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An early Obama test: unions vs. business

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THE EARLY DAYS of any new administration are carefully planned theater. What comes later is a better test of a new president's skill, for that's when he must start to navigate the jagged reefs that lurk just beneath the surface bonhomie.

One issue that could soon test President Obama is card check - or, as it's also known, the Employee Free Choice Act. Passage of that legislation, which Obama supported as a presidential candidate, is a key goal of the unions.

Labor is hoping for action this spring - and that's got some other Obama allies worried.

"The problem he is going to face is that card check is a top priority of the unions, who feel they were left out in the cold during the Bush administration, but it is a lightning rod to the business community, which believes it is anti-democratic and will increase the cost of doing business," says Bob Sherman, a member of Obama's transition team.

The act would require employers to recognize a union as soon as a majority of employees sign authorization forms or cards expressing their desire to unionize. Under current law, the National Labor Relations Board schedules a secret election when 30 percent of employees sign up. Unions view the change as crucial to reviving a struggling labor movement. As they see it, mandating immediate recognition of a union would greatly reduce the intimidation that workers sometimes face when they try to organize.

But the business community, whose confidence Obama wants and needs, is apoplectic at the prospect of easier unionizing. It has launched an advertising campaign charging the act would lead to union pressure on workers to sign an authorization card.

Both sides have a point. In the private sector in particular, unions provide important protection and leverage for workers. Employees have a right to unionize, and that unionizing should be free from intimidation or retaliation.

But business is certainly correct that unions can be guilty of pressure tactics. And, of course, a secret ballot has long been the gold standard when it comes to fair elections.

Although business and labor are at loggerheads on the issue, last week Obama signaled to the Washington Post that he might be open to compromise.

"I see him trying to get business and labor to devise a solution that may not be ideal to any one party, but will be livable for all," says Sherman, who stresses he is not speaking for the new administration.

But how? Perhaps by focusing on the real concern: the reprisals that sometimes occur during a union organizing campaign. Under the National Labor Relations Act, firms are forbidden from firing employees or threatening job losses or plant closure in their attempts to influence the election. Nor are they allowed to grill employees about their union sympathies or activities.

Problem: A strictly remedial law, the National Labor Relations Act lacks any real penalties to punish violators. If it has wrongly fired people, a company can be required to rehire them, with back pay and interest. For other violations, the most that can happen is that the business gets slapped with a cease-and-desist order, requiring it to discontinue the unfair labor practice and to post a notice that it's done so.

That lack of penalties can encourage abuse, for this simple reason.

"The consequences of a union forming are often much greater to an employer than exposure to NLRB remedies," says Michael Harper, professor of law at Boston University School of Law.

But if business interests mean what they say about the importance of a pressure-free choice, they should support a fair process throughout. That would mean beefing up the current law so the NLRB can assess serious monetary penalties for violations - something the proposed legislation includes - and perhaps holding union elections more quickly.

A sweetener for labor might be the promise of real say as Obama fills the three vacancies that currently exist on the five-member labor relations board.

Neither side is talking compromise. Not yet, anyway. But a skillful president just might pull it off.

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