KIRKLANDPEN

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KIRKLAND & ELLIS LLP

Private Equity Newsletter

Pending "EFCA" Labor Legislation Would Bring Sweeping Change to American Labor Laws

PENpoints

Enacting EFCA labor legislation would likely increase both unionization and the speed with which it can occur.

With the election of Barack Obama and larger Democratic majorities in the United States Senate and House of Representatives, the likelihood of the Employee Free Choice Act (EFCA) becoming law this year has increased significantly. EFCA would represent the most sweeping change in American labor law in the last half century, and is likely to promote private sector unionization, which is now less than 8%. EFCA's most publicized impact would be to curtail the use of secret ballot representation elections conducted by the National Labor Relations Board (NLRB). Two other lesser-known provisions of the proposed law, as presently drafted and described below, would have equally far-ranging effects, potentially more so for an acquirer (such as a private equity fund).

Change #1: No Right to Secret Ballot Elections

Under existing labor law, if a union obtains authorization cards from 30% of the employees in an "appropriate" bargaining unit in support of union representation for that bargaining unit, the union may petition the NLRB for representation rights. However, under existing labor law, the employer in such an event may insist upon an NLRB-sponsored secret ballot election.

The purpose of the secret ballot, of course, is to permit employees to vote their representational preference in private without pressure or other interference from the employer, the union or other employees.

EFCA would enable unions to obtain NLRB certification without the test of a secret ballot. If a *majority* of employees in a bargaining unit sign authorization cards, the secret ballot election would be waived and the union would immediately be certified by the NLRB as that unit's exclusive bargaining representative.

The practical consequence is that union organizers and supporters could exert pressure on individual workers, no longer protected by voting booth anonymity, to obtain such authorization cards. Card-signing "parties" and after-hours home visits by union organizers could become routine union organizing tactics. There would be no employer ability, as there is now, to require an NLRB election, with an employer free to campaign against unionization.

EFCA, if enacted, is likely to increase both unionization and the speed with which it can occur—perhaps even before an employer knows union organizing has begun and before the employer has an effective opportunity to respond. Under current law, a private equity firm or other investor can purchase a non-union business with the reasonable expectation that, unless unionization efforts are then underway, it will have the opportunity to implement new labor and operating strategies and make its case to employees before a union can be certified. In the absence of NLRB elections as allowed by current law, unionization could occur post-closing, without warning and before the new owner is able to implement strategies that may otherwise address workforce concerns. As a result, important changes in operations could be delayed or even derailed by bargaining requirements and union-filed unfair labor practice charges.

Change #2: Mandatory Arbitration of First-Contract Collective Bargaining Agreement

Under current law, collective bargaining is the process through which contractual terms and conditions of employment, including wages, benefits and work rules, are determined after a union has been certified or voluntarily recognized. Bargaining must be conducted in "good faith" by private parties (employer and union) familiar with industry and local work-site needs and conditions.

EFCA would fundamentally alter this framework of private negotiation by requiring mandatory arbitration of the "first contract" if the employer and union do not reach agreement within 120 days after NLRB certification. Under EFCA, if a first-contract bargaining dispute proceeds to mandatory arbitration, employment terms would be imposed by government-appointed arbitrators. Thus, an employer would no longer be permitted to bargain lawfully to "impasse" and then unilaterally implement its last offer. Instead, after 120 days, bargaining disputes would be presented to arbitrators for resolution. In circumstances in which a union believes it would fare better in arbitration than in negotiations, the union would have an incentive to await the imposition of terms through mandatory arbitration. Similarly, an employer seldom would submit its best contract offer to the union, knowing it could become the arbitration "floor" in setting the terms of the new labor agreement. With mandatory arbitration as the default process, good-faith "collective bargaining" as contemplated by the National Labor Relations Act could become a relic for most first contracts.

Moreover, terms imposed by arbitrators unfamiliar with the individual workplace are less likely to take local facility and market conditions into account than those negotiated by parties familiar with such conditions.

For private equity investors, mandatory first-contract arbitration could significantly complicate efforts to restructure newly acquired operations or accurately predict or prepare budgets. Operating plans for acquired companies may be delayed, or worse, made impossible or even unlawful.

Change #3: New Penalties For Unfair Labor Practices

Finally, EFCA imposes substantial new penalties for employer unfair labor practices while employees are seeking union representation and during first-contract negotiations, including NLRB-imposed treble damages (e.g., tripling of "back pay" awards required by NLRB-ordered make-whole remedies), new NLRB-imposed civil penalties of up to $20,000 for each violation, and mandatory injunctions. Presently, the NLRB has no statutory authority to issue punitive economic sanctions.

If you have any questions about the matters addressed in this Kirkland PEN article, please contact the following Kirkland authors or your regular Kirkland contact.

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New Illinois Anti-"Pay-to-Play" Ethics Laws Applicable to Private Equity Funds and Their Portfolio Companies

PENpoints

New Illinois ethics laws prohibit certain campaign contributions, require certain firms to register with the Illinois State Board of Elections and require other notices and governmental filings.

Private equity funds and their portfolio companies should be aware of new Illinois ethics laws, effective January 1, 2009, affecting companies that do business with the State of Illinois. The new laws (a) cover a private equity fund that has a portfolio company with large contracts with Illinois State agencies and (b) may also cover a private equity fund with an Illinois public employee retirement system limited partner.

The new laws are ambiguous in many respects and their applicability to any firm or individual is fact-specific. In general, though, they prohibit certain campaign contributions, require certain firms to register with the Illinois State Board of Elections and require other notices and governmental filings (with serious penalties for non-compliance):

- ***Campaign Contributions***. A "covered business"—i.e., a for-profit business with bids, proposals and contracts with Illinois State agencies to buy or sell goods or services aggregating more than $50,000 in a year—and the covered business' "affiliated persons" (broadly defined as described below) and "affiliated entities" (broadly defined as described below), may not make campaign contributions to an Illinois constitutional officer (e.g., the Governor or Attorney General), a member of the Illinois House or Senate, any declared candidate for those offices or any state political committee of any party represented by such officers or candidates.
- ***Registration***. A covered business must register[1] with the Illinois State Board of Elections and disclose the names and addresses of its "affiliated persons" and "affiliated entities."
- ***Notifications***. A covered business and its "affiliated persons" and "affiliated entities" must notify any political committee to which it makes a contribution that it is registered or affiliated with a covered business.

An "affiliated person" of a covered business includes all owners of more than 7.5% of the covered business (including a venture capital or private equity fund), as well as all executive employees and all spouses and minor children of such owners and executives. An "affiliated entity" of a covered business is similarly broad, including subsidiaries, parent companies, sister companies, entities controlled by an affiliated person, tax exempt organizations controlled by an affiliated person and related political action committees.

Penalties for failure to comply with the new laws can include: (1) the voiding of Illinois State contracts; (2) civil penalties; (3) the termination of contracts by the State of Illinois without additional compensation and (4) a three-year ban on making any proposal to Illinois State agencies.

Arguably, an Illinois public employee retirement system's investment in a private equity fund's limited partner interests should not be covered by the new laws. However, due to the laws' broad reach, ambiguities and substantial penalties, a fund with an Illinois public employee retirement system limited partner or with a portfolio company doing business with the State of Illinois, should consult with counsel and consider (a) refraining from making campaign contributions prohibited by the new laws and (b) registering under the new laws.

1 The registration deadline for a covered business was February 2, 2009. Any firm that becomes a covered business thereafter must register before submitting a bid or proposal or entering into a contract subject to the new laws. A covered business must also promptly report any change to its registration, including changes in its "affiliated persons" and "affiliated entities."

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Investment Firms Fined $800,000 for Failure to Make HSR Filings

PENpoints

Recent enforcement of HSR Act reports and obligations is a vivid reminder that the antitrust agencies demand strict compliance.

On December 15, 2008, two related investment funds, ESL Partners L.P. and ZAM Holdings, L.P., agreed to pay civil penalties totaling $800,000 for failing to submit timely Hart-Scott-Rodino (HSR) Act premerger notification filings prior to increasing their respective holdings of voting stock in AutoZone, Inc. This enforcement action highlights the importance of closely scrutinizing subsequent acquisitions of voting stock in the same company—even where the prior acquisition was the subject of a timely HSR filing or exempt from HSR reporting obligations.

An HSR filing is required for acquisitions of voting stock, assets or non-corporate interests valued in excess of certain dollar amounts where the parties meet certain asset and revenue thresholds and the transaction is not otherwise exempt. In an acquisition of voting stock, the size-of-transaction threshold is based on the value of all voting stock of that issuer that will be held by the purchaser after the acquisition—including, under certain circumstances, the value of any voting stock held prior to the pending acquisition. In the AutoZone case, ESL Partners and ZAM Holdings failed to take into account the AutoZone voting stock they already held in determining the HSR size-of-transaction, triggering the enforcement action.

This case is an important reminder that the antitrust agencies demand strict compliance with the HSR reporting obligation and expect companies to be sufficiently informed regarding the complex requirements of the HSR Act. Application of the HSR rules, especially with regard to the aggregation of prior acquisitions of voting securities of the same issuer, are extremely complex and require the guidance and advice of experienced counsel.

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PENbriefs

NYSE Announces Effective Date for Proposal to Eliminate Broker Discretionary Voting, Suspends $1 Price Requirement and Extends Lowering of Market Cap Requirement

On February 26, 2009, the New York Stock Exchange announced (1) a revision of its proposal to eliminate broker discretionary voting on the election of directors after January 1, 2010; (2) a suspension of the $1.00 closing price requirement until June 30, 2009; and (3) an extension until June 30, 2009 of the temporary lowering of the market capitalization requirement from $25 million to $15 million. For more on the NYSE announcement, please see our recent *Kirkland Alert*.

PENnotes

The 10th Annual International Conference on Private Investment Funds
London, England
March 8 - 10, 2009

The 10th Annual International Conference on Private Investment Funds will take place from March 8-10, 2009, in London, England. Key topics that will be covered include: increased regulation of private equity funds and hedge funds, counterparty and intermediary relationships in the current economic climate, the expanding role of intermediaries in the placement of both hedge funds and private equity funds globally and current terms of private equity funds. Kirkland partner Mark Mifsud is on the organizing committee for this event and is vice chair of the IBA Investment Funds Committee. Kirkland partner Chris P. Kallos, P.C., will moderate a panel on the current "hot topics" in negotiating private equity funds, focusing primarily on term sheet provisions.

"What's It All About, TALFie?"
New York, New York
March 11, 2009

Wondering what the Term Asset-Backed Securities Loan Facility is all about? Join us at this Kirkland seminar, held in our New York office, to learn about TALF and how to make it work for you from Kirkland partner Kenneth P. Morrison, other Kirkland securitization, tax and investment management attorneys, and professionals from Barclays Capital and Deloitte Touche. Topics to be discussed include an overview of the TALF program, a discussion of the process and impact of TALF and breakout sessions on special issues regarding TALF for investors, including private equity and hedge funds, and sponsors and issuers. For more information, please visit www.kirkland.com/files/TALF_Seminar.htm.

Capital Roundtable's "How to Buy & Fix Distressed Companies During the Recession" MasterClass
New York, New York
March 12, 2009

Despite the current economic recession, in many parts of the country, there is now a buyer's market to end all buyer's markets. The rules for buying, turning around and operating distressed assets have been turned upside down. Kirkland partner Richard W. Porter, P.C., will participate in a panel discussion at this seminar entitled, "When Should You Buy One of these Companies? And How Do You Buy it in Today's World?"

3rd Annual Duke Private Equity Conference
Durham, North Carolina
April 15, 2009

The Duke Private Equity Club is hosting its Third Annual Duke Private Equity Conference on Wednesday, April 15, in Durham, North Carolina. This conference brings together alumni, professors and students interested in the field of private equity to discuss current developments in the industry. Kirkland partners Kirk A. Radke, Andrew Wright and Jonathan S. Henes will lead the Buyout, LP and Restructuring panels at the conference, respectively.

Infrastructure Investment World Americas 2009
Bridgewaters, New York
April 27 - 30, 2009

Infrastructure Investment World Americas 2009 has been designed by the infrastructure community to uncover the possibilities and address the challenges that this crucial asset class poses in this time of uncertainty. The conference will bring together the key players in the infrastructure community, including government, infrastructure funds, financiers and end investors. Kirkland partner Bruce L. Gelman, P.C., will speak at this event.

"Hedge Funds: Issues and Opportunities in Today's Market"
New York, New York
April 29, 2009

This conference, co-chaired by Kirkland partner Stephen Fraidin, will explore the latest hedge fund strategies and survival tactics, including activist strategies and case studies of proxy contests, legal issues affecting hedge fund activism, how to prepare and respond to a hedge fund attack and a new look at redemption issues.

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Kirkland & Ellis LLP's Private Equity Practice

Kirkland & Ellis LLP's private equity attorneys handle leveraged buyouts, growth equity transactions, recapitalizations, going-private transactions and the formation of private equity, venture capital and hedge funds on behalf of more than 200 private equity firms in every major market around the world.

Kirkland has been widely recognized for its preeminent private equity practice. In 2009, Kirkland received the awards for Best Law Firm (Private Equity Deals) and Best Law Firm (Fund Formation in North America) from Private Equity International. In 2008, Mergermarket ranked Kirkland first by volume for Global and North American Buyouts in its "League Tables of Legal Advisers to Global M&A for Full Year 2007." Also in 2008, Kirkland received prestigious first-tier rankings in both private equity and fund formation from Chambers & Partners.

The Lawyer magazine recently recognized Kirkland as one of the firms in "The Transatlantic Elite," noting that the firm is "leading the transatlantic market for the provision of top-end transactional services ... on the basis of a stellar client base, regular roles on top deals, market-leading finances and the cream of the legal market talent." In addition, Kirkland's London office was recently named the 2008 "Banking Team of the Year" at the Dow Jones *Private Equity News* Awards for Excellence in Advisory Services.

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