

UNION LEGISLATION GREATER THREAT FOLLOWING ELECTION

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The “Employee Free Choice Act” (EFCA or “card check”) was passed by the House of Representatives, but was blocked by the Senate Republican minority during the 110th Congress. Long considered the top priority on organized labor’s wish list, the card check would eliminate the secret-ballot election for workplace organization that is overseen by the National Labor Relations Board. Instead, a union could be formed if a majority of employees in a bargaining unit sign authorization forms, or “cards.” Many fear that intimidation and coercion will result. The Employee Free Choice Act would also repeal a state’s right to declare itself a “right-to-work” state.

Swelling Democratic majorities and the election of a new President that was an original EFCA cosponsor during the 110th Congress give many in the business community reason for legitimate concern that the legislation could be enacted in the 111th Congress, which will be seated in January.

The Employee Free Choice Act could have a significant impact on the green industry. While agriculture is currently exempted from the National Labor Relations Act, and only a handful of states have an agricultural labor relations law, it is difficult to determine the extent of the vertically-integrated green industry’s exposure. The family-held, multi-generational and seasonal nature of the industry may not make most growing or retail operations top union targets. Yet, those engaged in landscape contracting and maintenance – and especially national or regional, multi-location operations, could very well be at-risk union targets.

Labor’s awareness of the green industry was evident during the H-2B returning guest worker exemption debate, when the local shipbuilders union LIUNA sent harassing letters to H-2B employers and public officials throughout the mid-Atlantic region demanding that these businesses seek their labor solutions through their local labor union chapters before turning to H-2B.

Passage of card check is almost a certainty in the House of Representatives. The fate of the EFCA will be decided in the Senate, where unions have presumably gained the support of every incoming Democratic freshman. Democratic victories in any of the remaining undecided Senate races in Alaska, Minnesota and Georgia would push leadership closer to the 60 vote filibuster-proof super-majority needed to adopt card check in its current form.

Sen. Arlen Specter (R-PA) was the lone Republican to vote “yes” to proceed to the bill during the 110th Congress. Assuming that his support holds, it would not be a stretch to envision a few more vulnerable, moderate Republicans joining an effort to vote for some variation of this legislation during the next Congress. President-elect Obama, strongly supported by organized labor and an original co-sponsor of EFCA in the 110th Congress, would be expected to sign such a bill into law.

GREEN INDUSTRY PROFESSIONALS ELECTED TO CONGRESS

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The general election was historic by any measure, including the election of two green industry professionals to seats in the U.S. House of Representatives. And though both challengers benefitted from anti-incumbent sentiment, each proved to be a skilled campaigner and centrist, pro-business candidate that scored a stunning upset on election night 2008.

SummerWinds Garden Centers co-founder Walt Minnick (D-ID) upset incumbent Republican Bill Sali in Idaho’s first congressional district. Minnick was victorious by a two point margin in what is considered a heavily Republican district, and was bolstered by support of ANLA-PAC and a significant number of green industry professionals that supported fundraising efforts to help push Walt over the top. Also scoring a stunning upset was challenger Kathy Dahlkemper (D-PA), Special Projects Director at Dahlkemper Landscape Architects and Contractors in Erie, PA. Dahlkemper overcame long odds to defeat long-time incumbent Phil English (R-PA) in Pennsylvania’s third district by a surprising 4 point margin.

ANLA-PAC also enjoyed a highly successful election cycle by collaborating with many Lighthouse Program state landscape and nursery association partners. During the 2008 election cycle, ANLA-PAC partnered with the following Lighthouse partner associations in successful local events and fundraisers that led to the election of supported candidates to federal public office:

Arizona Nursery Association (Rep. Giffords), Connecticut Nursery & Landscape Association (Reps. Delauro and Murphy), Illinois Green Industry Association (Rep.-elect Schock), Kentucky Nursery & Landscape Association (Sen. McConnell), Minnesota Nursery & Landscape Association (Rep.-elect Paulsen), North Carolina Nursery & Landscape Association (Sen.-elect Kay Hagan), Oregon Association of Nurseries (Rep.-elect Schrader), South Carolina Nursery & Landscape Association (Sen. Lindsey Graham) and the Wisconsin Green Industry Federation (Rep. Ryan).

NIOSH REPORTS ON INCREASE OF LANDSCAPE WORKER FATALITIES

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The National Institute for Occupational Safety and Health (NIOSH) issued a report entitled "Fact Sheet: Fatal Injuries Among Landscape Services Workers," making a statistical claim that the fatality rate for the landscape services industry is similar to more recognized high-risk industries like agriculture and mining. The report indicates that an average of 197 landscape services workers died from on-the-job injuries every year between 2003 and 2006, a total of 789 deaths due to traumatic injuries during those years.

The report also chronicles the demographics of the workforce that suffered fatalities, and identifies the most common causes of such an injury. The report underscores the importance of strong green industry safety and education programs. It could also fuel calls for more workplace regulation, and bears close monitoring. To read the report, visit: <http://www.cdc.gov/niosh/docs/2008-144/>

H-2B DEBATE UNLIKELY UNTIL JANUARY

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Though Congress will reconvene for a lame duck session following the November elections, it is unlikely that consideration of the returning guest worker exemption will occur during the last legislative session of the 110th Congress. While the Senate intends to meet for a brief session to address several stalled land use bills, House leadership will examine the possibility of a second stimulus bill that could include an extension of unemployment benefits, infrastructure investment and addressing the financial crisis within the American automobile industry.

Recent media comments by House Speaker Nancy Pelosi (D-CA) indicate that leadership in the House is intent on continuing to address immigration reform in a comprehensive manner, as she called for the end of ICE enforcement raids while trying to craft a bipartisan approach to reform. Organized labor, now feeling increasingly powerful after the November 4th elections, will continue to oppose virtually all expansion of existing or the creation of new guest worker programs. With strong disagreement in the Democratic "family" progress on the issue during a lame duck is a distant prospect. The debate on the H-2B returning guest worker exemption is likely to begin anew in January during the next session of Congress.

DEMOCRATS TAKE WHITE HOUSE, EXPAND MARGINS IN CONGRESS

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Profound economic fears coupled with a strong anti-incumbent and anti-Bush sentiment shaped an historic national election. American voters tend to display a preference for the "checks and balances" of divided government, but not this time. At least for the next two years, Democrats control the White House, Senate, and House. A few election specifics:

- By popular vote, the nation remains almost evenly divided in its presidential preference, with Obama garnering roughly 53%. However, Obama held traditional “blue” states, and carried the majority of key battlegrounds like Ohio, Florida, Virginia, North Carolina, Indiana, and Colorado, which are especially notable. As a result, Obama’s Electoral College margin was wide, more than double that of McCain.
- Obama did especially well among first-time voters (70%), under-30 voters (68%), black voters (96%), and Hispanic voters (67%). The latter is garnering much press coverage since Hispanics are now America’s largest and fastest growing minority and have been “up for grabs” politically. Republican mismanagement of the immigration reform issue is blamed at least in part for the shift in Hispanic voting patterns.
- The economy was the number one issue for 63% of voters, and 54% of those voters went for Obama. Other issues of primary concern all polled 10% or less; Obama led among voters worried about Iraq, health care, and energy. McCain was heavily favored by those who listed terrorism as their primary concern.
- The new Senate will have at least 55 Democrats and two independents who have historically caucused with the Democrats. This gives a stronger majority but short of the 60 votes needed to overcome blocking tactics.
- Democrats picked up 19 seats in the House, bringing their margin to 255 of 435. Several seats remain too close to call. Many Democratic pick-ups are in swing or Republican-leaning districts, and some of these freshmen and other “blue dog” moderates could band together to insist on political moderation – or cross over and vote with conservatives on tough issues.
- In the states, most incumbent governors held their seats; open seats in North Carolina and Missouri were Democrat pick-ups.

NEW PRESIDENT, NEW CONGRESS: CONTINUOUS CRISIS OR OPPORTUNITY?

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Many in business fear the worst in the wake of the November 8 elections. They see one-party rule leading to overreaching on unionization, labor and environmental regulation, and taxation. Others see the cup as at least half full. After all, President-elect Obama should know that any successful president must govern in a centrist way to be rewarded with a second term. Only time will tell who’s right. Here are a few insights on key green industry issues:

The Economy. Stabilizing and stimulating the economy will be Obama’s and Congress’s top priority. Some possibilities, including public works and infrastructure investments, could have some direct positive impact on the green industry. However, new rules requiring most federal contractors to electronically verify the immigration status/work eligibility of their labor force take effect January 15, and pose a new wrinkle.

Expect early efforts to focus on everything from extending unemployment benefits to helping homeowners caught in the mortgage and foreclosure crisis, to bailing out the Detroit automakers and “making good” on the promise to cut taxes for some, while at some point raising them for others. Early signs are that tax increases may wait for now.

Immigration. Prospects for progress are somewhat improved, though timing is a question. Immigration is unlikely to be a “first 100 days” issue. Rahm Emanuel, the Illinois congressman whom Obama tapped as his new White House chief of staff, once described comprehensive immigration reform as “a second presidential term issue.”

The good news is that Obama unequivocally supports comprehensive immigration reform, and the AgJOBS compromise that has remained intact through three Congresses. He will face less of an uphill challenge working with his own party than Bush did. Yet, there are major divisions within the Democratic fold. Hispanic groups want a very public end to much immigration law enforcement (Stop the Raids within 100 Days!), and broad legalization of the undocumented. However, labor unions – with just a few exceptions, like the United Farm Workers and

Service Employees International Union – want enforcement to continue and strongly oppose guest worker programs. The construction trades, especially, see immigration as “Mike vs. Miguel.” The troubled economy will add to the difficulty of taking this issue on, and may force a more incremental approach.

Unionization. The ironically named “Employee Free Choice Act” (EFCA) was passed by the House of Representatives, but failed in the Senate during the 110th Congress. Long considered the top priority on the union wish list, the EFCA would eliminate the opportunity for businesses to request a secret-ballot election for workplace organization that is overseen by the National Labor Relations Board. Instead, a union could be formed if a majority of employees in a bargaining unit sign authorization forms, or “cards.” The Employee Free Choice Act would also repeal a state’s right to declare itself a “right-to-work” state, eliminating the ability for a state to establish that membership in an organized union cannot be compulsory for employment. Given the changed political balance, the bill poses a growing threat, but many feel it would not pass in current form. Obama was an original EFCA cosponsor in the Senate.

Health Care. A major campaign issue that receded somewhat as the financial crisis unfolded, Obama has pledged to provide access to affordable health care for all. Obama’s plan would leave intact coverage under existing plans, and provide small business incentives to provide health insurance. The campaign claimed the plan would be paid for by raising taxes on the wealthiest Americans, and allowing the estate tax phase-out to expire.

One way to describe the coming battle on health care from an employment perspective is this: “play, or pay.” In other words, employers who choose not to provide health care that meets minimum criteria may be required to pay into a system of coverage for the otherwise-uninsured. Some small business people may resent the new mandate. Others who are already incurring the cost of health care may see this as leveling the playing field.

Last Minute Bush Regulations. Every outgoing administration rushes to complete regulations intended to leave a lasting legacy. The Bush administration is no different. Secretary Chertoff’s Department of Homeland Security, for instance, is pushing get-tough immigration enforcement rules. While Obama could issue a temporary across-the-board freeze on last minute regulations, don’t expect miracles on immigration enforcement. The fate of the dreaded Social Security No-Match rule is already in the hands of the federal courts, but the rule could be released and could take effect early next year. New Bush regulations overhauling the H-2A and H-2B programs are also likely to be published shortly. As proposed, they were a mixed bag. The H-2A proposal was especially problematic. Most of those who commented – even current program users – generally opposed the Bush proposals. Even if much improved when they are finalized, the H-2A regulations will probably be blocked by litigation or Congressional action.

MOST FEDERAL CONTRACTORS WILL BE REQUIRED TO USE E-VERIFY

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A new federal rule will require that most federal contractors agree to electronically verify the employment eligibility of their employees using the government’s “E-Verify” system. The new rule implements Executive Order 12989, as amended by President George W. Bush on June 6, 2008. The rule will require federal contractors to agree, through language inserted into their federal contracts, to use E-Verify to confirm the employment eligibility of all persons hired during a contract term, and to confirm the employment eligibility of federal contractors’ current employees who perform contract services for the federal government within the United States.

Federal contracts awarded and solicitations issued after Jan. 15, 2009 will include a clause committing government contractors to use E-Verify. The same clause will also be required in subcontracts over \$3,000 for services or construction. Contracts exempt from this rule include those that are for less than \$100,000 and those that are for “commercially available off-the-shelf” (COTS) items. Companies awarded a contract with the federal government will be required to enroll in E-Verify within 30 days of the contract award date. They will also need to begin using the E-Verify system to confirm that all of their new hires and their employees directly working on federal contracts are authorized to legally work in the United States.

The new rule is a mixed bag for the green industry. On a positive note, it appears that virtually all agricultural products – including nursery and greenhouse stock – that are “marked” (e.g., labeled) and “counted” have been

clarified to fall under the COTS exemption. The impact for landscape contractors is less clear-cut. Contracts or subcontracts under the threshold amount (\$100,000/3,000 respectively) presumably would not be affected. Also, services provided solely in association with a COTS transaction appear to be exempt. It would appear, for instance, that if the federal contract or subcontract "service" were to install federally purchased landscape trees, and no other work was involved, that the company providing the installation could be exempt from this new requirement. However, if the contract or subcontract involved other services as well, and meets the financial thresholds, it would appear to be covered.

More than 92,000 employers currently use E-Verify, a free Internet-based system operated by the Department of Homeland Security in partnership with the Social Security Administration that allows participating employers to electronically verify the employment eligibility of their employees. During Fiscal Year 2008, more than 6.6 million employment verification queries were run through the system. Critics of the system point out that this figure represents only 1 out of every 8 hires made in the United States, and that the error rate in the federal databases is too high to make the system mandatory. For a copy of the full rule, visit http://federalregister.gov/OFRUpload/OFRData/2008-26904_PI.pdf.

HOMELAND SECURITY NO-MATCH RULE FINALIZED BUT STILL BLOCKED FOR NOW

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The Department of Homeland Security (DHS) released a final version of its No-Match/Safe Harbor rule on October 28th, despite a U.S. District Court injunction barring the rule from taking effect. This rule would allow DHS to treat receipt of a "no-match" letter from the Social Security Administration as "constructive knowledge" that an employee is not authorized to work in the U.S. Employers who took certain steps prescribed by DHS to address the situation could avoid being held liable for employing the worker if DHS determines he/she is unauthorized.

Substantively, the final rule is no different than the original, except that it removes a requirement that employers notify employees of a no-match letter within five days. Employers receiving a no-match letter must still (1) check their records to verify the no-match is not due to a clerical error, (2) contact the employee to request confirmation of his/her name and social security number and correct any errors, (3) re-verify the employee's identity through the I-9 process if the previous steps do not resolve the no-match within 90 days.

In order for this rule to take effect, the U.S. District Court must lift the injunction it placed on the rule in response to a suit brought by ANLA and allied groups. DHS would like to make this rule effective before the end of the Bush Administration on January 20th, and will likely ask the Court to vacate the injunction shortly. ANLA and others will fight to keep the injunction in place.

USDA PUBLISHES "SPECIAL NEED" RULE

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The federal Plant Protection Act (PPA) gives the Secretary of Agriculture regulatory powers regarding plant pests and noxious weeds, and provides the legal framework for the foreign and federal quarantines that USDA oversees. Under the PPA, if USDA imposes a quarantine, states or localities are generally preempted from implementing more stringent measures than those established at the federal level. This federal preemption was tested, and upheld, in a fairly recent court case involving the federal quarantine for *Phytophthora ramorum*.

However, the law also gives the Secretary the discretion to waive this preemption if a state can scientifically justify that it has a special situation. USDA's Animal & Plant Health Inspection Service recently published a final rule establishing a process for considering such "special need" requests. The process spells out timeframes and specific requirements for individual states filing such requests.