



Employee Free Choice Act:

What is it and what do we do?

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Employee Free Choice Act

- Introduced five times in the House and approved on four previous occasions.
- Senate has not approved, whether because it failed to advance out of committee, or because of filibuster.
- Most recently introduced in Congress on March 10, 2009 by Rep George Miller (D-CA) Sen. Tom Harkin (D-MA).



“I support this bill because in order to restore a sense of shared prosperity and security, we need to help working Americans exercise their right to organize under a fair and free process and bargain for their fair share of the wealth our country creates. The current process for organizing a workplace denies too many workers the ability to do so. The Employee Free Choice Act offers to make binding an alternative process under which a majority of employees can sign up to join a union. Currently, employers can choose to accept—but are not bound by law to accept—the signed decision of a majority of workers. That choice should be left up to workers and workers alone.”



Employee Free Choice Act of 2007 –
Motion to Proceed,” Congressional
Record, GPO (2007-06-26), pp. 58378-
8398, Comments of Senator, now
President Barack Obama.



3 Main Features of EFCA

Feature 1: “Card Check”

Requires NLRB to develop procedures to “streamline union certification” including

- a) “model collective bargaining authorization language...used for purposes of making designations” by employees of bargaining representative, and



3 Main Features of EFCA

Feature 1: “Card Check”

b) “procedures to be used....to establish the authenticity of signed authorizations designating bargaining representatives.”

Purpose of these measures is to require the NLRB to certify a union as representative whenever:

“a majority of employees in a unit appropriate for bargaining has signed authorizations designating the individual or labor organization specified in the petition as their bargaining representative...”



COMPARISON OF CURRENT LAW AND EFCA

1) Authorization Cards

Currently

Used to demonstrate a “substantial question as to representation” so as to invoke NLRB election process. 30% showing of interest required for NLRB to docket case, and proceed with hearing on bargaining unit scope/voter eligibility questions.

EFCA

Signature by a majority (50% + 1) of employees in a unit appropriate for collective bargaining will result in certification of the “individual or labor organization.” Presumably, the NLRB will decide unit scope/voter eligibility issues after its card verification process.



COMPARISON OF CURRENT LAW AND EFCA

2) Elections

Currently

Scheduled 25-30 days after unit scope/voter eligibility issues determined either by consent of the parties, or by Decision of the NLRB's Regional Director, but not more than 42 days from the filing of the petition.

EFCA

Still available when the petitioning party does not possess majority support for the petition (cards). But if there is majority support, union will be certified even though the NLRB's signature authentication process may be followed by unit scope/voter eligibility hearings.



PRACTICAL EFFECTS OF “CARD CHECK” FEATURES OF EFCA

1. Certification of labor organizations will occur much more quickly.
2. Employers will have less opportunity to explain views on unionization, or to rebut false criticisms and promises of labor organizations.



PRACTICAL EFFECTS OF “CARD CHECK” FEATURES OF EFCA

- 3) “Whisper” organizing campaigns will become the norm, with organizers being immune to accountability, accuracy or subject to fair rebuttal.
- 4) A whole new area of law will require development as to “Coerced” or “Uncoerced” signing of authorizations.



FEATURE 2: BARGAINING FOR A FIRST CONTRACT

Currently	EFCA
<p>Duty to bargain does not require either a union or an employer to make a concession or to agree to a proposal. Merely requires that both parties meet at reasonable times, confer in “good faith” with a view toward reaching an agreement, and reduce to writing any agreement which is achieved.</p>	<ol style="list-style-type: none"> 1) Bargaining “must” begin within 10 days of labor’s request. 2) After 90 days, either party can request mediation. 3) If no agreement after 30 days the matter “shall” be referred to arbitration. 4) Arbitration Board issues its binding decision creating 2 year contract.



PRACTICAL CONCERNS OF EFCA'S EFFECTS ON FIRST-CONTRACT BARGAINING

- 1) Virtually all first contracts will be settled in arbitration by a government agency due to:
 - a) Triggering of disclosure of financial information by arbitration; and,
 - b) Arbitration board's natural tendency to trade off economic issues for operational/union-supportive demands, e.g., union security, seniority applications, etc.



PRACTICAL CONCERNS OF EFCA'S EFFECTS ON FIRST-CONTRACT BARGAINING

- 2) Decertification when employees realize they have been misled will no longer occur.
- 3) Competitive business data at risk of becoming public information.



FEATURE 3: ENHANCED PENALTIES FOR “UNFAIR LABOR PRACTICES DURING ORGANIZING DRIVES”

- 1) Expands application of Section 10(1) injunctive relief to situations where during organizing it is alleged that:
 - a) Any violation of Section 8(a)(3) has occurred;
 - b) Any threat to discharge or discriminate against an employee has occurred; or
 - c) There have been violations of Section 8(a)(1) (“interference, restraint or coercion”), that are “significant.”



FEATURE 3: ENHANCED PENALTIES FOR “UNFAIR LABOR PRACTICES DURING ORGANIZING DRIVES”

- 2) Triple damages for back pay and restoration of employment benefits for an employee found to have been discriminated against in violation of Section 8(a)(3).
- 3) Institution of civil penalties of up to \$20,000 for each “willful” or repeated violation of Section 8(a)(1) or 8(a)(3) committed by an employer from the onset of organizing, through achievement of a first collective bargaining agreement.



WHAT IS LIKELIHOOD EFCA IS LAW AS IS?

There is likely to be diminished enthusiasm for enactment due to:

- General economic climate;
- UAW “gift” of intransigence during industry bailout maneuvering, and,
- Likelihood of individual epiphanies now that the EFCA is capable of veto override.



However, it is equally likely that should the Bill become law:

- The NLRB and FMCS have completed their work on the regulatory compliance (short roll-out period); and,
- Labor Unions are “ready to go.”



WHAT CAN EMPLOYER TO DO?

1) Prepare your EFCOA letter to employees now:

Include:

- Employees have the legally-guaranteed right to form a union.
- The new “card check” legislation affects those rights in significant ways that the employer opposes.
- Secret ballot elections are not guaranteed and an employee’s anonymity in making a decision on the issue of forming a union is compromised.
- “Union cards” will no longer be used exclusively to obtain a union election by labor organizations – instead, signing such a card is the same thing as voting in favor of the union.



WHAT CAN EMPLOYER TO DO?

1) Prepare your EFCA letter to employees now:

Include:

- Once an employee signs card, will be difficult, if not impossible, to get it back should if a change of mind.
- We think the “card check” process will be unfair to employees who are called upon to make this very important decision because it stifles free and open discussion of the practical and legal effects of working in a unionized workplace.
- The new organizing process under this law will allow unions to take advantage of employees by not telling the whole story, and keeping it hidden from them.
- There is no reason to believe that any “card check” organizing is going on, but wanted to let employees know of this disturbing change in the law in a



WHAT CAN EMPLOYER TO DO?

- 2) To avoid enhancement penalties and risk of injunctive relief, instruct managers/supervisors in rules of conduct and the importance of ULP-avoidance.



INTERFERENCE, RESTRAINT OR COERCION UNDER 8(a)(1)

“TIPS”

THREATS

INTERROGATION

PPROMISES

SPYING (SSURVEILLANCE)



THREATS OR PROMISES

“The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.”

§ 158(c) of NLRA



HALLMARK THREATS

- Closure of facility
- Job loss
- Loss of business
(transfer/outsource)
- Won't deal with union
- Loss of benefits/wage reductions
- Future violence



PROMISES

- Extension of additional or improved benefits/increase in wage rates conditioned upon union loss
- Promotion/transfer promised on condition that union loses
- Withholding scheduled wage adjustments/ benefit improvements pending election outcome (implied promise)



INTERROGATION

- Inquiring of employees their support for the union, or the support of co-workers.
- Note: Prohibited are direct appeals/questions. Nothing prohibits a supervisor from listening to information which is volunteered by an employee.
- Further, “open and notorious” union supporters may be questioned as to the basis for their individual support.



SPYING (SURVEILLANCE)

- Surreptitious video/audio surveillance of employees engaged in protected organizing activity is prohibited. Visual Surveillance of open and notorious activity is permissible.
- Encouraging employees who are disinterested in the union to attend union meetings and to report back. (Contrast: “If I were you, and as important as these union issues are, I’d sure want to know what they’re up to.”)
- Increased management presence at work with systematic inspections if not routine.
- Positioning mgmt at or near an off-site union event with no other, legitimate, reason for being in that location.



WHAT CAN EMPLOYER TO DO?

- 3) Institute forums for obtaining employee input/feedback to foster dialogue which will facilitate disclosure of the “Whisper” campaign.
 - Town Hall Meetings
 - Suggestion Boxes
 - Employee Action Teams



WHAT CAN EMPLOYER TO DO?

- 4) Adopt principles known as “MBWA” (“Management By Walking Around”) to be better able to discover card-signing activity without running the risk of being accused of “spying.”
 - Be present and visible on all shifts;
 - Can’t create greater presence after Campaign has begun.



WHAT CAN EMPLOYER TO DO?

5) Enforce solicitation and distribution policies now.

- Generally cannot issue facially-permissible no solicitation/distribution rule only after organizing activity begins;
- Cannot tighten up enforcement of dormant rule only after organizing activity begins;
- Cannot enforce only against union solicitation/distribution.



VERBAL SOLICITATION

- Can prohibit during “working time.”
- Cannot prohibit during breaks, mealtimes.
- If not “working time” of either party to conversation, may occur in work & non-work areas.



DISTRIBUTION OF LITERATURE

- May be prohibited in “work areas” at any time.
 - (Threats of litter and other risks to productive order.)





Employees

- Off-Duty Employees.
 - *May not ban from outside non-work areas when off-duty except for compelling business reason.*
 - *Unless previously enforced, non-discriminatory no-access-while-off-duty- policy exists.*
 - *Even then, cannot prohibit off-duty employees from soliciting distributing in “outside non-work areas.”*



POSTINGS:

BULLETIN BOARD OR OTHER

- No right to post by union agents or employees.
- If, however, employer permits postings of non-work nature, must permit commensurate posting (scope & location) of union literature.



QUESTIONS???