

CLIENT ALERT
The Employee Free Choice Act:
An Employer's Survival Guide

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Introduction

HRW's labor attorneys have been alerting employers for several years about a controversial labor bill called the "Employee Free Choice Act" (EFCA). Now, given the recent change in leadership in Washington, EFCA is beginning to attract the national attention it deserves from the employer community.

There is a strong possibility that EFCA will be passed in 2009. If enacted in its current form¹, EFCA would make it much easier for unions to organize new members by taking away a worker's right to vote in a secret ballot union election and by instead allowing unions to achieve recognition on the basis of signed authorization cards alone. EFCA would also ensure that a union is quickly awarded a binding first contract with a newly organized employer, through mandatory arbitration.

It is no exaggeration to say that EFCA would be *the most significant piece of labor legislation passed in the United States since the passage of the National Labor Relations Act in 1935*.

Given the high financial stakes and strong emotions on both sides of the EFCA debate, it is not surprising that a lot of inaccurate information has been disseminated about EFCA. This alert is designed to cut through the rhetoric and help employers understand exactly what EFCA is all about, what its passage would mean, and what protective steps businesses need to take right now.

What is EFCA?

Based on EFCA's current proposed language, there are three components:

1. *Recognition by Card Check* – EFCA would allow unions to achieve recognition via card check, and would do away with the current system that culminates in a secret ballot union election. This aspect of EFCA has received the most attention in the media. Card check recognition means that a union would achieve recognition merely by obtaining a sufficient number of employee signatures on union authorization cards.² EFCA contains

¹ H.R. 800; S.1041

² Typical card language reads: "I, _____ [name of employee] hereby designate and select the _____ [name of union] as my exclusive representative and agent for purposes of negotiation and collective bargaining with respect to wages, hours, and the terms and conditions of my employment with _____ [name of employer]."

no express restrictions governing how the union may obtain these signatures. The differences between EFCA and the current election-based system are stark:

Current System - Unless an employer voluntarily agrees to recognize the union via card check, a union that wishes to organize a group of workers today must obtain signed authorization cards from at least 30% of the targeted workers and then file a representation petition with the National Labor Relations Board (NLRB). The NLRB will schedule and oversee a secret ballot election, typically within about 45 days of receiving the union's petition. Employees cast their votes via secret ballot, declaring whether or not they wish to be represented by the union. Neither the employer nor the union knows how each employee has voted. If more than 50% of eligible voting employees vote in favor of the union, then the NLRB, barring any election objections, will certify the union as the employees' exclusive collective bargaining representative. Upon certification, the employer is obligated to bargain in good faith with the union over wages, hours, and other terms and conditions of employment.

EFCA's System - EFCA would effectively do away with the above system and allow a union to organize workers based on signed authorization cards alone. Under EFCA, if a union obtains signed authorization cards from more than 50% of the employees in a proposed appropriate bargaining unit then the NLRB must certify the union.³ Workers would not have the opportunity to vote. Signed authorization cards would be determinative, and the union would control the card signing process.

2. *Mandatory Settlement of 1st Contract* – EFCA would impose a strict and very short timetable for a union and newly organized employer to reach a binding first contract. Currently, it might take an employer and union more than a year to negotiate a first contract. After all, the parties are starting with a blank sheet of paper and are negotiating a comprehensive agreement that will likely govern their relationship for decades to come. But unions complain that the process takes too long and that employers have an incentive to proceed slowly, or to not reach an agreement at all. It's true that by law a union is only protected against decertification for a one-year period following its certification, after which it is only protected if it reaches an agreement with the employer. And workers often become frustrated with their union if negotiations drag on too long and if it appears that the union's campaign promises are not being achieved. Accordingly, EFCA would assist unions by imposing the following strict timetable for first-time negotiations:

- *Bargaining Must Begin Within 10 days* - Within 10 days of a union being certified and requesting bargaining, EFCA would require an employer to meet with the union and begin bargaining. EFCA would further require that the

³ Specifically, EFCA states that if the Board finds that a majority of employees have signed valid authorization cards, then “the Board shall not direct an election but shall certify [the union] as the [bargaining] representative.”

parties “make every reasonable effort to conclude and sign a collective bargaining agreement.”

- *Mediation After 90 days* - If the parties haven’t reached an agreement within 90 days, EFCA provides that either party may request mediation through the Federal Mediation and Conciliation Service (FMCS).
- *Binding Arbitration After 120 days* - If mediation is not successful within 30 days, EFCA provides that the FMCS must “refer the dispute to an arbitration board.” This arbitration panel “shall render a decision” which “shall be binding upon the parties for a period of 2 years.”

In sum, EFCA guarantees that a union will have a binding 2-year collective bargaining agreement within 120 days after being certified as the employees’ collective bargaining agent.

This aspect of EFCA would represent a major shift in national labor policy. For the past 70 years, the National Labor Relations Act (NLRA) has focused merely on leveling the playing field in bargaining, not on forcing either party’s hand to reach agreement. The NLRA currently requires only that the parties “meet at reasonable time and confer in good faith” and expressly states that the law “does not compel either party to agree to a proposal or require the making of a concession.”⁴

3. *Increased Penalties* – EFCA would increase the penalties imposed on an employer found to have unlawfully discharged an employee based on union activity during an organizing drive. Currently, a discharged organizer would be entitled to reinstatement and backpay. Under EFCA, the discharged worker could receive triple backpay damages and an employer that “willfully or repeatedly” engages in this type of unlawful behavior is subject to a civil penalty of up to \$20,000 per occurrence.

Very little opposition has yet been leveled against this third component of EFCA. This may be due in part to employers being accustomed to the availability of multiple damages and civil penalties in other wrongful discharge contexts (e.g., race discrimination), but more likely there has simply been little attention paid to this aspect of the law because the other two components of EFCA are so radical and controversial.

What Are People Saying About EFCA?

Some may defend EFCA from an “ends justify the means” perspective. Consider that the unionized percentage of the private sector workforce in the United States has slipped to an all-time low of 7.5%, and that the high-water mark, some 50 years ago, was nearly five times higher.⁵ EFCA may sacrifice employee rights, but if one believes that it is beneficial on the whole to have a meaningful union presence in the American workforce, then if a few eggs must be broken to make the omelet, so be it. In addition, supporters of

⁴ 29 U.S.C. sec. 158(d).

⁵ Bureau of Labor Statistics, Economic News Release, January 25, 2008.

EFCA claim that the current rock-bottom low percentage of unionized workers indicates that the system is somehow broken and in need of an overhaul.

Yet many people reject EFCA as an ill-advised gift to organized labor. By sacrificing an employee's right to vote in a secret ballot election, EFCA would subject employees to all manner of pressure from union organizers and co-workers to sign cards. At a minimum, the card-check process forces employees into the awkward position of having to declare – in the presence of union supporters – their support for, or opposition to, the union. The Supreme Court of the United States long ago noted the unreliability of authorization cards for this reason:

*“The unreliability of the cards is not dependent upon the possible use of misrepresentation and threats . . . It is inherent, as we have noted, in the absence of secrecy and in the natural inclinations of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees.”*⁶

Even the AFL-CIO has conceded that *“NLRB pledge cards are at best a signifying intention at a given moment. Sometimes they are signed to ‘get the union off my back’ . . .”*⁷

A former union organizer for UNITE-HERE, Jen Jason, recently testified before Congress in opposition to EFCA, pointing out these inherent flaws in a card-check system:

*“I personally took great pride in the fact that I could always get the worker to sign the card if I could get inside their home. Typically, if a worker signed a card, it had nothing to do with whether a worker was satisfied with the job or felt they were treated fairly by his or her boss. I found that most often it was the skill of the organizer to create issues . . .”*⁸

Aside from the inherent unreliability of authorization cards, it has also been noted that the current election-based system is neither broken nor in need of an overhaul. Unions currently win over 60% of representation elections, and the union victory rate has been increasing steadily over at least the last five years.⁹ Also, NLRB-run elections usually occur very quickly after a petition is filed. The average is 40 days, and 94% are held within 56 days.¹⁰

Regarding EFCA's mandatory arbitration provisions, observers like former NLRB Chairman William B. Gould have pointed out that while the current first-contract bargaining rules may be in need of change, resort to mandatory binding arbitration goes

⁶ *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

⁷ AFL-CIO “Guidebook for Union Organizers” (1961).

⁸ http://www.house.gov/ed_workforce/testimony/020807JenniferJasontestimony.pdf

⁹ See analysis of NLRB election data by Bureau of National Affairs (BNA), as reported in 11/10/08 Daily Labor Report.

¹⁰ NLRB Memorandum GC 08-01, December 5, 2007.

too far and would ironically encourage unions to engage in bad faith bargaining. “[U]nions will simply . . . sit back without bargaining in good faith [waiting for arbitration].”¹¹

Lastly, opponents of EFCA argue that in the current economic climate EFCA is the last thing that American businesses need.

All of this led George McGovern, former U.S. Senator and Democratic presidential nominee to succinctly conclude:

*“I worry that there has been too little discussion about EFCA's true ramifications, and I think much of the congressional support is based on a desire to give our friends among union leaders what they want . . .”*¹²

What is the Likelihood that EFCA will be Passed?

There is a strong likelihood that EFCA, or some version of it, will be passed in 2009.

EFCA was first introduced in the House and Senate in 2003, and it has been slowly gaining momentum ever since. In March of 2007, the bill passed the House by a vote of 241 to 185 (H.R. 800), and was only defeated in the Senate (S. 1041) in June 2007 via Republican filibuster. Barack Obama was a co-sponsor of the Senate bill in 2007 and he has clearly articulated his support for the legislation:

*“We will pass the Employee Free Choice Act. It's not a matter of if, it's a matter of when.”*¹³

* * *

*“We need to strengthen our unions by letting them do what they do best --- organize our workers . . . I was one of the leaders fighting to pass the Employee Free Choice Act. That's why I'm fighting for it in the Senate. And that's why we'll make it the law of the land when I'm President.”*¹⁴

In sum, EFCA is organized labor's highest legislative priority in 2009 and it enjoys strong presidential support.

¹¹ Bureau of National Affairs (BNA), Daily Labor Report, 11/3/08.

¹² Wall Street Journal editorial, 8/8/08.

¹³ Barack Obama, Chicago Tribune 3/4/07.

¹⁴ Barack Obama, from a speech given in Dubuque, IA, 11/13/07.

What Can I Do Now?

Employers should implement an *EFCA Preparation Plan*. A comprehensive plan includes:

- *Lobbying* – Your elected representatives need to hear from you about EFCA.
- *Employee Education* – If EFCA passes, you may not know that your company is the target of a union organizing drive until it is too late. You won't necessarily have the opportunity to discuss important issues with workers prior to an election. Accordingly, employers may conclude they have little choice but to begin educating employees about unions, about the meaning of signing a union authorization card, and as to the reasons why your company opposes unionization.
- *Employee Feedback* – Remember the adage that employees don't vote for a union, they vote against their employer. Be sure you have a thorough understanding of your employees' concerns, and develop and maintain open avenues for employees to present and resolve grievances.
- *Vulnerability Assessment* – Conduct a comprehensive vulnerability assessment, focusing on the areas that are often the focus of an organizing drive. Remember that a union's battle cry during an organizing campaign is often "Dignity and Respect!" or "You Need a Voice in Your Company!" A comprehensive vulnerability assessment means more than just analyzing the competitiveness of your compensation and benefits package.
- *Patch the Holes* – The time to fix any deficiencies or vulnerabilities is now, before an organizing drive starts. By law, it may be too late to make changes once an organizing drive has begun.
- *Internal Policies / Documents* – Be sure your solicitation / distribution policy is up to date, as well as your dispute resolution policy and other labor related policies. Also, you may need to review and update your job descriptions, paying close attention to such factors as supervisory authority ("supervisors" are members of management and are not permitted to organize).
- *Bargaining Unit Demarcation* – There are steps you can take now to help ensure that appropriate bargaining unit lines are respected in an organizing drive. Bear in mind that only employees with a "community of interest" may be included in the same unit, and that under EFCA a union would need more than 50% of employees in an appropriate bargaining unit to sign an authorization card. The scope of the bargaining unit can be critical to a union's success or failure in organizing.
- *Training* - Training must occur at every level. Senior managers, officers and board members need to understand the implications of EFCA and be in agreement on a proactive plan; front-line supervisors need training to recognize the signs of an organizing drive and to know how to effectively and lawfully answer employee questions.

We urge you to contact HRW to speak with one of our labor attorneys who can help you tailor an EFCA Preparation Plan that's right for your organization.

Conclusion:

EFCA would certainly present a major new challenge for non-unionized employers. However, it is a challenge that can be met. Employers should bear in mind that the keys to maintaining a union-free workplace remain the same: maintain a competitive compensation and benefits package, be cognizant of employee fears over job security, treat employees fairly and with dignity and respect, provide meaningful mechanisms for employee feedback and prompt grievance resolution, focus on employee recognition and participation, and be sure to thoroughly train supervisors and managers.

EFCA primarily adds a new *urgency* for employers and also creates an imperative to begin speaking with employees directly about union-related issues, even in the absence of an active organizing drive.

HRW is encouraging employers to be prepared by developing and implementing a comprehensive EFCA Preparation Plan.

This information has been presented by HRW's labor practice group. Our labor attorneys possess decades of experience helping non-union employers remain union-free. Contact HRW today to learn how we can help you meet the challenges of EFCA and achieve your business goals.

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