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EMPLOYEE FREE CHOICE ACT:
DON'T LET THE NAME FOOL YOU

In March 2007, the House of Representatives passed H.R. 800, the Employee Free Choice Act, a bill to amend the National Labor Relations Act ("NLRA"). But, *Don't Let the Name Fool You!* If passed, H.R. 800 would take away fundamental free choice rights for employees in the workplace currently guaranteed by the NLRA. While it is expected that this bill will face tough opposition in the Senate or will be vetoed by President Bush, employers should take steps to make their opinions known! There are three primary components to this bill:

1. **It eliminates the right of employees to decide if they would like a union through a secret ballot election conducted by the NLRB.** It would require the NLRB to certify a union without a vote when the union presents evidence that a majority of employees have indicated they would like the union to represent them. Right now, if a union approaches an employer and claims that a majority of employees want it to be their representative, the employer has an absolute right to insist that majority status be resolved by secret ballot election conducted by the NLRB.
2. **It provides for binding arbitration when an employer and a union cannot reach an initial collective bargaining agreement following NLRB certification or employer recognition.** If, after 90 days of bargaining, an agreement is not reached, either party could request the assistance of a Federal Mediator for a period of 30 days. If this does not result in an agreement, the unresolved issues would be submitted to an arbitration panel. The arbitration panel would have authority to write the terms of the contract which would be binding for two years.
3. **It provides substantial monetary penalties when employers commit certain violations of the NLRA, including civil penalties of up to \$20,000 per violation and treble back-pay.** It also authorizes courts to issue immediate temporary restraining orders and other injunctive relief.



Proponents of the bill assert it will add "some fairness to the system" because the current process is "skewed in favor of those who oppose unions" citing as examples that that employers can force employees to attend anti-union meetings during working time, control the information workers receive, etc. whereas the unions' access to employees is heavily restricted. See: Rep. George Miller (D-CA), 2007 Congressional Record, Vol. 153, p. E260 (February 5, 2007). These assertions are disingenuous given the current NLRA framework. Democratic gratitude to the unions for helping them take back the House and Senate seems to be a far bigger driving force behind H.R. 800 than parity in the NLRA certification process.

Recent Victories for
Our Clients

PCT was successful in avoiding summary disposition against our client in an FMLA interference & retaliation case. The case involves an employee's separation the day she returned from an FMLA qualifying leave, which was not designated as FMLA qualifying w/ a WH-380 form. Counsel for plaintiff argued that the company's failure to process the absence as FMLA qualifying barred it from contesting whether the employee suffered from a serious health condition & that the plaintiff was entitled to judgment as a matter of law. The case is now scheduled for trial in late July.



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Right now unions enjoy far more freedoms and advantages than employers do with respect to the mechanics of the election. The union controls who the voters will be in the election because, as the petitioning party, the union defines the unit it seeks to represent. If it thinks it has major support, it can seek a broad unit. If it has better support within a certain segment, it can define the unit more narrowly. The union controls how much time the employer will have to run its campaign. Unions often keep a low profile and target a select group of employees until they have enough momentum to “go public” with a petition. Of course, this could occur at the height of the employer’s busy season. The NLRB reports that in 2006, the median processing time from petition to election was only 39 days. Sometimes, this is the first time the employer learns that a union is on the scene. This does not leave much time to set the record straight and educate the employees what being unionized actually will mean to the employees.

The union is also allowed to say and do many things that the employer cannot. For example, the union can and usually does promise employees the world (e.g., better wages, better health insurance, union pensions, etc.). Employers are absolutely prohibited from doing the same. The premise for the disparity is that employees are supposed to recognize that none of the union’s promises can be implemented without the employer’s agreement. In reality, many employees do not understand this. In a typical election campaign, much of the employer’s time is spent dispelling all of the half truths and explaining all of the things that the union has not told them about what it actually means to be represented by the union.

One thing is for certain: unions do not need any more advantages than they currently enjoy under the existing NLRA. In reality, **substituting a card check for an election** does very little for freedom of choice, particularly since unions are not even obligated to tell employees the truth about what signing the authorization card actually means to them. We do not elect our political leaders this way and we should not elect workplace representatives this way either. Employees have a right to make an informed decision before placing their trust and their hard-earned money in the hands of the union. This is the democratic way even if unions fair better when employees are uniformed. This is precisely why unions and their democratic proxies wish to strip employers of their ability to tell employees the truth about unionization. But, our democratic values and procedures simply should not be left at the employer’s front gate.

The bottom line is that union membership has been on the decline for years. According to the Bureau of Labor Statistics, union membership dropped to an all time low last year from 20.1 % in 1983 to just 12% in 2006. Of course, decline in membership means the loss of dues-paying members. Seemingly, recouping monies is the real driving force behind the Employee Free Choice Act. Hopefully, however, the bill will not make any further headway and the democratic processes that employees now have will remain in force.



- FORMS & POLICIES AVAILABLE ON THE PC&T WEBSITE:**
- Benefits and Detriments of Arbitration of Statutory Claims vs. Traditional Litigation
 - Consent and Authorization to Release Employment Information
 - Employment Application
 - Fair Credit Reporting Act Forms
 - Garnishee Disclosure Form
 - HIPAA Authorization for Disclosure / Use of Personal Health Information
 - I-9 Forms
 - Policy—Wage Deductions
 - Relief of Charge
 - Sample CCW Memo
 - Sample Certification for Users of Consumer Report
 - Severance Agreement and Release of Claims
 - Severance Agreement and Release of Claims (In Compliance With Older Worker Benefit Protection Act)
 - Social Security Privacy Policy
 - WH 380/381 Forms (under FMLA guidelines)
 - Workplace Violence—Risk Factor Checklist

DON'T WAIT UNTIL THE LAST MINUTE: MAKE SURE YOU'RE READY TO REPORT YOUR EEO-1 INFORMATION UNDER THE NEW STANDARDS

As some of you may remember, around this time last year we wrote about the revised guidelines for reporting EEO-1 information. **These guidelines take effect this year, and covered employers will be required to follow the revised guidelines when they file their EEO-1 Reports, which are due by September 30, 2007.** Covered employers are those (1) with federal government contracts in excess of \$50,000 who employ 50 or more employees (subject to a few exceptions), and (2) employers with 100 or more employees whether or not they have government contracts.

If you are an employer subject to the EEO-1 reporting requirements and have not taken steps by now to get ready for the changes, it is time to act. There are three substantial changes that come into play with this year's EEO-1 reporting requirements:

1. **Race Information**--For the first time, the form will include a category "Two or more races." The form divides "Asian or Pacific Islander" into two separate categories - "Asian" and "Native Hawaiian or other Pacific Islander." The prior category "Black" has been renamed "Black or African American." And, the prior category "Hispanic" has been renamed "Hispanic or Latino."
- 2) The "**Officials and Managers**" has been divided into two categories: "Executive/Senior Level Officials and Managers" (those who plan, direct and formulate policy, set strategy and provide overall direction; in larger organizations, within two reporting levels of CEO) and "First/Mid-Level Officials and Managers" (those who direct implementation or operations within specific parameters set by Executive/Senior Level Officials and Managers; or oversee day-to-day operations)
- 3) **Self-Identification**--For the first time, employers are permitted and encouraged to report information based upon employees' self-identification of their race. In the past, the EEOC discouraged employers from asking employees questions directly about their race or ethnicity. Rather, employers were directed to visually survey the workforce or obtain the information from post-employment records. Self-identification is voluntary for employees and when employees do not voluntarily self-identify their race, employers are instructed to utilize the visual survey method, as before.

Employers must take precautions to preserve the confidentiality of the information and must notify employees that their participation is voluntary. We suggest several steps be taken to avoid liability in this respect and to make sure the

information used to complete the EEO-1 is not used improperly (e.g. for employment purposes):

- If you are not required to track data of applicants, like if you had an affirmative action plan, the information should be obtained **post-employment**.. This will avoid the appearance that the information was any way considered in making the hiring decision. Employers should ask for the information after the hiring decision is made and communicated to the employee. It could be obtained as part of a new-hire orientation, for example.
- To the extent practicable, have human resources conduct the surveys and collect the information from employees directly. This will promote an atmosphere of voluntary disclosure and safeguard against supervisors becoming privy to the information which can help counter the argument that they knew or used the information improperly.
- The EEO information **SHOULD NOT** be placed in personnel files. It should be stored in a location where persons without a need-to-know do not have access to it (e.g., in a locked cabinet, etc.). This, too, will help counter any argument that the EEO information was considered in employment, or known by supervisors.
- Persons who are responsible for conducting the surveys should be trained, and understand that the information is confidential. They should understand that the information should not be discussed with others, except persons who need to know (e.g., those responsible for completing and filing the EEO-1 report).
- Employers should develop a self-identification form, which explains to employees that their participation is voluntary and that the information will be kept confidential as provided by law. As referenced above, the EEOC has issued model language. PCT has developed a self-identification form, which is available on our website.



The EEOC has a website devoted to EEO-1 reporting, with many additional resources such as instruction booklet for assessing employees' job categories, filing instructions, etc. The link is:

<http://www.eeoc.gov/eeo1survey>.

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WORKPLACE CHRONICLE

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You can find back issues of the *Workplace Chronicle* on the Web at “www.MI-EmploymentLaw.com”

PCT ADDS THREE NEW MEMBERS TO ITS TEAM

We are pleased to announce three new additions to PCT. Ironically, more attorneys and staff are needed to handle the increase in claims that arise in a slow economy.

Paul Kramer comes to the firm as a seasoned employment litigator, who will provide additional depth to the firm’s litigation capabilities. Paul has represented management in employment issues and litigation for fifteen years. After graduating cum laude from the Detroit College of Law in 1983, he became an Assistant Prosecuting Attorney in the Oakland County Prosecutor’s Office, where he rose to the level of Senior Trial Attorney. He then joined another Metro-Detroit labor and employment law boutique firm, rising to partner status. Mr. Kramer has conducted numerous jury trials in State and Federal Courts in Michigan and other states, and has handled dozens of appeals, including *Timko v. Oakwood Custom Coating, Inc.* 244 Mich. App. 234, 625 N.W.2d 101 (2001), which authorized employers to shorten the limitations period for bringing claims via provisions in their employment applications. He has also counseled employers on litigation avoidance, drafted employment policies and agreements, negotiated severance agreements, and advised employers on compliance with a wide variety of employment laws, including the ADA, FMLA, Title VII, Elliott Larson and the Wage and Hours Laws, just to name a few.

John Schwartz joins the firm as a recent law school graduate. Mr. Swartz will be supporting each of the five PCT attorneys in all aspects of the practice. He is currently studying for the State Bar exam. John received his Bachelor of Arts from Albion College in 2004 where he majored in public policy and management. He studied international business abroad at the **University College London** in 2002. After graduating from Albion, he attended Michigan State University College of Law where he was selected for the prestigious Moot Court and Advocacy Board. He eventually authored an award-winning appellate brief and became a moot court advocacy instructor. He would eventually be elected President of the MSU College of Law Labor and Employment Law Association. Mr. Schwartz will be in the trenches shortly tackling a variety of labor and employment law issues and assisting us all.

Kelly Narring has joined PCT as a legal assistant. She brings nearly 20 years experience as a professional legal assistant, much of which comes from a mid-sized Oakland County defense firm.

With the addition of Paul, John and Kelly, PCT has now doubled in size since its inception in 2001.

