Holland and Holland L.L.C.

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EMPLOYMENT LAW DIGEST

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EMPLOYEE FREE CHOICE ACT:

EMPLOYERS BEWARE

The National Labor Relations Act is a significant federal labor law which governs the relationship between labor unions and company management. This law applies to virtually all employers in the United States with some aspects of the law being applicable to even non-unionized employers which will be discussed in more detail later in this newsletter.

There is a major new amendment to the National Labor Relations Act ("NLRA") which would remove an employer's current right to insist that employees express their sentiments on electing a labor union in a secret election conducted by the National Labor Relations Board. The Employee Free Choice Act introduced in the House of Representatives as HR800, would require employers to recognize the union without an election if the majority of employees in a unit appropriate for bargaining sign cards authorizing union representation.

Before going into detail concerning this dramatic Bill, this newsletter will briefly explain the current law in order for you to better understand why the Employee Free Choice Act is so dangerous.

Under current law three steps must be completed before a union can represent a group of employees. First of all, the union must obtain at least 30% of a collective bargaining units' signature on an authorization card which indicates the employees' interest in joining a labor union. Once the union obtains the magical 30%, the union then files a petition with the National Labor Relations Board to hold an election. Some time thereafter, a secret ballot election is conducted and if the union obtains at least 51% approval from the particular group of employees which the union is trying to organize (known as the collective bargaining unit) the union then has the right to demand recognition and begin negotiating a Collective Bargaining Agreement with management.

A Collective Bargaining Agreement is a fancy way of saying a contract between management and the union which lays out all kinds of rules and restrictions on management, ranging from vacation pay to paid time off, to how and when employees can be disciplined or discharged, to hours of work and the like.

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Employee Handbooks practically become obsolete once a Collective Bargaining Agreement is entered into between unions and management.

Under current law, however, management does not *have* to agree to a Collective Bargaining Agreement with a labor union. All management has to do is bargain in good faith. Even this aspect of the NLRA will change with the new Employee Free Choice Act which will be explained below.

Under the proposed amendment, all a union has to do to be recognized as the exclusive bargaining representative for a collective bargaining unit is to get 30% of a particular unit's employees to sign the authorization card. Once this is accomplished, the union can demand recognition and demand to negotiate with the employer without a secret ballot election even being held.

Under the current law, once management learns that employees are signing authorization cards, management can begin to educate employees on the numerous faults and problems with labor unions before the secret ballot election occurs. This is exactly why organized labor is pushing so hard for this amendment as it would eliminate management's rights to educate its own workforce on the pros and cons of joining a labor union.

It is important to remember that unions are big businesses and unions need employees to have problems so that the union can come riding in and solve the problem for the employee against management. It is also important to remember that unions are not free – they charge dues on a monthly basis to their members (your employees).

The problem for labor unions is that they have been declining in membership for the past sixty years. In fact, the number of employees voting to become union members has dwindled from 33% in the 1950's to 7.5% today. This is why organized labor has spent $200 million dollars in order to elect certain politicians (who in fact have now been elected) who have promised to make sure the Employee Free Choice Act is passed.

Another problem with this Bill is that if it is passed, employers would be forced to sign a Collective Bargaining Agreement with the labor union whether or not they bargain in good faith. Under the new law, an employer would be required to meet with an authorized union within 10 days of the union's request to begin collective bargaining. Once bargaining begins, if no agreement on a contract is reached within 90 days, either party may request mediation. If no contract is reached within 30 days of the mediation, the matter will then be referred to a neutral arbitration board which will resolve all disputes and write a Collective Bargaining Agreement for the parties to sign.

Yet another blow for employers under this new law has to do with complaints or charges of employer unfair labor practices. An allegation of an unlawful threat by an employer during an election campaign must be investigated by the National Labor Relations Board on an expedited basis. This is a change in the law as some unfair labor practice charges can take months and even years to process through the National Labor Relations Board's system. Under the Bill, a similar threat by a labor union during a campaign would not be given any priority and can take several months or years to process through the system. The Bill provides new employer civil penalties of up to $20,000.00 per violation and triple back pay for unlawfully discharged employees. There are no equivalent union penalties under the Employee Free Choice Act.

Since 2006, organized labor has repeatedly tried to push this Bill through and force the amendment to the NLRA. Because of President Bush's repeated promises to veto such a measure and because of Republican Senators filibustering the Bill, the Bill never made it out of the Senate although it was passed in the House of Representatives largely along party lines in 2006. With the political change in the November elections, nearly everyone agrees that the Employee Free Choice Act will become law – some even believe it will become law within the

first 100 days of President Elect Obama's presidency.

What can we do to prepare for this amendment? First of all, you should immediately contact every U.S. Congressman in your district, in writing, and make it clear to them that you strongly oppose this amendment. You should also immediately contact all employer friendly organizations you know such as the Texas Association of Business as well as your local and United States Chambers of Commerce. Because the Bill is probably going to pass anyway, there are certain measures we can begin to take right now in order to prepare for what appears to be a very difficult and rocky road ahead. The following is simply a partial list of ideas to help prepare for what is to come:

- Communicate with your employees as much as possible – keep an open door policy for any type of employee complaints or problems.
- Train your supervisors on the do's and don'ts of organizing and inform them of what to look out for with respect to organizing efforts.
- Treat employees as you would want to be treated (i.e. if bathroom in your company is filthy all the time, get it cleaned and keep it cleaned).
- Let employees know the company's position on labor unions – it is legal to tell employees that management is against labor unions.
- Train your front line supervisors on what to look for (i.e. union authorization cards laying around, rumors about organizers hanging around, etc.).
- Adopt and enforce an Anti-Union Policy. Below is such a policy:

ANTI-UNION POLICY

At Our Company, we try to maintain the closest possible working relationship with our employees and to provide excellent wages and benefits without a union. Under state and federal law, it is not necessary, and it will never be necessary, for any of our employees to belong to any union in order to get or keep a job at any location. There was a time when having a union seemed to be the "fashionable" thing, the thing everyone was doing. But that day is fading. People who work for a living are recognizing more and more that having a union isn't all it's cracked up to be, and that a union can be a handicap, not a help.

It is quite possible that, at sometime or other, our employees may be approached by union representatives, who will try to sell them on unionism. Please keep in mind that the union organizer is a salesman. His job is to say whatever you want to hear. Union organizers often make false promises and claims, and very frequently distort the facts with respect to business, profits, and other matters affecting employees' working relationship with the Company. Unions destroy teamwork. When teamwork fails, the Company loses its ability to compete and, in the end, we all lose. We therefore intend to oppose unionism by every proper means, and in particular, by fair and equitable treatment of our employees at all locations.

If anyone ever approaches you and asks you to sign a union authorization card, we urge you not to sign it. Federal law protects your right to refuse to join the union or participate in its activities. Please keep in mind that any person who might join or belong to any union will never get any advantage or any preferred treatment of any sort over those who do not join or belong to a union. We invite you to seek further information from your supervisor if questions arise at any time on these matters.

In short, our business is successful because the spirit of working together pays off for all of us. The only way any of us can protect the security of our jobs and guarantee ever-better wages and benefits is by working together to produce better products and service than our competitors. We're all in this together!

- Adopt and enforce a No Solicitation Policy (must be uniformly applied, which means you can not have a Girl Scout cookie drive, etc. in your workplace). Below is an example of such a policy:

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NO SOLICITATION

For the protection of employees and to avoid disruptions of the Company's work schedule, solicitation of employees by non-employees for any charitable or commercial purpose, and the promotion, distribution, or circulation of pamphlets, literature, or any other material by non-employees on Company premises is prohibited.

Sales of commercial products and services and the distribution of advertising matter, circulars, leaflets or petitions in connection with commercial products or services are strictly prohibited at all times on company premises.

Working time, unlike meal periods and rest periods, is for work. Accordingly, solicitation of employees by other employees is strictly prohibited during either employee's working time. The distribution of literature by employees is forbidden during working time or in working areas. The posting of any leaflets, notices, literature, or other material on Company property without the permission of management is strictly prohibited.

Any employee who violates any of the above rules will be subject to disciplinary action, up to and including discharge.

Please be advised you are free to use these policies as you see fit in your handbooks or posted on your bulletin boards. It is very important, however, that they not be presented together so someone could argue we are deliberately trying to target labor unions. In other words, Anti-Union and No Solicitation policies should be placed far apart in an Employee Handbook and they should be placed far apart on your bulletin boards. We do not want to give unions the opportunity to claim that we are engaging in an unfair labor practice by trying to intimidate or coerce employees into not being allowed to present and talk about union authorization cards in the workplace.

There are many other traps and pitfalls for management under the NLRA which are beyond the scope of coverage of this newsletter. If, for any reason, you believe that your employees are being approached by an organizer, you are strongly urged to take immediate action within the law to educate your employees and lawfully convince them not to sign anything a stranger presents them which could affect their employment at you business. For more information on the NLRA, the National Labor Relations Board has a website which can be found at www.NLRB.gov. Although the website appears to be primarily geared toward information for employees and labor unions, there is good information for employers buried within the website itself. I urge you to take the time to peruse this website if you are able. ***

HOW THE CURRENT NLRA APPLIES TO THE NON-UNIONIZED WORKPLACE

Most people assume that federal labor laws such as the NLRA apply only to employers who have labor unions in their midst. In reality, the NLRA extends certain rights to non-unionized employees. For example, non-unionized employees have the right to engage in certain protected "concerted" activity, which is usually two or more employees acting together to seek to improve wages or working conditions. Section 7 of the NLRA states: "Employees shall have the right to self-organization, to form, join, or assist a labor organization, to bargain collectively through representatives of their own choosing, and to engage in other **concerted activities** for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities."

The term "concerted" activity has been construed as any activity by individual employees who are united in pursuit of a common goal. For an employee's activity to be "concerted," the action must be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.

This means that if an employee approaches management solely on his own behalf this generally would not be "concerted." The employee or group of employees must be approaching management on some term or condition of employment on behalf of other employees.

The following are some examples of protected concerted activity:

- Two or more employees addressing their employer about improving their working conditions or pay.
- One employee speaking to his or her employer on his/her own behalf and on behalf of one or more co-workers about improving workplace conditions.
- Two or more employees discussing pay or other work related issues with each other.
- Using employer's internal e-mail system to oppose and enlist other employees to join in opposing the implementation of a new policy.
- Aiding a discharged employee in filing an EEOC complaint.
- Group complaints made to safety and health agencies (i.e. OSHA).
- Discussing work schedules or pay with co-workers.
- Making efforts to secure paid maternity leave for a co-worker.
- Two employees who work near an open door walking out to protest cold and drafty conditions.

These are just a few examples of what the Board has found to be protected concerted activity and if employees are disciplined or otherwise discharged because of these activities they are free to file an unfair labor practice charge with the Board seeking damages and compensation for the adverse action by the employer. Fortunately, there are limits to protection for concerted activity by employees. For example, when employees break the law, engage in violent behavior, refuse to follow employer's instructions or policies or behave disloyally toward their employer then their concerted activity is likely not protected.

It is important to remember that employment at-will doses not supersede employees' association and organizational rights under the NLRA. One common trap for non-unionized employers occurs when non-unionized employees walk off a job in protest of their working conditions. Obviously, most employers just simply terminate the at-will employee, however, if employees get together and engage in a work stoppage based upon a legitimate job complaint, the activity may in fact be protected by the NLRA. For example, an employer was held liable for back pay and reinstatement for terminating six non-unionized employees who walked off the job in response to unanswered complaints about their supervisor. Such a work stoppage was found to qualify as protected concerted activity under the NLRA. Other examples of unfair labor practices for violating employees' rights to engage in protected concerted activity include the following:

- Salesman fired for being "an outspoken critic" against special two hour meetings, which sales personnel were required to attend before the store opened.
- Employer fired two employees who composed a letter protesting change in the method of compensation.
- Employer terminated employees who mailed a letter to the employer's parent company, complaining of bonuses and working conditions.
- Employer terminated employees who provided affidavits to a sheriff, testifying that employer's vice president had embezzled funds from the employer.
- Employee terminated after objecting to an employee meeting to hear the supervisor's lecture about the volume of radio headsets.
- A restaurant owner/manager's discharge of an employee who complained about the employer's tip pool system.

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In order to avoid interfering with employees' concerted activity rights under the National Labor Relations Act, employers should consider doing the following any time a group of employees or one employee on behalf of other employees approaches management concerning any term or condition of employment:

1. Determine whether the activity is in fact concerted. Are two or more employees acting together or is one employee acting on behalf of the authority of other employees?

2. Is the activity in fact protected – is it for the employees' "mutual aid and protection" (i.e. regarding better terms and conditions of employment?).

3. Does the employer know of the employees' protected concerted activity? If so, the employer should make sure that any contemplated employment action is not motivated by any such protected activity.

Obviously, all employers regardless of union status should exercise care when dealing with their employees who engage in conduct that could be perceived as concerted activity in the workplace. We again urge you to consider reviewing the NLRB's website which contains a fairly good explanation of this odd area of the law.

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Keeping Employers Out of the Courtroom for over 20 Years

If you, or anyone in your office, would like a copy of this newsletter on a quarterly basis, at no cost, please contact Deanna Jennings at (210) 824-8282.
E-mail copies are also available

ABOUT THE FIRM

Holland & Holland L.L.C. Represents management in a wide variety of employment law matters. Our primary goal for clients will continue to be claims avoidance through timely advice and counsel before events occur which can lead to lawsuits. However our firm has significant experience in jury trial litigation in a wide variety of employment related claims in different venues throughout the great state of Texas.

Our expertise includes the following areas:

—**management counseling**

—review and preparation of **personnel policy** and procedures including employee handbooks;

—representation in administrative matters before the **Equal Employment Opportunity Commission**;

—**representation of management in state and federal court** for employment related claims involving Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Worker Adjustment and Retraining Notification Act, Consolidated Omnibus Budget Reconciliation Act, Polygraph Protection Act, and a variety state court causes of action such as retaliation, defamation, invasion of privacy, negligence, assault and battery;

—**protection of trade secrets** and other confidential information through the use of covenants not to compete and non-interference agreements;

—preparation of **arbitration agreements**, non-subscriber programs and waivers of jury trial agreements;

—**management training** on proper techniques on hiring, disciplining and discharging employees including seminars on recent Supreme Court decisions;

—general **human resource audits** to promote compliance with the myriad of legal and regulatory obstacles facing employers on a daily basis;

—**wage/hour compliance** audits and defense of FLSA collective actions.