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LABOR ORGANIZING LAW AND SMALL BUSINESS

The long awaited Employee Free Choice Act has finally been introduced. The bill, often referred to as the "card check" union authorization bill, may have set the record for the most lobbying dollars spent before introduction – by proponents and opponents. Representative George Miller (D-CA), Chairman of the House Education and Labor Committee introduced H.R. 1409, the Employee Free Choice Act. Senator Ted Kennedy (D-MA), Chairman of the Senate Health, Education, Labor and Pensions Committee, introduced S 560, the companion bill in the Senate. President Obama made passage of this legislation one his campaign promises.

Under current law, individuals interested in organizing a union must file a petition with the National Labor Relations Board (NLRB). This petition must demonstrate that 30 percent of potential union members want to have a union organizing election. Generally, the potential union members sign an authorization card indicating their desire to join a union. Importantly, within 45 days of receiving the petition, the NLRB then will conduct a secret ballot election to let employees decide whether they want to join the union. The secret ballot election allows employees to choose in private whether or not they wish to join the union.

Under the proposed legislation, if an organizing campaign can collect signed authorization cards or a petition from more than 50 percent of the employees (this is often referred to as the "50 plus one" rule as the cards must collected from 50 percent of the employees plus one more employee), an employer would be required to recognize the union. There would be no secret ballot election in such a case.

The legislation also provides for the mediation and binding arbitration of the initial collective bargaining agreement following any recognition of the union if the parties cannot agree on a first contract.

I have been asked many times does this apply to small businesses?

The National Labor Relations Act is the basic law from which the NLRB derives its authority. The authority is very broad; generally, the NLRB has jurisdiction over any enterprise whose operation affects commerce, with "commerce" meaning interstate commerce but with "affects" interpreted to include indirect activity. There are some specific exclusions for types of employees, most notably agricultural laborers, but there is no exclusion based on the number of employees.

The NRLB has the discretion ***not*** to assert jurisdiction over enterprises. The NLRB's requirements for exercising its power or jurisdiction are called "jurisdictional standards." These standards are based on the yearly amount of business done by the enterprise, or on the yearly amount of its sales or of its purchases. They are stated in terms of total dollar volume of business and are different for different kinds of enterprises. Most of the Board's current standards were set on July 1, 1990. The ceilings on these exclusions are very low. The two most notable for small business are:

Nonretail business: Direct sales of goods to consumers in other States, or indirect sales through others (called outflow), of at least $50,000 a year; or direct purchases of goods from suppliers in other States, or indirect purchases through others

(called inflow), of at least $50,000 a year.

Retail enterprises: At least $500,000 total annual volume of business.

There are separate "exclusion" amounts for several specific categories such as hotels, motels and residential apartment houses, or newspapers. More information on specific exclusions can be found at www.nlrb.gov.

Since the exclusions are discretionary, I would think if someone was looking for a way to take small business' dog out of this hunt, it would be to make the exclusions part of the statute (e.g. mandatory), raise them to realistic current day levels (I don't know exactly where I would set those but we do have some $5 million thresholds in the tax code; the net operating loss temporary stimulus was $15 million) and indexing them for inflation. It would seem to me number of employees might be an alternative, but using the gross receipts standard does remove issues such as whether a company used independent contractors, whether part time employees count and the numerous other employee definition issues that come into play in various labor laws such as equal employment opportunity law.

Recently, House Speaker Nancy Pelosi (D-CA) said to the Senate "You first." A month ago, Senate Majority Leader Harry Reid (D-NV) had said: "summertime." I have not seen any indication that he has changed his mind. Certainly, nothing is going to happen until the Minnesota seat is filled.

PATENTS

Congress is going to try again to pass a major patent system reform bill. Bipartisan legislation has been introduced in both chambers. Senator Patrick Leahy (D-VT), Chairman of the Senate Judiciary Committee, along with Senator Orrin Hatch (R-UT) have introduced S. 515 and Representative John Conyers (D-MI), Chairman of the House Judiciary Committee, along with Representative Lamar Smith (R-TX), has introduced H.R. 1260. This has been the battle of the titans, with various industry sectors (e.g. technology on one side, pharmaceuticals on the other) squaring off against each other. The biggest issue for the big players is whether damages in infringement cases are out of proportion to the value of the patent to the business use.

Once upon a time, small business did participate in patent policy debates. While the mantle of small business is still invoked by some, I am not sure there is consensus anymore within the small business community on patent policy.

The basic elements of the Senate bill would:

*Establish a first-inventor-to-file rule for U.S. patent law, replacing the first-to-invent rule for determining which of two inventors may obtain a patent for inventing the same thing. Most of the world uses the first to file rule.

*Change the standard for willful infringement

*Establish a new procedure for a post grant review that can be requested within 12 months after the date of patent grant. The 12-month period, a so-called "first window," would create an opportunity for members of the public to submit information and present arguments that may not have been available to the Patent Office during examination.

*Require the court to conduct an analysis to ensure that, when a "reasonable royalty" is the award, it reflects the economic value of the patent's "specific contribution over the prior art", i.e. the contribution the invention makes to promoting science and the useful arts.