

message from partner in charge

In this issue, we again focus on ways clients and friends can weather challenging economic times.

Jonathan Kane and Amy McAndrew outline the push-and-pull surrounding the proposed Employee Free Choice Act, which could greatly simplify union organizing in workplaces. They relate what the act might do and how employers must prepare.

Running afoul of the Foreign Corrupt Practices Act can cost companies and entrepreneurs big. Gregory Paw and Stanley Soya summarize major surveys of business execs about their perceptions of the ethical pitfalls that may come with doing business overseas. It's a don't-miss read for those already abroad and those expanding into other nations.

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

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.”

successfully from the outset. Employers should not wait to undertake this type of review.

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.

Compliance Risks in Overseas Business Highlighted by Business Executive Surveys

Company executives navigating the challenges of international business have taken note of high-profile prosecutions brought recently under the Foreign Corrupt Practices Act (FCPA), and of the risks from the actions of business partners in foreign markets. In addition to the lessons of these prosecutions, two recent business surveys provide guidance in assessing risks and implementing effective compliance plans.

Understanding the risks related to international business partners and joint ventures remains an area for compliance review under the FCPA, as actions of partners in foreign lands can produce FCPA liability in the United States. The Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have made clear that companies cannot use business partners to make payments prohibited under the FCPA. Turning a blind eye to such practices is not an option, as enforcement authorities look for such warning signs of improper conduct.

KPMG Survey

KPMG's 2008 Anti-Bribery and Anti-Corruption Survey demonstrates the difficulties in ensuring that business partners comply with the FCPA. Almost 75 percent of business executives surveyed in KPMG's study said their

companies were not doing enough to prevent business partners from violating the FCPA. The survey indicated that 84 percent of the companies had FCPA/anti-corruption policies — what the DOJ and SEC would characterize as a program on paper only. More than 50 percent of the executives reported that their companies did not have protocols for FCPA risk assessment or monitoring, and 33 percent did not provide any training. Executives said that performing due diligence on the actions of foreign agents and third parties were particularly difficult and daunting tasks. Executives expressed reluctance to ask international business partners to certify their business practices, or to audit these partners, even when such audits are contractually permitted.

The risks, however, of not reviewing business partners' practices are great. The KPMG survey makes clear the importance of tackling these issues to avoid FCPA liability. Conducting due diligence on international business partners is essential. Requiring them to abide by the FCPA and international anti-corruption principles and to provide documentation of expenses are important components of an anti-corruption program, as are checks to ensure a partner's compliance. Even having compliance documents translated into the languages of countries where business partners operate is helpful, the KPMG study noted.



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.

Transparency International Survey

Another recent survey is a reminder to international businesses of the importance of making realistic risk assessments. Transparency International's 2008 Bribe Payers Index surveyed executives to gauge the perceived frequency that international businesses engaged in bribery.

The survey placed countries into clusters, with businesses from Australia, Belgium, Canada, Switzerland and the United Kingdom being in the cluster least likely to bribe. The United States was in the next cluster, along with France, Singapore and Spain. The lowest cluster, in which companies are most likely to bribe, included China, India, Mexico and Russia. Among other things, this survey helps companies identify countries where potential business partners may have more extensive compliance issues.

Similar lessons can be drawn from Transparency International's index of perceived corruption by industry. Executives reported higher perceptions of corruption in industries such as public work contracts and construction, oil and gas, and real estate property and development. These risks also are reflected in recent enforcement actions brought by U.S. officials.

While these perception indexes do not measure risk with scientific certainty, risk perception is important in determining the compliance measures a company should employ.

Companies conducting business internationally can work with the experienced professionals at Pepper Hamilton to address FCPA risks and other legal issues to help minimize the chances of liability.

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The Capital Roundtable

- **Succeeding at Fundraising for PE, VC and Mezz Firms: How to Win at Fundraising Despite the Funding Famine - Where to Go, Who to See, What Not to Say**

MasterClass - Thursday, May 7, 2009
8:00 a.m. - 4:30 p.m. EDT
Julia D. Corelli and Michael B. Staebler

- **Special Half-Day Pre-MasterClass Workshops**

Wednesday, May 6, 2009
2:00 p.m. - 5:00 p.m.

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 worth of 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.

Pepper Hamilton LLP

Attorneys at Law

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