job steward
- Difficulty administering discipline
- Production standards



Recognizing Unionization Efforts

- Unusual number of policy questions
- Employees out of work area
- Avoiding supervisors
- Argumentative questions in group meetings
- Turnover increases
- Union material on bulletin boards, restrooms
- Union literature



Recognizing Unionization Efforts (cont'd)

- Employees complain as a group
- Employee petition circulated
- Union vocabulary terms
- Strangers on premises
- Employees resist work outside department
- Sudden changes in job security, policies, etc.



Principles of Union-Free Management

- Pay competitive wages and benefits
- Ensure fair internal wage rates
- Listen and respond to employee complaints
- Enforce policies consistently and discharge
- Promote diversity
- Treat employees with respect



Principles of Union-Free Management (cont'd)

- Promote job security
- Effective complaint procedures
- No solicitation rule
- Use overtime fairly
- Reward and recognition
- Social activities
- Quality of life



Top 10 Things You Can Do

1. Tell employees the Company prefers to deal with them individually
2. Tell employees the disadvantages of belonging to union – strikes, dues, fines
3. Tell employees the union can't guarantee them anything
4. Tell employees your own bad experiences with unions
5. Tell employees about language in union contracts – super-seniority, check-off
6. Tell employees they don't have to sign authorization card
7. Tell employees they don't have to talk to organizers at their homes
8. Tell employees that without a union, they can bring problems directly to you
9. Tell employees there is no guarantee of job security
10. Anything that doesn't involve "T.I.P.S."



Top 10 Things You Cannot Do

1. Promise pay or benefit increase if union is defeated
2. Threaten job loss or reduction of pay or benefits if union comes in
3. Threaten to close, relocate, or reduce operations if union comes in
4. Spy on employee activities
5. Show favoritism to employees not supporting union
6. Select union supporters for layoff
7. Ask employees if they have signed an authorization card
8. Visit homes of employees for purpose of persuading them
9. Cannot interview employees individually or in groups about union activity
10. Anything that involves "T.I.P.S."



Top 10 Employee Questions

1. "Won't we automatically get more pay and benefits with a union?"
– Answer: "All union proposals are subject to negotiations"
2. "Won't the company have to sign a contract if we have a union?"
– Answer: "The Company only has a duty to bargain in good faith"
3. "Won't the company have to get rid of bad supervisors?"
– Answer: "The union can't tell the Company how to run its business"
4. "If we figure out we don't like the union, can't we get rid of them?"
– Answer: "Not if there's a contract in place, which could be for three years"
5. "Why is the Company against the union?"
– Answer: "Not in the best interests of the employees or the company. For example, strikes, profitability, prefer to deal directly with employees".



Top 10 Employee Questions

6. "Does it cost money to belong to the union?"
 - Answer: "Yes, dues out of every paycheck".
7. "If there is a strike, couldn't I still work?"
 - Answer: "Yes, but the union could legally fine you".
8. "If all the employees went on strike, could the company continue to operate?"
 - Answer: "Absolutely, the company can hire replacement workers".
9. "Don't employees on strike get strike benefits from the union?"
 - Answer: "Maybe...you'll have to ask the union how much that is. It probably won't replace your wages, and you don't get unemployment benefits from the state.
10. "Why doesn't the Company make promises like the union does?"
 - Answer: "Because the law allows the union to make promises, but doesn't allow the company to make promises".



Wimberly Lawson Seale Wright & Daves, PLLC

Presented by Gary W. Wright
www.wimberlylawson.com


