

message from partner in charge

In this issue, 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. Our Clean Tech Webinar Series continues, as we consider how clean-tech companies can survive and even prosper now. And Mike Rule's Peppercast discusses battles over trademarks in these economic times.

In other news, we direct readers to Pepper's "Economic Stimulus Resource Center" on www.pepperlaw.com, and we welcome commercial litigator Salvatore Picariello as of counsel to Pepper in Orange County.

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 is 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.

Salvatore Picariello, Commercial Litigator, Joins Pepper Hamilton in Orange County

Salvatore Picariello, a litigator experienced in complex commercial matters and class actions, has joined Pepper Hamilton as of counsel in its Orange County, California, office.

Mr. Picariello has litigated a wide range of business disputes in state and federal courts, including claims of unfair competition, trade secret misappropriation, bad faith, breach of fiduciary duty, breach of contract, RICO violations and fraud. He also has substantial experience representing clients in the areas of property torts, false advertising and securities matters.

His experience extends into labor and employment matters, including wage-and-hour class actions and claims for wrongful discharge, employment discrimination and related torts. Earlier in his career, he was an investigator for the Occupational Safety and Health Administration.

“Sal Picariello is a valuable addition to Pepper’s on-the-ground litigation team in California,” said **Sharon R. Klein**, the partner in charge of the firm’s Orange County office. “His experience in many aspects of commercial and

employment litigation will be an asset to our litigation and corporate clients here, and his presence will enhance our opportunities to serve additional clients in a variety of matters.”

Mr. Picariello joined Pepper Hamilton from Morgan, Lewis & Bockius LLP in Irvine.



Mr. Picariello is a graduate of Seton Hall University School of Law (J.D. 1995), San Diego State University (M.A. 1989) and Occidental College (A.B. 1987). After law school, he served as a law clerk to the Honorable Garrett E. Brown, Jr. of the U.S. District Court for the District of New Jersey (1995 to 1997) and the Honorable Robert E. Cowen of the U.S. Court of Appeals for the Third Circuit (1997 to 1998).



Peppercast: Internal Battle Over Trademarks in Today’s Business Climate

In this podcast, **Michael A. Rule**, partner in Pepper’s Orange County office with particular experience in the representation of clients’ trademark portfolios, discusses the internal battle that a company’s marketing and legal departments sometime go through over trademarks in today’s business climate.

Mr. Rule has maintained and protected more than 1,000 marks in more than 100 jurisdictions.

Listen today by visiting the Corporate and Securities or Intellectual Property 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 is a massive piece of legislation (more than 1,500 pages) with provisions affecting 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.

Articles include:

- “The Stimulus Package: Creating a Nationwide Health Information Technology Infrastructure while Protecting Patient Privacy and Security”
- “ARRA May Provide IP and Life Science Clients With New Financing Option”
- “The 2009 Recovery Act: Allocations for Public Housing, Green Retrofits, Section 8, HOME, Low-Income Housing and New Markets Tax Credit Stimulus”

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

Pepper Hamilton LLP

Attorneys at Law

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