

## **What Employers and Employees Should Know About the Employee “Free” Choice Act**

With the current Democratic majority in Washington and the effort put forth by organized labor to make last November’s election such a success, labor is now attempting to assert its own agenda upon our elected officials. In January 2009, the first pro-labor bill was passed with the Lilly Ledbetter Fair Pay Act. Several other bills favorable to labor have also been introduced, including but not limited to, the Equal Remedies Act which would remove the statutory caps on damages for discrimination claims. However, the initiative that poses the most substantial threat to businesses is the Employee Free Choice Act (“EFCA” or Card Check bill) which has been hailed as organized labor’s top legislative priority. The EFCA would make it easier for unions to organize worksites, require binding arbitration of first contracts after 120 days and provide for harsh penalties for certain unfair labor practices.

### **I. Overview of the EFCA.**

The EFCA, as currently written, would require an employer to recognize a union as the exclusive bargaining representative for a group of employees if the National Labor Relations Board (NLRB) finds that a majority of employees in an appropriate unit have signed cards designating the union as its representative. Current law provides that an employer is generally not required to recognize the union as a bargaining representative unless the union is successful in a secret ballot election. The EFCA would require that within 10 days after receiving a written request for collective bargaining the employer and union must commence bargaining. If after 90 days, no agreement is reached, the EFCA would require the parties to submit the dispute to the Federal Mediation and Conciliation Service for mediation. If after 30 days of mediation no agreement is reached, the parties would be required to submit to mandatory and binding interest arbitration whereby a third party arbitrator would determine wages, hours and other terms and conditions of employment, the results of which are binding for 2 years.

The EFCA would provide for harsher penalties for certain employer unfair labor practices such as, requiring the NLRB to seek a federal court injunction against an employer whenever there is reasonable cause to believe that the employer has discharged or discriminated against employees, threatened to discharge or discriminate against employees, or engaged in conduct that significantly interferes with employee rights during an organizing drive or first contract negotiations. The EFCA would authorize federal courts to grant temporary restraining orders or other appropriate injunctive relief. In addition, the EFCA increases the amount an employer is required to pay when an employee is discharged or discriminated against during an organizing campaign or first contract negotiations to three times the amount of back pay. Finally, the EFCA provides for civil fines of up to \$20,000 per violation against employers found to have willfully or repeatedly violated employee rights during an organizing campaign or first contract negotiations.

The EFCA is a utter power grab by organized labor. For example, there are no comparable penalty provisions for improper conduct of unions during an organizing campaign or first contract negotiation. Moreover, the title of the bill is a complete misnomer as the employee is not provided with any choice at all. Under current law, employers are entitled to conduct their own informational campaign with their employees in order to provide them with information about unions in the workplace. Employers can provide their own statements of opinion, facts and examples to its employees in order to allow for an informed decision at the time of an election. The EFCA would eliminate an employers right to “free

speech.” In essence, if a majority of a particular group of employees sign an authorization card, the employer could virtually have a union overnight. As some commentators have described it, “half plus one and your done.” Similarly, the bill eliminates any concept of “good faith” in contract negotiations. The union can simply come to the table with a laundry list of items knowing that the employer will not agree and force the matter into arbitration where a neutral arbitrator is likely to give the union most of what it is requesting.

The EFCA was introduced in the Senate on March 10, 2009. A counter proposal known as the “Secret Ballot Protection Act” was introduced by the Senate Republicans on March 11, 2009. Senate support for the EFCA appears to have waivered over the course of the last several months due to pressures from the business community. Senators from Arkansas and Louisiana are among six who have backed off from supporting the bill. Also, Senator Arlen Specter from Pennsylvania, prior to his change in party affiliation, announced his opposition to the bill as written. Interestingly, there has been significant discussion about possible alternatives to the EFCA known as “EFCA Lite.” This would involve a break from the current card check philosophy and involve a fast-track election process, but provide labor unions a new right: union access to an employer’s workplace in order to campaign among the employees. Senator Specter, for example, supports granting unions “equal time under identical circumstances” to meet with employees on employer property, if the employer uses “captive audience” meetings. Further, on March 5, 2009, Democratic Representative Sestak introduced a bill known as the “National Labor Relations Modernization Act,” which excludes mandatory “card check” recognition, but provides for “equal” union access to an employer’s workplace to campaign among employees.<sup>1</sup> Granting union access to an employer’s facility, including potentially the employer’s e-mail system or other communications systems, would heavily tilt the tide in favor of unions, unless unions and employers also have “equal access” to employees away from the workplace. Under the NLRA, employers are prohibited from visiting employees at home due to their coercive effect. If combined with a “quickie” election process, “equal access” would make it much easier for unions to win a secret ballot election and to organize employees. For the time being, the apparent split among Democrats underscores this author’s belief that the EFCA will have difficulty garnering the necessary 60 votes to avoid a filibuster in the Senate. However, as evidenced by the alternatives being proposed, the EFCA is long from dead and it will continue to rear its ugly head for some time to come.

## **II. What can Employers do to prepare for the EFCA?**

The EFCA, in whatever form, represents a reality check for employers. Every private employer (i.e., those with 2 or more employees) is vulnerable to fast track recognition of unions. In fact, it is quite possible that employers could have stealth card signing going on their workplace now. In a typical union organizing campaign, employees only receive one side of the story from the union and do not understand the significance of signing an authorization card nor are they aware that they are free to decline to sign a card. Such a threat stresses the importance of being proactive. If you fail to take the necessary precautions to prepare for the EFCA, you won’t have the luxury of time to campaign and educate your employees and management staff. The ramifications for failing to do so include increased labor and benefit costs, lost

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<sup>1</sup> Also included in the Sestak bill would be an extension of the mediation process to 120-days prior to submitting the matter to binding arbitration. The arbitration panel would be required to render a decision not later than 30 days after commencement of the arbitration. In addition, the length of any contract ordered after arbitration would be reduced from 2 years to 18 months.

flexibility in the form of employee resistance to change, rigid work rules, limits on discretion and the creation of a system that emphasizes seniority over performance.

**a. Why authorization cards are not an accurate measure of employee support for a union.**

Assuming the EFCA passes in its current form, authorization cards are not a true measure of union sentiment. Typically, authorization cards are solicited before employees have heard and are educated by the employer about unions. In most cases, the employee will sign the card to simply get the organizer off his or her back. However, employees can and do change their minds. Thus, their opinion at the outset of an organizing effort may not be the same when it comes time to cast their ballot. Similarly, cards are typically not read by the employee, but if signed, the employee is legally presumed to have read and understood the document. Under the EFCA, if the employee signs card, they don't get to change their mind. Moreover, if 51% of the employees in a particular group sign cards, those employees not signing cards are covered by the union. As such, employers need to stress to their employees the significance of signing authorization cards.

**b. Objections to the EFCA.**

The EFCA represents a significant departure from 75 years of existing law and precedent in labor relations. It also conflicts with the basic principles of our democratic society including (i) the selection of representatives by secret ballot; (ii) right to keep views private; (iii) free and open exchange of information with free speech on controversial issues; (iv) right of parties to freely and voluntarily enter into contracts; and (v) right to resist unwarranted government intervention. The EFCA also converts an employee oriented statute (i.e., NLRA) into an act designed to enhance the institutional interests of labor. It also presumes that unions do not violate the law by coercing employees and refusing to bargain in good faith. The true purpose of the EFCA is simply to breathe life into an organization that has been on life-support for decades.

**c. Employer preparedness.**

1. Educate officers, directors, supervisors, managers on the law so that they can recognize, understand and have awareness of the challenges and urgency posed by the EFCA.
2. **Orient employees, including new hires about union card signing.** It cannot be stressed enough that employers don't want a union organizer to be the first person to talk their employees about unions. Employers should protect and build a line of communication with their employees. Employers should also promote the benefits that having a direct relationship with employees is superior to having to deal through a third party. Employers need to emphasize that employees have the legal right to refuse to participate in union activity and to oppose unionization.
3. **Train managers and supervisors to recognize "early warning signs" of union card signing:**
  - Red Flags:
    - i. lines of employee communication go silent;

- ii. employees begin to gather together in unusual manner;
- iii. great deal of activity during breaks;
- iv. groups of employees suddenly become silent when you approach;
- v. ordinarily friendly people become withdrawn and refuse to talk to you;
- vi. formerly poor performer suddenly becomes a model employee;
- vii. restrooms become meeting room of choice;
- viii. increase in questions about company policies and benefits;
- ix. employees begin bringing complaints to you in a militant manner;
- x. unusual and increased criticism of company policies, programs, pay plans, fringe benefits, management communications and disrespect for managerial authority;
- xi. increase in employees challenging supervision;
- xii. employees begin using terms like seniority and arbitration;
- xiii. former employees begin to show up after work and engage in conversation with other employees

4. **Identify and properly vest authority in those who must be in a supervisory role.** Your supervisors are your eyes and ears. They are the communicators and educators for your employees. Employers need to be sure to convey actual authority to their supervisors. The NLRA provides that a supervisor is an individual having authority, in the interest of the employer, to: “hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” The traditional test for supervisors is: (i) whether the employee has the authority to engage in any of the 12 criteria listed above; (ii) whether the exercise of such authority requires the use of independent judgment and (iii) whether the employee holds the authority in the interest of the employer. Under current law, supervisors fitting these criteria are excluded from any bargaining unit. However, there is currently an initiative under the Re-Employment of Skilled and Professional Employees and Construction Tradeworkers Act (RESPECT) to amend the NLRA definition of supervisor that would result in narrowing the scope of employees who would qualify as a supervisor. Under RESPECT, to qualify as a supervisor employees must devote a “majority of their worktime” to management tasks over other employees. The current NLRB stance is that the employee only need to devote 10% of his or her time to management tasks. For now, it is not enough to simply denote an individual as a supervisor on paper. Employers need to be sure to properly convey the necessary authority and responsibility to those employees it wishes to deem as supervisors.
5. **Train supervisors on the dos and don'ts.** Employers are not permitted to use threats, interrogations, promises or to spy on employees in an effort to influence their union sentiments. However, employers may provide statements of fact and opinion about unions and provide specific examples of how particular unions fair in prior elections. This is known as the employer's right to free speech. In other words, this means an employer can express views, arguments or opinions, whether written or unwritten, without running afoul of the NLRA, so long as there is no threat of reprisal, promise of benefit connected to the

expression. In addition, employers cannot poll or interrogate employees about union membership or sentiments.

6. **Pointers when faced with union discussion.** Employers should be aware that employees have the right to form, join or assist labor organizations, but that employees have a similar right to refrain from such activities. Employers should advise employees that no one or no union can threaten or coerce employees to join a union. Likewise, employees should be advised that no one is required to sign a union membership or authorization card and to read carefully anything they are asked to sign. If an employee is pressured by a union organizer to join, advise them to let you know immediately. Assuming current law remains the same, advise employees that signing a card does not mean a vote for the union and that they will be allowed to vote in a secret ballot election. However, if the EFCA passes, caution against signing cards unless the employee knows all of the facts such as inquiring into the background of the organization and its agents. Advise employees to consider union promises very carefully. Let your employees know that you are willing to discuss any problems. Be sure you have explained all benefits of your company. Stress to your employees that if a majority select a union the company will have to deal with the union on all matters involving wages, hours and other conditions of employment. Emphasize that you would prefer to continue dealing directly with your employees. Tell your employees how their wages, benefits and working conditions compare with other companies in the area whether or not unionized. Highlight the disadvantages of belonging to a union such as the expense of initiation fees and monthly dues, membership rules restricting freedom and their loss of the right to make their own decisions on matters involving wages, hours and other conditions of employment.
7. **Prohibited employer conduct:**
  - i. refrain from making any promises based upon some action for or against the union;
  - ii. refrain from making threats to employees contingent upon some action;
  - iii. do not interfere with employees right to join, form or assist;
  - iv. do not ask whether or not they have joined a union or how they are going to vote or what their inclinations are;
  - v. do not circulate employee petitions;
  - vi. do not indicate approval or disapproval of activities of employees trying to form a union (exception would be a uniformly enforced non-solicitation policy);
  - vii. do not criticize or discriminate against any employee for expressing a preference or a desire for any particular labor organization;
  - viii. do not discharge or discriminate against employees because of union activities;
  - ix. do not spy on employee meetings;
  - x. do not discipline or select for lay-off employees due to union activities;
  - xi. do not ask employees for an expression of thoughts about a union or its officers;
  - xii. do not ask at the time of hiring or thereafter whether an employee belongs to a union or have they signed a union application or authorization card; and
  - xiii. do not make a statement that you will not deal with a union.

Any such activity could be viewed as an unfair labor practice and potentially used to set aside an election result or serve as the basis of a possible penalty under the EFCA.

8. **What to do if I see signs of organizing.** Employers will want to try to identify any potential organizing efforts as early as possible. At the point it becomes apparent or should you receive a petition for election, you will want to engage in an informational campaign over the course of several weeks that will include a combination of the following: employee meetings; video presentations; flyers to supplement any videos, letters to employees to reinforce themes for the week and asking employees to think carefully and to obtain all facts; distribution of particular union information (i.e., financial reports and prior election results). In addition, if a supervisor learns of any such activities they should:
- i. contact the appropriate management representative;
  - ii. contact legal counsel;
  - iii. follow supervisor dos and don'ts
  - iv. remember you don't have time to delay so immediate action is required.

The EFCA will continue to be a topic of discussion for some time and may eventually become law. However, it is unclear whether the law will pass in its current form. Until it becomes law, employers need to take precautionary steps to ensure that they are prepared to properly respond to an organizing effort.

If you should have any questions or concerns about the EFCA or any other labor and employment topic please feel free to contact Jeff Halbert at (317) 639-5454 or [jhalbert@silegal.com](mailto:jhalbert@silegal.com). Please feel free to visit our website at [www.siemploymentlaw.com](http://www.siemploymentlaw.com).