

## *The Employee Free Choice Act: A Brave New Workplace*

By

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On March 1, 2007, the House of Representatives passed the Employee Free Choice Act (“EFCA”) by a wide margin, although several months later the bill died in the Senate after a Republican-announced filibuster. Since then, the political climate in Washington has changed, catalyzed by the election of President-elect Barack Obama.

In his first newspaper interview since the election, President-elect Obama said this about EFCA:

When it comes to unions, I have consistently said that I want to strengthen the union movement in this country and put an end to the kinds of barriers and roadblocks that are in the way of workers legitimately coming together in order to form a union and bargain collectively.

EFCA’s passage would certainly do that and more. EFCA would radically alter more than 75 years of labor law that started in 1935 with the pro-labor Wagner Act, which was amended by the pro-business Taft-Hartley Act of 1947.

Symbolically, EFCA’s passage would mark a major victory for the union, a strong gust in union sails after three decades of declining membership rolls. EFCA played centrally into President-elect Obama’s campaign to court working, middle class voters, and many expect him to introduce EFCA legislation within the first one-hundred days of his presidency.

Not surprisingly, employers have raised the loudest voices in opposition to EFCA’s passage. Despite the legislation’s strong backing by a Democrat-heavy Congress, EFCA’s passage is by no means guaranteed. If the legislation is introduced in early 2009, it will be at a time when many businesses are struggling to stay afloat as the economy weathers storms from the mortgage crisis, heavy individual and corporate debt, instability in the banking sector, tight credit markets, and increasing unemployment. Straining under the realities of these daunting market forces, employers argue that EFCA’s sweeping labor reforms would come at the worst possible time, and could prove to be the proverbial “last straw” that causes many businesses to move their operations overseas or close their doors.

### **What Changes Will EFCA Bring?**

EFCA would streamline the unionization process, force employers to submit to the binding decisions of a federal arbitration board, and impose stricter penalties on employers who violate the Act.

Under current labor laws, a union can represent a company’s employees if the company either voluntarily recognizes the union or if the union wins a secret ballot election by a majority vote of eligible employees, called the “collective bargaining unit.” After a union is formed, the union and the employer negotiate the terms and conditions of employees’ employment and memorialize the subsequent agreement in a collective bargaining contract.

Although EFCA would change current labor laws in a variety of ways, three changes in particular are worth noting because they constitute major departures from present practice and would radically alter the workplace landscape. The three major changes are:

- (1) A “card check” process that will replace the secret ballot election;
- (2) Compulsory first contract interest arbitration, binding on the employer for two years; and
- (3) Substantially increased penalties and remedial relief for employer violations.

### **Burying The Secret Ballot Election**

Presently, an election on whether or not a company should unionize is held by secret ballot. Whatever one’s leaning – whether pro-union or anti-union – employees could always take solace in the fact that they could cast their vote anonymously and privately in a secret ballot election, a hallmark of the democratic process and a voting mechanism thought to represent the electorate’s “truest” choice.

EFCA would replace secret ballot elections with “card checks,” and employees would no longer be able to cast their vote by secret ballot. Instead, card checks would enable unions to organize simply by getting a majority of employees within the collective bargaining unit to sign authorization cards. While authorization cards exist under the present rules, garnering the requisite majority of authorization card signatures simply opens the door to holding a secret ballot election. In the run-up to a union election, an employer can counter the union message by organizing a competing campaign of its own. Under EFCA, this would no longer be the case. All the union would need to do to organize is collect signatures on authorization cards from more than 50% of the collective bargaining unit.

Since unions can collect signatures on authorization cards without the employer’s knowledge or consent, the employer’s ability under EFCA to respond to a union organizing within its company would be significantly impaired. Critics argue that under EFCA, employees would make the decision about whether to unionize with less information, not more. Some employers have expressed concern about the union’s use of intimidating tactics, unchecked coercion, and the spread of misinformation in the gathering of signatures for authorization cards. Those employers are concerned that such union tactics would increase under EFCA and give union organizers an unfair advantage over employers.

### **Binding Interest Arbitration**

Under EFCA, after unionization, the union and the employer have 90 days from commencement of negotiations to come to an agreement on the terms and conditions of employment. If the parties are unable to reach agreement within the 90 days, they must submit to mediation overseen by the Federal Mediation and Conciliation Service (“FMCS”). If, after 30 days, the parties are still unable to reach an agreement, then FMCS “shall refer the dispute to an

arbitration board.” A federal arbitration board will then decide the parties’ collective bargaining contract, and the decision will remain binding on the parties for a period of two years.

### **Increased Penalties for Employers**

EFCA includes stiff penalties for employers who fail to comply with the new labor rules, or engage in unfair labor practices. Many of these new penalties are punitive, and not merely compensatory, in nature, and range as high as \$20,000 per violation.

### **A Dickey Political Issue**

EFCA has stirred up a firestorm in Washington as Democrats and Republicans are lobbying hard to either bolster support in favor of the new labor legislation, or foment dissent in the ranks to see EFCA defeated. Both sides are trying mightily to prevent defections. Staunch supporters of EFCA call it the “greatest piece of anti-poverty legislation since the Great Society.” Critics say that EFCA’s passage will deepen the global recession by driving up the cost of doing business. In addition, requiring that employers submit to the binding decision of a federal arbitrator will encourage the union to replace “good faith negotiation” with “leveraged and interest-based bargaining.” Because authorization card signing makes it significantly easier to unionize, employers argue that the checks-and-balances system would be dismantled since they cannot effectively mount a competing union campaign.

### **Just The Tip Of The Iceberg**

While EFCA dominates labor law headlines, its passage could be a precursor to other labor legislation battles in Congress. Moreover, EFCA’s passage could pave the way for passage of other labor laws such as the Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers Act (commonly referred to as the “RESPECT Act”) (H.R. 1644/S. 969); the Patriot Employer’s Act (S. 1945); the Contractors and Federal Spending Accountability Act (H.R. 3033); the Honest Lending and Accountability in Contracting Act (S. 606); the Working Families Flexibility Act (H.R. 4301/S. 2419); the Right to Work Repeal (H.R. 6477); the National Right to Work Bill (H.R. 697/S. 1301); the Protecting Employees and Retirees in Business Bankruptcies Act of 2007 (H.R. 3652); the Independent Contractor Proper Classification Act (S. 2044); and the Public Safety Employer-Employee Cooperation Act (H.R. 980/S. 2123).

### **Conclusion**

Labor law stands poised today to undergo its most dramatic change in over 75 years with EFCA’s passage. While this polemical issue continues to divide Democrats and Republicans largely down party lines, both sides agree on one thing: it comes at a particularly difficult time in U.S. financial history when the wheels of industry risk slowing to a crawl. How EFCA will either alleviate or exacerbate these social and economic ills is a hotly debated issue.