

Message from Our Boston Office

We're again focusing on helping clients and friends weather challenging economic times.

Jonathan Kane and Amy McAndrew outline the proposed Employee Free Choice Act, which could greatly simplify union organizing, and relate what employers must do to prepare.

Pepper webinars and podcasts always help keep you on the right track. This time, we consider how clean-tech companies can survive and even prosper now, and how companies can trim their real estate costs in down markets.

In other news, we direct readers to Pepper's "Economic Stimulus Resource Center" on www.pepperlaw.com; in Boston, we welcome P. Thao Le to partnership and Courtney Worcester to of counsel status; and we note that Pepper partner Matt Gilman will be a speaker at the 2009 Babson Business Plan Competitions in April.

As always, we welcome your comments and questions about this newsletter, and suggestions for future issues.

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Are You Prepared for the Employee Free Choice Act?

By now, most employers have heard of the Employee Free Choice Act (EFCA), the proposed legislation that would make it dramatically easier for unions to organize workers and obtain favorable terms in a first collective bargaining agreement. Under the National Labor Relations Act (NLRA) as it currently stands, unions organize workers through the private election system and then bargain collectively with employers. With the secret ballot system, employees can decide in the privacy of a voting booth whether they want to be represented by a union. As it has been proposed, EFCA would change that by allowing the National Labor Relations Board (NLRB) to certify a union as an employee unit's exclusive bargaining representative after a union convinces a majority of employees to sign union authorization cards or a petition. What's more, EFCA would allow the union to demand that the employer participate in mandatory arbitration for a first contract, which would allow a third party to dictate terms of the agreement and potentially create disastrous economic consequences.

EFCA did not make it through Congress when it was last proposed in 2008. At that time, the legislation overwhelmingly passed the House, and it is expected that it would do so again. In 2008, 52 senators voted in favor of the EFCA, which was not enough to get the legislation onto the floor of the Senate for a vote. However, the union movement targeted Senate races last fall in an attempt to have the requisite 60 votes to overcome a filibuster. While it still is not entirely clear if all of the Senate votes are there, it is clear that this legislation will not go down without a fight. If EFCA makes it through Congress, President Obama has vowed to sign the bill.

Management's first priority is to stop the legislation. Because of where things stand now with the proposal, that may not be possible. If passed, the EFCA will represent the most dramatic change in labor relations since the passage of the Wagner Act in 1935, and will make it extraordinarily easy for unions to organize in both the "traditional" sectors

and in many other sectors of the service economy. Is it time to panic? Of course not, but it is time to take action. The ease with which a union could organize through a petition or card-signing campaign¹ makes a thorough re-evaluation of company policies, procedures and practices essential. There are many prudent and cost-efficient steps that employers can take right now to positively affect their workplaces.

When a company knows that it is being targeted for unionization, it should immediately take steps to ensure a healthy environment for relations with employees. These steps should start with an accurate review and assessment of policies and practices, compensation, management training, communications systems and problem-solving procedures. An internal self-serving review is not only a waste of time, but can be counterproductive in its failure to identify real problems and their causes. External reviews are much more accurate and do not cover up blemishes. Once problems are identified, they must be corrected. In addition, auditing and survey mechanisms need to be put in place to ensure that the employer's policies, practices and procedures continue to be assessed and corrected on an ongoing basis.

Cooperative or collaborative committees or groups comprised of management and employees also can promote positive employee relations. But if not organized correctly, such groups or committees could violate the company-dominated union provision of Section 8(a)(2) of the National Labor Relations Act. Competent labor relations counsel can put in place the most effective cooperating committees possible, while avoiding the National Labor Relations Act prohibitions. The committees are effective; unions so strongly oppose them because, if used well, continually and legally, the committees can eliminate the unions' element of surprise, as the committees – not the unions – serve as an excellent “early warning” system that will alert the company of employee unrest.

Further, companies in multiple locations should have their labor counsel review all the sites to determine which of them would be an “appropriate unit” under the National Labor Relations Act. It may be possible to take action to ensure that the “only appropriate unit” consists of multiple sites. Even if a petition or cards are signed at one site without the employer's knowledge, it would be extremely difficult for a union to extend that successful organizing to another site or, in the alternative, to organize multiple sites successfully from the outset. Employers should not wait to undertake this type of review.

Clean Tech Webinar Series: Thriving in Tough Times

Today's financial and economic landscape presents enormous challenges to clean technology companies. Join Pepper Hamilton LLP, KPMG LLP and Green-World Capital LLC for a special series of webinars where you will learn what you and your firm can do to thrive in this dynamic new environment.

April 2, 2009: M&A
12:00 -1:00 pm EDT

Visit the webinar section of www.pepperlaw.com to register for this session and to listen to the recordings of the other webinars in this special series that focused on “The Stimulus Plan and Clean Tech Under Obama,” “Current Financing Strategies for Public Companies” and “Project-Based Financing.”

An enormous amount of money and political effort is involved in supporting the proposed legislation. It is important to take prudent and cost-effective steps now to be prepared.

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Endnotes

- 1 Think, for example, about employees who do not want a union to represent their interests but may sign an authorization card in the face of subtle or even explicit union intimidation since they will not be permitted to make their decision in secret.

Pepper Hamilton Elects Three Associates to Partnership and Four to Of Counsel

Pepper Hamilton LLP announced that three associates have been elected to the partnership and four have been elected of counsel, effective January 1, 2009. All were promoted from within the firm.

The three new partners are:

- **P. Thao Le** – Boston, Corporate and Securities
- Isla L. Long – Philadelphia, Commercial Insurance and Reinsurance
- Daniel W. McDonough – Berwyn, Pa., Corporate and Securities

The four new of counsel are:

- Elizabeth S. Campbell – Philadelphia, Commercial Litigation
- Lance S. Jacobs – Washington, D.C., Tax
- Amy G. McAndrew – Berwyn, Pa., Labor and Employment
- **Courtney Worcester** – Boston, Commercial Litigation

P. Thao Le is a member of Pepper Hamilton's Corporate and Securities Practice Group and concentrates her practice on mergers and acquisitions, private equity transactions, venture capital investments, private fund formation and general corporate matters. She has represented financial investors and operating companies in a variety of transactions, including leveraged buyouts, mergers, stock and asset purchases, and recapitalizations. She also has represented funds and investors in fund formation matters and their investments. A graduate of the University of Houston (B.S. 1994) and South Texas College of Law (J.D. 1999), she joined Pepper in 1999.

Courtney Worcester is a member of Pepper Hamilton's Commercial Litigation Practice Group and concentrates her practice on corporate governance and shareholder litigation, including associated federal securities law issues. She has defended companies, financial institutions and individuals in securities and consumer class actions, and has represented clients in litigation matters ranging from contractual disputes to the protection of trade secrets and other business torts. A graduate of Bowdoin College (A.B. 1996) and Boston University School of Law (J.D. 1999), she joined Pepper in 2008.



Peppercast: Eight Steps to Finding Real Estate Savings in a Tough Economy

The United States is in the midst of the worst fiscal downturn in decades. With anticipated revenues declining and expenses increasing, businesses are bracing for the impact, and savvy executives are looking at their expenses and determining ways to cut back. The real estate a company owns or rents is often one of its biggest expenses.

Pepper partners Norman B. Berlin and Dusty Elias Kirk are co-chairs of the firm's Real Estate Practice Group. In this podcast, Mr. Berlin and Ms. Kirk discuss eight steps companies can use to maximize the investment in real estate and reduce expenses and slow spending this year and next.

Listen today by visiting the Real Estate or Sustainability and Climate Change sections of Pepper's podcenter at www.pepperpodcasts.com.

Economic Stimulus Resource Center

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (ARRA or Recovery Act), which contained \$819 billion spending provisions and tax incentives that are intended to help revitalize the U.S. economy. The ARRA legislation affects almost every department and agency of the federal government – and virtually all taxpayers. To help inform our clients, our lawyers are producing a series of articles, webinars and other presentations that examine various aspects of the legislation.

Visit Pepper's Economic Stimulus Resource Center at www.pepperlaw.com.

Upcoming Event

- *2009 Babson Business Plan Competitions*

April 16, 2009
Babson College
Babson Park, Massachusetts

Pepper Hamilton is the marquee sponsor of this annual event and Pepper partner **Matthew S. Gilman** will be a speaker.

Visit <http://www3.babson.edu/Events/studentventuring/> for more information.

Pepper Hamilton LLP

Attorneys at Law

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