

The Impact of the Employee Free Choice Act

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Many expect that Congress will pass the Employee Free Choice Act (EFCA) early in the Obama administration. What would this mean for employers who are not currently unionized? There are several significant changes which the EFCA will bring for employers, including a decrease in elections to choose certified labor representatives, mediation and conciliation for parties which cannot reach an agreement, and additional relief for unfair labor practices.

All of these changes are a response to the perception that unions have faced significant hurdles in organizing and reaching collective bargaining agreements in recent years.¹ Only about 12% of the overall workforce in the U.S. is represented by a labor union, down from about 20% in 1983.² According to one National Labor Relations Board (“NLRB”) member, Wilma B. Liebman, the number of representation petitions filed by unions declined by 46% between 1997 and 2007. Board member Liebman recently stated that the National Labor Relations Act “does not effectively protect workers’ right to organize” and “does not effectively promote the institution of collective bargaining.”³

President-Elect Obama has voiced his support for the changes included in the EFCA. The House of Representatives passed the Employee Free Choice Act of 2007 in March 2007, but a similar bill did not pass in the Senate. This summary of the EFCA will prepare employers for the potential passage of a similar bill.

Selection of Union as Representative

Under the EFCA, a union can support a petition to be recognized as the exclusive representative of a group of employees based on a **majority** of the employees signing a valid authorization designating that union as their bargaining representative. Keep in mind that the cards must be signed by a majority of employees in the appropriate bargaining unit, not all employees. This

¹ Logan, John. 2002. Consultants, lawyers and the “union free” movement in the United States since the 1970’s. *Industrial Relations Review* 33, no. 3:197-214; Logan, John. 2006. The union avoidance industry in the United States. *British Journal of Industrial Relations* 44, no. 4:651-675; Godard, John. 2003. Do labor laws matter? The density decline and convergence thesis revisited. *Industrial Relations* 42:458-492.

² Bureau of Labor Statistics, Current Population Survey, as reported in James A. Walker, Union members in 2007: a visual essay, available at <http://www.bls.gov/opub/mlr/2008/10/art3full.pdf>.

³ Speech at November 2008 conference sponsored by Washington D.C. chapter of the Labor and Employment Relations Association.

method for recognition is only available if no other labor organization represents any employees in the bargaining unit.

Authorization for union representation is usually shown by employees' signatures on authorization cards provided by a union representative or a coworker. The employer faced with authorization cards signed by a majority of its employees can still challenge the validity of those cards. The NLRB is charged by the EFCA with establishing procedures to establish the validity of the authorizations signed by the unit employees.

The NLRB has expressed concern in recent decisions regarding the validity of signatures on authorization cards. In a decertification drive, for example, the NLRB found that card authorizations are fundamentally less reliable than an election.⁴ Similarly, some commentators have concerns about losing the "sanctity" of the secret ballot election.⁵

In contrast, the U.S. Supreme Court has held that union authorization cards can be convincing evidence of majority support for a union, unless there is evidence that employees were misinformed about the purpose of the cards.⁶ In addition, some research shows that employees feel less coerced and better exercise their free will when employers accept the "card check" procedure for selection of a union representative.⁷

Mediation and Conciliation

The second major change under the EFCA would be the opportunity for the parties to notify the Federal Mediation and Conciliation Service (FMCS) to request mediation and conciliation. A union or employer would only be able to make such a request after 90 days from the first day of collective bargaining, or some additional period as agreed on by the union and employer. The ECFA also requires that the union and employer meet and commence the bargaining process no more than 10 days after a request for bargaining has been made by the union, unless the parties agree to meet at a later time.

After receiving a request, the FMCS will first help the parties reach an agreement through mediation and conciliation. Mediation is defined as a procedure in which a neutral third party (the mediator) facilitates negotiations to help two parties reach an agreement.

⁴ Dana Corporation, 351 NLRB No. 028 (2007).

⁵ Stewart, J. Hamilton. 2006. Neutrality and card check agreements: Union assaults on employee rights and the integrity of the National Labor Relations Board. *Journal of Labor Research* 24, No. 4:443-472.

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

⁷ Eaton, Adrienne and Jill Kriesky. 2001. Union organizing under neutrality and card check agreements. *Industrial and Labor Relations Review* 55:42-59; Lafer, Gordon. 2008. What's more democratic than a secret ballot? The case for majority sign-up. *Working USA* 11:71-98.

If the parties cannot reach an agreement within 30 days of the request for mediation, or some longer period agreed to by the union and employer, then the FMCS will refer the dispute to an arbitration board to settle the dispute. In this type of arbitration, a panel of neutrals chooses the terms of the agreement based on information presented by the employer and the union. Any agreement that results from this arbitration process will be binding on the parties for 2 years, unless the parties agree to amend it during that time.

Enforcement

An unfair labor practice has a significant effect if it occurs during an organizing drive by a union, or after the union is certified but an agreement has not been reached. The EFCA directs that the NLRB give those claims priority to be investigated. This provision could be beneficial to unions who in the past have faced years of delay in their organizing efforts due to the time taken for a NLRB investigation.

If during an organizing drive by a union, or after the union is certified but an agreement has not been reached, the NLRB finds that the employer discharged an employee for her union activities, the NLRB would be required to award back pay plus 2 times that amount as liquidated damages. The NLRA currently provides for damages for unfair labor practices to include only reinstatement with full back pay. If during this same period an employer engages in any willful or repeated unfair labor practices, that employer would be subject to civil penalties not to exceed \$20,000 per violation.

Impact of EFCA

In light of the possible changes from the EFCA, employers are advised to examine and revise practices which could do any of the following:

- Fail to reward employees and treat employees fairly, so they are encouraged to sign union authorization cards
- Delay or prevent a voluntary agreement with a new union
- Engage in practices that discriminate based on union organizing activities or union affiliation