

## MATTHEW RICH | CONTROVERSIAL EMPLOYEE FREE CHOICE ACT DEBATED BY CONGRESS



**A**lthough its passage is far from certain, with Arkansas Senator Blanche Lincoln recently withdrawing her support, the Employee Free Choice Act ("EFCA") is sure to be a hotly debated topic in the weeks and months to come. This article

will explain the substantial changes EFCA would bring about in the landscape of today's labor law.

The first – and most substantial – change initiated by EFCA would be to the manner of obtaining NLRB certification of a union as a bargaining entity on behalf of a group of workers. Under the current system, if a union organizer obtains the authorization cards of anywhere between 30 and 100 percent of employees in a proposed bargaining unit (which could be the entire workforce or could be a discrete group or type of employees), the union can request a secret ballot election, which will determine whether the workforce will or will not be unionized.

All of this would change dramatically under EFCA. If a union organizer is able to present authorization cards of a majority of the employees in a proposed bargaining unit (50.1 percent), that organizer may take those cards to the NLRB and the union will be certified, without any election whatsoever. The employer would have no ability to request a secret ballot election in this instance.

After a union is certified, EFCA would also change the process for bargaining with that union. Currently, the collective bargaining process has no time limit and both parties are free to accept or reject terms of any agreement as long as those terms do not suit them. EFCA would usher in a new, timeline-specific process for collective bargaining that could force an agreement if one is not reached voluntarily.

Within 10 days of certification, the employer and the union must begin negotiating in earnest, and they must make every reasonable effort to enter into a collective bargaining agreement. If they are unable to agree at the end of 90 days, either party may notify the Federal Mediation and Conciliation Service, which will communicate with the parties to mediate the dispute. If at the end of 30 days after the request for mediation there is no agreement, then the parties must submit to binding arbitration.

It is called binding arbitration because the arbitration panel will hear the dispute and will create a contract – a collective bargaining agreement – for the parties at the conclusion of the hearing. That collective bargaining agreement will be binding on the parties for two years unless they voluntarily agree to modifications.

Finally, EFCA would impose additional penalties on employers who commit unfair labor practices. Those penalties include fines of up to \$20,000 (per violation) for repeated or willful violations of employees' rights, as well as treble back pay awards for those terminated or discharged on account of union activities during an organizing campaign or the negotiation of a collective bargaining agreement.

Given these changes, and given the possibility that EFCA could become law in the near future, it will be important for management and supervisory employees to understand the process and be trained on how to communicate with workers and conduct themselves during organizing campaigns. In addition to avoiding possible claims of unfair labor practices, employers will want to be in a position to educate employees regarding unions so that employees can make informed decisions when approached about the issue. Katz Teller offers training on this subject, and if you are interested you should contact Matt Rich, Cynthia Gibson or Wijdan Jreisat to discuss.

*EFCA would allow unions to be formed based solely on signed authorization cards and without a secret ballot. Not only that, an arbitration panel may decide the terms of a collective bargaining agreement under EFCA, thereby dictating employee wages and benefits.*

## FMLA CHANGES MEAN THAT IT'S TIME TO UPDATE YOUR EMPLOYEE HANDBOOK

Just when you might have gotten comfortable administering your company's Family and Medical Leave Act (FMLA) policy, the Department of Labor (DOL) has announced significant changes that will affect your handling of FMLA leave and the policies in your employee handbook. These changes are in addition to the recently covered service-member leave provisions previously announced by the DOL. Some of the more noteworthy changes are summarized below:

### Determining Employee Eligibility

The DOL provided additional guidance on eligibility of employees, making it easier for employees with gaps in their employment history to qualify for FMLA leave. Specifically, an employee need not be employed for 12 consecutive months to qualify for leave, but instead may count periodic or intermittent employment not separated by a gap of more than seven years for the purpose of reaching the 12-month employment threshold.

There are two exceptions to this rule: if the gap is occasioned by military service or is on account of approved leave pursuant to a written agreement or collective bargaining agreement, the employee may count the prior employment regardless of the gap. An employee may become eligible for FMLA protection after a leave period commences once he or she meets the 12-month and 1,250 service hours requirements.

### Counting Leave that Coincides with a Holiday

This depends on whether the employee is taking leave for a full week or a partial week. If the leave period is a full week including a holiday, then the holiday counts against the FMLA entitlement. If the leave period is a partial week, the holiday does not count, unless the employee was scheduled to work that holiday.

### Employer/Employee Notice Requirements

One of the most significant changes from an employee handbook standpoint is to the forms used to administer FMLA leave. Not only are some of the old forms changed, but entirely new forms have been added. A complete and current FMLA policy should include the following forms:

- Request for Time Off Work or Report of Absence
- Request for Family or Medical Leave
- Notice of Eligibility and Rights & Responsibilities (**Revised**)
- Designation Notice
- Acknowledgment & Authorization
- Certification of Health Care Provider for Employee (**New**)
- Certification of Health Care Provider for Family Member (**New**)
- Fitness for Duty Certification
- Certification of Qualifying Exigency (**New**)
- Certification for Serious Injury or Illness of Covered Servicemember (**New**)

These forms should be included in your FMLA policy documents. If your policy does not include these forms, please contact us and we can provide them. Please note that the Notice of Eligibility and Rights & Responsibilities form and the Designation Notice (both notifying the employee of the determination

on whether the leave qualifies under the FMLA) must be provided within five (5) days of the FMLA leave request being received or, at a minimum, within five (5) days of when the employer learns that the requested absence qualifies under the FMLA.

In addition to employer notification changes, there are changes or clarifications to the notice that an employee must give an employer. These changes are designed to allow employers to manage employee leave in a more efficient manner. Absent unusual or extraordinary circumstances, an employee must follow an employer's process for requesting leave, including the provision of written notice to a specific individual. Failure to comply can result in a delay or denial of the leave requested.

### Waiver

Employees may now voluntarily waive their FMLA claims based on past or prior employer conduct without seeking or obtaining DOL or court approval for the waiver or release of those claims.

### Clarification of Medical Certification Forms and Second Opinions

In the past, employers have not been permitted to contact an employee's health care provider directly for the purpose of clarifying or authenticating information on a certification form. An employer, acting through an HR professional, another health care provider, leave administrator or management official, may now do so without obtaining permission from the employee.

When an employee submits a form that is incomplete or insufficient in detail, the employer must advise the employee of the additional information needed and must give at least seven (7) calendar days to complete and return the form.

An employee may not refuse to authorize the release of his or her medical information in connection with a review by a health care provider offering a second (or third) opinion.

Feel free to contact Cynthia Gibson, Wijdan Jreisat or Matt Rich to ensure that your FMLA forms are accurate and that your policy complies with the new regulations, or to ask any questions you may have about administering FMLA leave.

### EMPLOYMENT LAW SEMINAR SERIES

Along with Schiff, Kreidler-Shell, Katz Teller will present a seminar series on recent legal updates affecting employers. The series schedule and topics are as follows:

- **June** *Employee Free Choice Act and the Lilly Ledbetter Fair Pay Act*
- **August** *Recent COBRA changes and the Children's Health Protection Act of 2009*
- **October** *Recent changes to the Family and Medical Leave Act and the Americans with Disabilities Act*

The seminars are offered free of charge and will be submitted for HRCI credit. If you are interested in attending, please let us know at (513) 721-4532 or [ktbh@katzteller.com](mailto:ktbh@katzteller.com) and we will make sure to send an invitation.



**Andy Berger and Adam Colvin** represented a 30-physician specialty group in its sale to a major Cincinnati hospital.

**Cynthia Gibson** spoke to more than 150 human resource professionals at the 2009 Annual Employment Law Update of the Employers Resource Association. Her remarks analyzed the legal risks for employers posed by social networking sites such as Facebook, LinkedIn and Twitter.

**Brad Haas** will serve as Chairman of the Board of Big Brothers Big Sisters of Greater Cincinnati starting in June of 2009. Big Brothers Big Sisters is an organization whose mission is to help children become confident, competent and caring individuals through professionally supported mentoring relationships with volunteers who help children reach their full potential.

**Reuven Katz** is this year's honoree at the American Cancer Society Golf Outing to be held on August 31, 2009.

**Jim McCarthy and Cynthia Gibson** have been invited to join Litigation Counsel of America. Litigation Counsel of America is an invitation-only trial lawyer honorary society limited to 3,500 Fellows representing less than one-half of 1 percent of American lawyers. Fellows are selected and invited after being evaluated on effectiveness and accomplishment in litigation and trial work, along with ethical reputation.

**NEW COBRA SUBSIDY RULES**

The American Recovery and Reinvestment Act of 2009 (ARRA), enacted February 17, 2009, introduced premium assistance for COBRA continuation coverage for certain individuals. The following is a summary of the more important provisions of this new law:

- In general, the new law provides for a 65 percent reduction in the COBRA premium ("Premium Subsidy") otherwise payable by certain "involuntarily terminated" individuals and their families for up to nine months.
- Eligibility for Premium Subsidy - An individual is generally eligible for the Premium Subsidy if the individual (1) is a qualified beneficiary as a result of an "involuntary termination" during the period from September 1, 2008, through December 31, 2009, (2) is eligible for COBRA continuation coverage at any time during that period, and (3) elects the coverage.
- "Involuntary Termination" - This term has been broadly defined by the IRS to include employer-initiated terminations (with or without cause except in the case of gross misconduct), layoffs and when the employee terminates for "good reason."



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- There is an extended election period for eligible individuals who were involuntarily terminated from September 1, 2008, through February 17, 2009. This extended election period is for 60 days after the eligible individuals are provided notice of the extended election period.
- The employer must advance the 65 percent Premium Subsidy and remit it to the insurance company. The employer recaptures the 65 percent Premium Subsidy as a credit against payroll tax on Form 941.

**NEW COBRA SUBSIDY RULES** (cont.)

- Notices – Affected individuals must be notified of these new COBRA rights. The Department of Labor has issued model notices and forms.
- In general, Federal COBRA does not apply to the employers with fewer than 20 employees in the previous year. However, many states, including Ohio, have adopted mini-COBRA statutes that

provide modified contribution coverage for certain employers with fewer than 20 employees. These new Premium Subsidy rules apply to these mini-COBRA states such as Ohio (although there are some important differences in how the rules are to be applied to these smaller employers). The State of Ohio has issued a model notice addressing these new rules.

**PROFILE** **WHITNEY MAXSON**



Whitney Maxson was born and raised in Jamestown, Ohio, a rural farm community about 50 miles north of Cincinnati, east of Dayton and south of Columbus. Whitney gave Dayton a try while attending college, but it was Cincinnati that won her over when she attended the University of Cincinnati College of Law. While

Whitney was eager to trade in the cornfields for skyscrapers, she can't seem to stay away from her hometown for long, often visiting her family and the local outlet mall, of course.

The daughter of an English teacher and a sports fanatic, Whitney acquired a love of learning and competition early on, and both of those passions continue today. Whitney took 15 years of ballet, which helped her compete in soccer, track, volleyball and basketball. Although competitive athletics are behind her, Whitney hasn't lost interest in working out. She tries to find ways to connect sports with her charitable inclinations, and recently rode a "Century" (100 miles) on her bike in Whitefish, Montana, to benefit the Juvenile Diabetes Research Foundation.

Whitney attended college at the University of Dayton, where she met her husband, Nate (also a student at UD and now an Investment Product Research Analyst with Fifth Third Asset

Management). Whitney graduated with honors in 2002 with a degree in political science. Whitney then began law school at the University of Cincinnati, where she learned that taxes were more interesting than she ever thought imaginable. After two years on the Law Review, Whitney graduated from UC Law in 2005 and immediately began her practice at Katz, Teller, Brant & Hild. As an associate with Katz Teller, Whitney's practice is concentrated in estate and wealth planning. Whitney assists clients in implementing, reviewing and updating estate planning and gifting mechanisms tailored to their needs. Her practice also includes all areas of probate administration. Whitney is active with the firm's recruiting, benefits and administrative committees.

In 2005, Whitney and Nate decided that they had seen enough concrete and began their search for a home with a yard and trees. Having lived in downtown Cincinnati (a mere seven blocks from the river) throughout law school in a small studio apartment with two 60-pound boxers, Whitney and Nate were eager to have more space and green grass. They settled in Lawrenceburg, Indiana, purchasing a home in the natural and beautiful community known as Hidden Valley Lake, where they enjoy gardening, riding bikes, running and hiking with their dogs. When the weather keeps her indoors, Whitney can usually be found watching whatever college or professional sporting event she can find.

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