



THE "EMPLOYEE FREE CHOICE ACT"
A CALL TO ACTION

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During the 100th Congress, Congressman George Miller (D-CA) and Senator Ted Kennedy (D-MA) introduced a bill which they dubiously named, "The Employee Free Choice Act." The EFCA is designed to greatly ease Union efforts to recruit union members and to organize employees of non-union employers.

On March 1, 2007, the U.S. House of Representatives passed the Bill 241-185. In the Senate, although President-Elect Obama was a co-sponsor of the Bill, a Republican filibuster blocked the Bill from reaching a full Senate vote. Given the narrow margin by which the EFCA failed to pass in 2008, and given the results of the November elections, there is little doubt but that the new Congress will pass the EFCA and President Obama will sign it into law.

Supporters and detractors of the EFCA both agree that, when passed, the EFCA will likely usher in the most radical changes to the landscape of the American workplace since the Civil Rights Act of 1964. There is still time for non-union employers to prepare for the EFCA and to minimize its harmful effects, but the time to act is now!

I. Current Law

Under current law, if a union wishes to organize the employees of a particular non-union employer, Union organizers must collect the signatures of at least 30% of the proposed bargaining unit on "union authorization cards." (Although a minimum of 30% of the bargaining unit is required by law, Unions readily concede that a serious show of interest in the Union requires signatures from 65-75% of the bargaining unit.)

The Union has no duty during the process of collecting signatures to notify the employer. In fact, employers are frequently unaware that the Union has targeted its workforce until well after many employees have signed cards. During the card signing process, the Union typically has no accountability and will tell employees only "one side of the story." The process is also subject to union coercion and harassment of employees who refuse to sign a card.

Once an adequate number of signed cards are gathered, the Union presents those cards to the National Labor Relations Board and requests an election. The NLRB then notifies the employer and schedules a secret ballot election to be held at some time within the next 42 days.

During the intervening time period, the Union and the employer are permitted to engage in a campaign. The NLRB strictly regulates what an employer (and, to a lesser degree, the Union)

can say during the campaign. Any form of retaliation by an employer because of an employee's pro-union attitudes or activities is strictly prohibited.

All employees in the bargaining unit are permitted to vote in the election by secret ballot. All employees – whether they signed a card or not – are permitted to vote “for” or “against” union representation. In fact, many employees who sign cards ultimately choose to vote against the Union.

If the Union prevails, then the NLRB will “certify” the Union as the bargaining representative of the bargaining unit. The employer and the Union then have a duty to bargain with each other in good faith. Either party may be penalized by the NLRB if that party fails to bargain in good faith. However, there is no duty to reach agreement. The Union may strike or bring other pressures to bear, and the employer may lock out.

II. Employee Free Choice Act (“EFCA”)

The EFCA would amend the National Labor Relations Act to require the NLRB to certify a Union as the bargaining representative of a bargaining unit if a majority of those employees had signed union authorization cards. Thus, the EFCA would do away with secret ballot elections.

The Act also mandates that, if an employer and the union are engaged in bargaining for their first collective bargaining agreement and are unable to reach an agreement within 90 days, then either party may refer the dispute to the Federal Mediation and Conciliation Service (“FMCS”) for mediation. If the FMCS is unable to bring the parties to agreement after 30 days of mediation, then the dispute would be referred to binding arbitration. The arbitrator would be empowered to implement such terms and conditions of employment as he or she sees fit. There is no appeal from the decision of the arbitrator. The mandated agreement would be in effect for at least two years.

Finally, EFCA adds two new penalties for violations of the NLRA by employers during the organization process. (The Bill does not provide similar penalties for violations by labor unions.) New penalties would include civil fines of up to \$20,000 per violation against employers found to have willfully or repeatedly violated employees' rights during an organizing campaign. Also new is an award of “liquidated damages” equal to two times the award of backpay to any employee who is discharged or discriminated against during an organization campaign.

III. Arguments in Favor of EFCA

In support of EFCA, Unions argue:

- According to an AFL-CIO poll, 53% of non-union workers say that they would like to belong to a union. Yet, Union membership continues to dwindle. Currently, only approximately 7.5% of the private sector is unionized. (This includes the steel and auto industries.)

- Despite signing authorization cards, when given the opportunity to vote in a secret ballot election, many workers often ultimately vote against union representation. (Unions win only about 60% of representation elections.) The AFL-CIO's 1961 Guidebook for Union Organizers states, "NLRB pledge cards are at best a signifying of interest at a given moment. Sometimes they are signed to 'get the union off my back.' Whatever the reason, there is no guarantee of anything in a signed NLRB pledge card except that it will count toward an NLRB election." Unions claim that this phenomenon is due to undue harassment and threats by employers during the campaign process. Unions claim that some employers fire union supporters during organizing election campaigns in order to intimidate the remaining workers. (In fact, illegal firings of union supporters are rare. According to NLRB statistics, substantial evidence of illegal firings was found in just 2.7% of organizing election campaigns.)

IV. Arguments Against EFCA

- The EFCA would strip American workers of their right to a private vote. Representative John Klein (R-MN) stated, "It is beyond me how one can possibly claim that a system whereby everyone – your employer, your union organizer and your co-workers – knows exactly how you vote on the issue of unionization gives an employee 'free choice.' It seems pretty clear to me that the only way to ensure that a worker is free to choose is to ensure that there is a private ballot so that no one knows how you voted. I cannot fathom how we were about to sit there today and debate a proposal to take away a worker's democratic right to vote in a secret ballot election and to still call it 'employee free choice'."¹
- The EFCA would deny employees of the right to know both sides of the story before making a final decision. The Heritage Foundation quoted one former union organizer as saying, "We rarely showed workers what an actual union contract looked like because we knew that it wouldn't necessarily reflect what a worker would want to see. We were trained to avoid topics such as dues increases, strike histories, etc. and to constantly move the worker back to what the organizer identified as his or her 'issues'."
- The EFCA would deny the employer of the opportunity to provide employees with the other side of the story.
- The EFCA leaves workers vulnerable to union intimidation. From 2000 to 2007, 2,742 Unfair Labor Practice ("ULP") charges were filed against Unions for illegal coercion and threats against U.S. workers. 416 ULPs were filed against Unions for violence and assault.

¹ Proponents of EFCA argue that, technically, the Bill does not "eliminate" the possibility of secret ballot elections for union organizers who gather between 30 and 50% of the signatures of the bargaining unit. Critics of the Bill refer to this argument as "the 30-50 myth" because the unions' own literature recognizes that it is pointless to seek an election if less than 60-75% of the bargaining unit has signed cards. In fact, under current law, virtually NO unions request an election with only 30-50% of the required signatures. Under EFCA, it would be even more foolish for a Union to request an election with only 30-50% because of the knowledge that, with a bit more time, they will either determine that they cannot acquire at least 50%+1 signatures (in which case the bargaining unit clearly does not support the Union and an election would be pointless) or they will acquire the required 50%+1 signatures and avoid the election process entirely. Thus, while not technically eliminating the possibility of a secret ballot election, EFCA will make secret ballot elections completely irrelevant.

- The EFCA will destroy the concept of “bargaining” between the employer and the Union. The EFCA would force employers into binding-arbitration which discourages good faith bargaining and will leave unions and employers (and, in some cases, the future of the employer’s business) at the unpredictable whims of an arbitrator.
- The increase in penalties for unfair labor practices committed by employers – but not unions – during an organization drive strongly indicates and implies that violations of the law by labor unions are insignificant and unimportant while the same violations by the employer are to be treated very severely.
- Abuse of union-sympathizers by employers during campaigns is already made illegal by current law. If employer abuse during organizing campaigns was truly a serious problem, then card check laws that force workers to reveal their preferences in public on an authorization card would not deter such abuse and would likely only help an employer sharpen the focus of its alleged abuse.

V. Action Steps – The Employer’s Toolbox

- Maintain good communication and fair working conditions for employees.
- Adopt a written, “employee freedom” or “declaration of independence” policy.
- Carefully train supervisors, foremen, officers, etc. Ensure that they are able to identify early signs of union organizing activity. Ensure they understand the Company’s position on unionization and what they can and cannot say about unions and in what context.
- Train the rank and file. Start your anti-union campaign now! Do not let a Union Organizer be the first person to talk to your employees about joining a union. Even if the EFCA becomes law, employers will still have the opportunity to educate their employees about the negative aspects of unionization. However, under the EFCA, that training must be done before the employee is pressured into signing a union card. Remember, **“KNOW UNION = NO UNION!”**