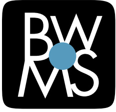

Burke, Warren, MacKay & Serritella, P.C.

Spring 2009 BWM&S Bulletin Volume 8 • Issue 1

BWM&S

A Summary of the American Recovery and Reinvestment Act of 2009

The recently enacted "American Recovery and Reinvestment Act of 2009" (the stimulus package) contains a wide range of tax provisions that includes tax relief for individuals and businesses. Below is an overview of some of the more widely applicable tax changes affecting individuals and businesses.

Individual Tax Changes

Making Work Pay Tax Credit

The Making Work Pay credit allows a credit against income tax in an amount equal to the lesser of 6.2% of an individual's earned income or $400 ($800 for married couples filing a joint return). The credit phases out for individuals with adjusted gross income between $75,000 and $95,000 ($150,000 and $190,000 for married couples filing a joint return). Most individuals will

Continued on page 2

Mediation: Enriched Negotiation

There are a number of misconceptions about mediation that merit comment. These misconceptions have caused mediation to often be poorly understood, leading to its underuse when it could be a very useful tool for dispute resolution. Below are a few of the common questions regarding mediation, along with some responses.

Jim Serrirella

What if the mediator rules against me?

The fact of the matter is that mediators do not make rulings.

Continued on page 7

Hyundai Construction Equipment U.S.A., Inc., recently won its first-ever legal challenge against a gray market (e.g., goods intended for one national market that are exported and sold in another) equipment dealer, with a federal court judgment permanently barring the sale, advertising and marketing of Hyundai "gray iron" and returning approximately $1 million in lost sales plus court costs.

Judge Harry D. Leinenweber of the U.S. District Court for the Northern District of Illinois ruled that Chris Johnson Equipment, Inc. of Macomb, Mich., illegally imported 29 Hyundai-branded wheel loaders and excavators and sold them primarily to U.S. customers.

"We pursued this case in the interests of protecting and strengthening our U.S. dealer network," explained John Lim, President of Elk Grove Village, Ill.-based Hyundai. "Gray market equipment sales put our dealers at a distinct competitive and financial disadvantage." The Hyundai gray market case was covered in more than 80 news outlets across the US including Forbes and the LA Times. The firm's Fred Mendelsohn and Aaron Stanton represented Hyundai on this matter.

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receive the credit through reduced payroll withholding although the credit can also be claimed on an individual's tax return. The credit applies for both 2009 and 2010.

$250 Economic Recovery Payment

The new law provides a one-time payment of $250 to certain individuals on fixed incomes (primarily Social Security recipients, railroad retirees and disabled veterans). This payment will only be made in 2009. If an individual receiving this payment is otherwise eligible for the Making Work Pay credit, the Making Work Pay credit will be reduced.

Julia Turk

Greg Winters

First-Time Homebuyer Tax Credit

A refundable credit of up to $8,000 is provided for first-time homebuyers. To be eligible, a new homebuyer must purchase their residence by November 30, 2009. So long as the taxpayer stays in the residence for at least 3 years, the taxpayer is not required to repay the credit. (Under prior law, a credit of up to $7,500 was available. The taxpayer, however, was required to repay the credit over 15 years.) First-time homebuyers purchasing a house in 2009 are allowed to claim the credit on their 2008 or 2009 tax returns. The credit phases out for individuals with adjusted gross income above $75,000 ($150,000 for married couples filing a joint return).

New Car Deduction

Individuals purchasing new vehicles for the rest of 2009 are allowed an above-the-line deduction for state and local sales taxes or excise taxes paid on the purchase. Sales or excise taxes attributable to any portion of the purchase price above $49,500 are not deductible. Further, the deduction is phased out for individual taxpayers with adjusted gross income in excess of $125,000 ($250,000 for married couples filing joint returns).

Education Credit

For 2009 and 2010, the law effectively replaces the existing Hope Scholarship Credit with a more generous American Opportunity Tax Credit. The American Opportunity Tax Credit will provide a benefit of up to $2,500 per student per year (formerly up to $1,800) and up to 40% of the credit will be refundable. The credit can be claimed for the first four years of post-secondary study in a degree or certificate program. The credit phases out for individual taxpayers with adjusted gross income between $80,000 and $90,000 ($160,000 and $180,000 for married taxpayers filing a joint return).

AMT Patch

The new law includes an alternative minimum tax (AMT) patch for 2009. The AMT patch for 2009 raises exemption amounts slightly above the 2008 patch levels.

Business Tax Changes

Extension of Bonus Depreciation

The new law extends the 50% depreciation bonus for qualifying property purchased and placed in service in 2009. The 50% depreciation bonus is in addition to the regular depreciation for the year the property is placed in service.

Net Operating Losses

The net operating loss carryback is extended to 5 years from 2 years for small businesses with gross receipts of $15 million or less. This carryback only applies to net operating losses for any tax year beginning or ending in 2008. In 2009, the net operating loss carryback reverts to 2 years.

Delayed Recognition of Certain Cancellation of Debt Income

For certain businesses that repurchase their own debt at a discount in 2009 and 2010, the new law allows the businesses to recognize cancellation of indebtedness income over 10 years. The tax on the cancellation of indebtedness income can be deferred for the first four or five years and then the income is recognized ratably and taxed over the next five years.

Extension of Enhanced Small Business Expensing under Section 179

Section 179 permits small business taxpayers to elect to write off the cost of certain capital expenses in the year of acquisition in lieu of recovering the costs over time through depreciation. In 2008, the amount that small businesses could write off was increased to $250,000 and increased the phase out threshold to $800,000. The new law extends these temporary increases for 2009.

For more information on these and other tax provisions found in the American Recovery and Reinvestment Act, please contact Julia Turk at 312/840-7033/jturk@burkelaw.com or Greg Winters at 312/840-7059/gwinters@burkelaw.com.

Circular 230 Disclosure: Any tax advice contained in this publication was not intended or written to be used, and cannot be used (i) by any taxpayer for the purpose of avoiding any penalties that may be imposed on the taxpayer, or (ii) to promote, market or recommend to another party any transaction or matter addressed herein.

SHAREHOLDER WARS: Firm partners deliver prescription to manage shareholder disputes in national seminar broadcast

Given the current economy, the corporate pie is more often shrinking than expanding. Rather than resolve disputes about the size of their piece of the pie, shareholders and other business partners are increasingly likely to ask a judge, not their fellow partners, to cut the slices. Burke Warren partners Craig McCrohon and Fred Mendelsohn recently presented a legal seminar that was broadcast nationally concerning legal developments and best practices to prevent and manage shareholder and similar business disputes.

Like a marriage strained by the loss of a job, shareholder relations at closely-held businesses have become strained as sales decline and financial and management agendas diverge. One side may demand cash from a company to maintain lifestyles, while another faction may seek to reinvest cash for the long-term — to grow the business for the future. Others may seek to sell or merge, believing survival or other circumstances mandate this type of action.

McCrohon and Mendelsohn, who practice regularly in this area, surveyed the causes and consequences of these disputes, along with techniques to avoid disagreements that can destroy the company or the wealth of its owners. In reviewing recent case law from across the 50 states, they focused their presentation on the following trends in the law of shareholder and ownership governance disputes:

For closely-held business entities, courts are increasingly ignoring traditional judicial deference to management decisions, absent obvious conflicts of interests. Courts now frequently review not only the substance of the decision, but also the process of decision making in the particular business.

Bottom line: Companies in potentially contentious situations should document significant business decisions. This includes more detailed minutes of decisions by shareholders, partners, LLC members, directors, officers, and others, as well as documenting the financial and strategic justification for significant or contentious business decisions. For truly company-changing acquisitions, such as sale of corporate control, management should consider third-party valuations and similar support.

Rather than reviewing how controlling shareholders unfairly harmed the non-controlling group, courts have more frequently examined the "reasonable expectations" of the non-controlling shareholders in their ownership of shares of the company.

Craig McCrohon

Fred Mendelsohn

Bottom line: Management should document the expectations of owners and other interested persons. Documents can include employment agreements, management agreements and/or shareholder agreements (depending on the type of business entity), with clear provisions relating to the subject matter — grounds for employment termination, circumstances under which ownership is bought and sold, and how corporate governance is handled. In the case of payment of fees or dividends to related companies, appropriate documents can effectively evidence the expectations of the parties and substantially limit risk.

Courts have more frequently allowed terminated employees to claim that their salary is a de facto dividend from the company, and one that is not easily terminated. The theory is cut off the salary, and the controlling shareholders have effectively hoarded the dividends (i.e., the terminated owner's salary).

Bottom line: Document, document, document. Execute employment agreements that describe anticipated compensation and responsibilities. Shareholder agreements can demonstrate whether the parties anticipated dividends, or provided a means to sell shares to the controlling shareholders. Operating agreements in limited liability companies (LLC's) can address these issues and more, again to avoid claims based on unwarranted or unreasonable expectations.

Increasingly, the law applicable to "closely-held" businesses diverges from court cases establishing the law applicable to publicly-held corporations, especially as to control by the board of directors. Delaware corporate case law — that occupy the bulk of legal textbooks on the subject — have become increasingly irrelevant to courts reviewing claims of shareholder oppression and other wrongful conduct by those in control of business entities vis-à-vis the minority (who are of course not in control).

Continued on page 4

SHAREHOLDER *Continued from page 3*

Bottom line: Unfortunately, the obscure cases rule the day. Consult with advisors with access to and knowledge of these buried judicial bombshells.

As LLCs have become widely accepted, courts have become more comfortable applying the letter of the operating agreements to owner disputes. Courts will rely less on the judge-made legal principals such as duties of fairness, due care and loyalty, oppression claims. Thus, owners of interests in LLCs can rely far less on the general common law standards than on the precise words of their agreements.

Bottom line: The more likely disputes among LLC owners, the more value exists in carefully crafted LLC operating and other related agreements. Given the interpretation of the LLC acts, versus corporation statutes, or even age-old partnership law, courts often defer to LLC agreements and governing document.

The McCrohon and Mendelsohn program also focused on various courtroom tactics and strategies to resolve ownership, management and governance disputes and other "business divorces," including:

The applicability of derivative claims. In some circumstances, particular in entities (primarily corporations) that have several managers (directors), an owner may need to make a demand on the business entity to file suit against an owner, manager or officer who has harmed the company (such as an owner engaged in self-dealing). Before pursuing this type of claim, the owner must request that the company sue the offender. Only after formal rejection by the company, will courts then allow a suit to proceed.

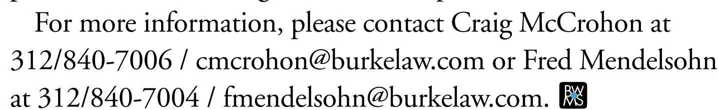
In some circumstances, a disgruntled owner may seek to "dissolve" the business entity, because of deadlock, oppression by those in control, waste or misapplication of business assets. These claims can be very effective to secure a buy out of the owner or to achieve other dispute resolution objectives, and can often set the stage for alternative dispute resolution such as mediation, as would occur in a marital dissolution.

In other circumstances, different remedies may be employed to achieve desired results. Business owners can employ various statutory or other remedies to remove managers in control, or seek to appoint receivers, all with an eye toward a strategic business objective tied to the underlying business ownership dispute.

Bottom line: Focus on these additional legal remedies that can have major strategic and tactical impact on bringing, defending or resolving claims among owners in dispute in privately-held businesses.

In short, with a slumping economy, having and maintaining appropriate documents and adhering to corporate and other business formalities has become increasingly important to reduce the chance, or intensity, of business ownership and related disputes. With owners more likely to fight amidst a corporate downturn with competing ownership goals, management should review documents and practices to avoid inside disputes — and preserve resources to fight outside competitors.

For more information, please contact Craig McCrohon at 312/840-7006 / cmcrohon@burkelaw.com or Fred Mendelsohn at 312/840-7004 / fmendelsohn@burkelaw.com.



(From left to right, Barry Howard, Director, CampOut for Kids, Melissa C. Selinger, Burke, Warren, MacKay & Serritella, P.C., Marc Lifshin, Director, CampOut for Kids and Joe von Meier, Burke, Warren, MacKay & Serritella, P.C.)

Firm clients, Marc Lifshin (LG Development Group and Campus Acquisitions), Barry Howard (LG Development Group and Campus Acquisitions) and Brian Neiswender (Campus Acquisitions) (not pictured) identified a need in their community and they acted to fulfill it. Last November, Lifshin, Howard and Neiswender teamed up with Firm Attorneys Melissa Selinger and Joe von Meier to form the 501(c)(3) not-for-profit organization CampOut for Kids. The mission of CampOut for Kids is to send at least 10 underprivileged kids under the age of 16 to an overnight sporting or outdoor adventure camp each year. CampOut for Kids will cover 100% of the cost of attending the camp, including, tuition and travel expenses. Grant recipients are selected based on their personal applications, which can range from an essay to a video or even a song. On December 3rd, CampOut for Kids hosted its inaugural event at Landmark Grill and Lounge in Chicago and raised over $12,000 for the cause. The event was co-sponsored by a number of local businesses, including Burke, Warren, MacKay & Serritella. Melissa Selinger provided corporate and tax advice for CampOut for Kids and was assisted by Joe von Meier, recipient of Super Lawyer Magazine's 2009 Illinois Rising Stars Award for Real Estate Law.

Burke, Warren, MacKay & Serritella, P.C. promotes three experienced attorneys

Burke, Warren, MacKay & Serritella, P.C. recently promoted three attorneys to new positions. Jonathan Michael, a partner in the firm's Wealth & Succession Planning practice, is now a firm shareholder. Litigators Susan Horner and Daniel Klapman were promoted from associate to partner.

Jonathan Michael focuses his practice on estate and gift tax issues, with an emphasis on wealth and business succession planning for closely held business owners and entrepreneurs. He represents a broad array of clients, including entrepreneurs, business owners, executives, professionals, actors, athletes, and individuals and families with inherited wealth.

Mr. Michael received his undergraduate degree in Finance from Miami University, in Oxford, Ohio, his law degree, *cum laude*, from the University of Miami School of Law, in Coral Gables, Florida, and his Masters of Law degree, in Taxation, from the New York University School of Law, in New York, New York. Mr. Michael is also an Adjunct Professor in the L.L.M. Program at The John Marshall Law School as well as a frequent speaker on business succession and estate planning issues.

Jonathan Michael

Susan Horner is a member of the firm's Religious & Human Services and Litigation practice groups. Before joining the firm in 2007, Ms. Horner served as a prosecutor in the felony trial division of the Cook County State's Attorney's Office, where she was employed since law school graduation. Ms. Horner has tried more than 25 jury trials and litigated hundreds of motions and bench trials. In addition, Ms. Horner has handled appellate matters and has argued before the Illinois Court of Appeals.

Susan Horner

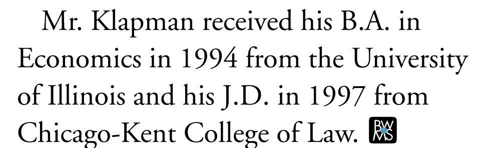
Ms. Horner received a Bachelor of Fine Arts in Art & Religious Studies in 1993 from St. Mary's College, *magna cum laude*, a Master of Arts in Art History in 1995 from the University of Notre Dame, and her Juris Doctor from Notre Dame Law School in 1998, *cum laude.*

Daniel Klapman serves clients ranging from entrepreneurial individuals to Fortune 500 companies in complex litigation cases before state and federal courts. Mr. Klapman has represented clients in a wide variety of matters, including shareholder and other business investment, ownership and governance disputes, commercial contract cases, employment and labor matters, as well as manufacturer-representative, real estate, landlord-tenant, consumer fraud, intellectual property and trade secret litigation.

Daniel Klapman

Prior to joining the Firm, Mr. Klapman was an associate in a mid-sized commercial law firm in Chicago. Mr. Klapman began his practice in the public sector, bringing to the Firm six years of investigative and prosecutorial experience from the State's Attorney's Office, where he served in several different divisions, training and supervising many junior attorneys. His background also includes real estate and real estate tax matters.

Mr. Klapman received his B.A. in Economics in 1994 from the University of Illinois and his J.D. in 1997 from Chicago-Kent College of Law.

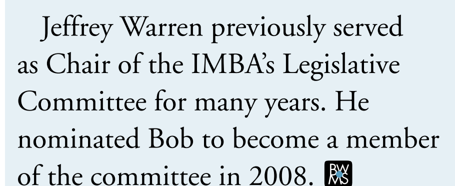


Emanuel named Vice Chair of IMBA Legislative Committee

Bob Emanuel was recently named Vice Chair of Illinois Mortgage Bankers Association (IMBA) Legislative Committee. The Legislative Committee reviews and comments on proposed mortgage banking industry legislation in Illinois.

Bob Emanuel

Jeffrey Warren previously served as Chair of the IMBA's Legislative Committee for many years. He nominated Bob to become a member of the committee in 2008.



Illinois Decoupling

A Federal /State legal miscue forces many to amend estate plans

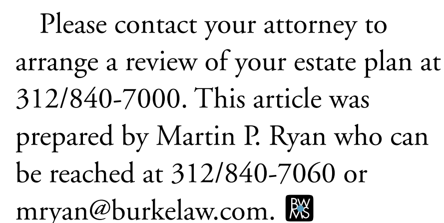
Changes in one's family or financial situation as well as changes in tax laws can necessitate amending an estate plan. Beginning on January 1, 2009, there is a change in Federal and State estate tax laws that could, if not addressed, force survivors to pay estate taxes years before they would normally be due.

Historically, the payment of Illinois (and most other states) estate tax was linked to the payment of federal estate tax. Thus, estate plans were drafted to defer the payment of federal estate tax until the death of the surviving spouse, which also resulted in the deferral of the payment of Illinois estate tax. However, a few years ago, Illinois "decoupled" from the federal tax system. As a result, beginning January 1, 2009, unless certain provisions are included in an estate plan, the situation could arise where federal estate tax is deferred until the death of the surviving spouse, but Illinois estate tax is payable upon the death of the first spouse. The vast majority of estate plans prepared by our firm beginning in late 2005 and thereafter address this issue. Those executed before 2005, whether prepared by our firm or others, would most likely not.

Martin P. Ryan

While we and other Illinois attorneys were hopeful that Illinois will amend its laws to correct this problem, firm contacts in Springfield advise us that, at least for the near future, the legislature does not plan on doing so. Therefore, we recommend that all estate plans prepared prior to 2006 be reviewed to determine if a change is necessary to address Illinois decoupling.

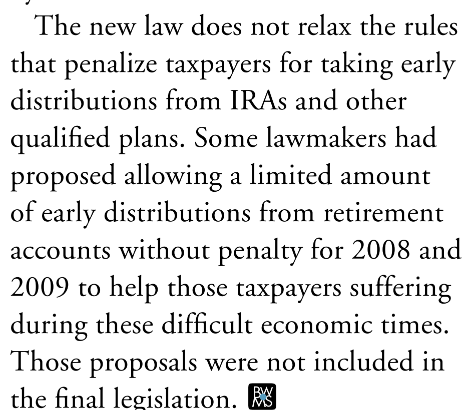
"Therefore, we recommend that all estate plans prepared prior to 2006 be reviewed to determine if a change is necessary to address Illinois decoupling."



Please contact your attorney to arrange a review of your estate plan at 312/840-7000. This article was prepared by Martin P. Ryan who can be reached at 312/840-7060 or mryan@burkelaw.com.

Legislation offers some relief from minimum distribution rules for 2009

Many retirees watched as the value of their retirement accounts plummeted during the second half of 2008. Existing tax rules would have forced those retirees to further deplete their retirement accounts when they are at their lowest by taking required minimum distributions from their IRAs or qualified plans. The Worker, Retiree, and Employer Recovery Act of 2008 which was signed on December 23, 2008 suspends required minimum distributions from qualified retirement accounts for 2009. Required minimum distributions for 2008 were not waived by the new law.



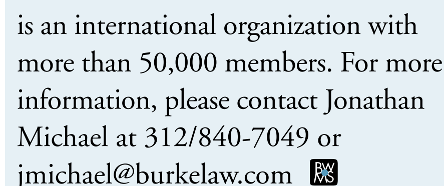
The new law does not relax the rules that penalize taxpayers for taking early distributions from IRAs and other qualified plans. Some lawmakers had proposed allowing a limited amount of early distributions from retirement accounts without penalty for 2008 and 2009 to help those taxpayers suffering during these difficult economic times. Those proposals were not included in the final legislation.

Michael presents at ASHRAE National Convention

Jonathan Michael was a featured presenter on business succession planning issues at the recent 2009 national convention of the American Society of Heating, Refrigerating, and Air-Conditioning Engineers at the Palmer House.

Jonathan Michael

ASHRAE is an international organization with more than 50,000 members. For more information, please contact Jonathan Michael at 312/840-7049 or jmichael@burkelaw.com



MEDIATION *Continued from page 1*

Arbitrators and courts make rulings. Mediators assist the parties in negotiations. A skilled mediator may be able to help the parties find areas of agreement that they would not have found themselves. Mediation can be thought of as enriched negotiation. The purpose of mediation is to assist the negotiations, and could enhance the possibility that the negotiations will be successful.

"I do not want to get into mediation because, if I do, I'm going to have to give up something."

Not so. Remember, mediation is enriched negotiation. It does not require one to give up anything he or she would not be willing to give up in negotiation.

There are many kinds of successful mediation outcomes. The obvious successful outcome is when parties come to an agreement that resolves their dispute. However, there are also other positive outcomes. The parties may narrow their area of disagreement which, in turn, may stimulate "homework" that will help them resolve their dispute at some future time. On the other hand, the parties may also come to the realization that they cannot resolve the dispute through negotiation and that some other method of dispute resolution is necessary. These methods include traditional litigation or arbitration.

There are also hybrid approaches to dispute resolution that have elements of both mediation and arbitration. The parties may come to an agreement on certain elements of their dispute through negotiation enhanced by mediation. The parties may want to submit the remaining parts of their dispute to arbitration. For example, there may be agreement that a claim is worth at least $10,000 but no more than $25,000. The parties may be so entrenched in their views that negotiation reaches an impasse. At this point they can ask an arbitrator to make a decision on how much should be paid. The arbitrator's discretion would be limited to an amount between $10,000 and $25,000.

"I don't want to go into mediation because it is too expensive."

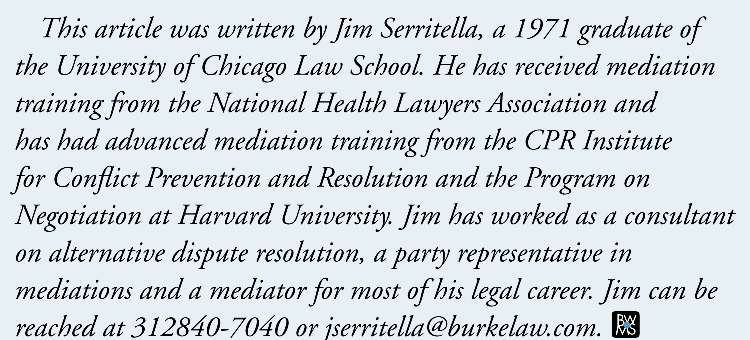
In fact, litigation is exponentially more expensive than mediation. Arbitration is also likely to be significantly more expensive because it typically involves discovery, including depositions and expert witness discovery, as extensive as civil litigation.

Think about it for a moment. A mediation may go for a day or part of a day. You have to pay for the mediator's time as well as your own lawyer. The mediator's fee is usually split between or among the parties. Even if the mediator schedules follow-up conferences or phone calls after the primary mediation session, the cost is usually limited to time expended. Litigation involves months (if not years) of discovery, that usually includes searching and producing documents, answering interrogatories, and taking (as well as defending) depositions. If there are disagreements about any of this (and there usually are), discovery also involves court appearances and likely drafting briefs. There may still be other court appearances and briefs for other kinds of motions. All this still does not resolve the dispute. It culminates in a trial where a judge or jury is going to make a decision for the parties. That decision, of course, is appealable to another court or courts. All of these tasks take time and the parties pay for the time by the quarter hour. Even if the parties decide to settle before completion of the full litigation cycle, the cost up to the time of settlement can be significant.

Realize, however, that the size and complexity of cases also determines the value of mediation. Large, highly complex cases often take years to resolve, making litigation an inefficient and highly costly option. Smaller cases with less complex demands may not require the same resources, sometimes blurring the benefits between mediation and arbitration or litigation. Therefore, the size and nature of the case should also influence the path followed.

Summary

I would be the first to agree that mediation is not always the right choice. In fact, there are situations where there is no wonderful or even palatable alternative for resolving the dispute. All the more, in every dispute the parties need to think long and hard about just moving into litigation, because it is "the routine." Mediation may well be either the better or, at minimum, the least onerous alternative for resolving their dispute. It certainly merits serious consideration unencumbered by misconceptions — especially in a time when money is tight for everyone.



This article was written by Jim Serritella, a 1971 graduate of the University of Chicago Law School. He has received mediation training from the National Health Lawyers Association and has had advanced mediation training from the CPR Institute for Conflict Prevention and Resolution and the Program on Negotiation at Harvard University. Jim has worked as a consultant on alternative dispute resolution, a party representative in mediations and a mediator for most of his legal career. Jim can be reached at 312840-7040 or jserritella@burkelaw.com.

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The Bulletin is written by the firm of Burke, Warren, MacKay & Serritella, P.C. to keep clients and friends current on developments in the law and the firm that might affect their business or personal lives. This publication is intended as a general discussion and should not be construed as legal advice or legal opinion on any specific facts or circumstances. It is meant as general information only. Consult an attorney with any specific questions. This is a promotional publication. ©2009 Editor: Cy H. Griffith, Director of Marketing.

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BWM&S

The Employee Free Choice Act: What follows is an overview of key elements of the Employee Free Choice Act as we know it at printing, April 3, 2009.

The Employee Free Choice Act (EFCA) is proposed legislation (to amend the National Labor Relations Act) that, if passed by Congress in 2009, will dramatically change the landscape of union organizing in our country. While the rationale of the EFCA is beyond the scope of this article, it is legislation that cuts to the heart of many political issues and has been hotly debated. While President Bush made clear his intent to veto the bill, it was passed by the House of Representatives during his second term, but was tied down in a motion to invoke cloture in the Senate at that time . The bill is supported by President Obama, and has broad support among Democrats in the 111th Congress. Senator Specter, however, has recently indicated that he would support a filibuster if the bill reaches the Senate floor this year.

The EFCA has three main components which would replace the current system of secret-ballot union organizing elections, compel initial collective bargaining agreements, and impose more serious penalties for employers who engage in unfair labor practices. The EFCA has far reaching implications for a great number of domestic employers and is organized labor's top legislative priority.

Under existing law, a union can petition the National Labor Relations Board (NLRB) to hold a secret ballot election when it has collected signed authorization cards from at least 30% of employees of an "appropriate bargaining unit." Unions more often obtain cards from 50% plus 1 of the employees in a unit it seeks to organize before petitioning the NLRB for certification as the collective bargaining agent for the employee group. Under current law, however, the employer need not accept the "card check," and can demand a secret ballot election to determine the union's majority status. Under the EFCA, once a union presents authorization cards for a majority of an employer's workers, the NLRB must certify the union as the representative of the employee group for at least one year – doing away with secret ballot elections. The result is challenging: before employers even know a union is "talking" to its employees, that union could be its next business partner, looking for a labor agreement.

Under existing law, once a union officially represents a group of employees, the employer and the union are obligated to bargain in good faith on an agreement as to wages and other terms and conditions of employment. The obligation to bargain in good faith does not include an obligation to reach agreement. If good faith bargaining fails, the union can strike or the employer can unilaterally implement its last, best offer. Under the EFCA, the parties still engage in a mutual give-and-take, but are obligated in an initial contract to reach agreement within 90 days. If they fail to do so, the EFCA mandates that the parties mediate their dispute with the Federal Mediation and Conciliation Service. If mediation fails, the EFCA mandates binding interest arbitration under which terms and conditions of a collective bargaining agreement will be imposed on the parties by an arbitrator for a two-year period. The result in a nutshell: control over wages and other conditions of employment vests in a third party government official who is not accountable to or for the employer's business.

Under the third component of the EFCA, the NLRB is obligated to seek a federal court injunction whenever there is reasonable cause to believe that an employer has improperly discharged employees, discriminated against them, or interfered with employee rights during an organizing campaign or initial contract bargaining. Employers found to have illegally discharged an employee are no longer exclusively liable for "back pay." Rather, a penalty of two times any back pay (effectively, triple back pay), plus a $20,000 penalty for unfair labor practices committed during organizing drives, would be applicable under EFCA.

Legislation surrounding the EFCA is being watched by many including the authors of this article, Ken Richman and Fred Mendelsohn, who can be reached at 312/840-7002 / krichman@burkelaw.com or 312/840-7004 / fmendelsohn@burkelaw.com.