



**TUCKER ELLIS & WEST LLP**  
ATTORNEYS AT LAW

CLIENT ALERT

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**THE EMPLOYEE FREE CHOICE ACT: EMPLOYER BEWARE**

The Employee Free Choice Act (“EFCA”) will be one of President Obama’s first priorities during 2009 – the bill was introduced in the House and Senate on March 10, 2009. Republicans, meanwhile, have introduced a countermeasure bill in the House and Senate – the Secret Ballot Protection Act – requiring secret ballot union representation elections (H.R. 1176 and S.478). The stage is set for this to be a very contentious issue in 2009.

**Union Perspective on the EFCA**

A posting on a website affiliated with the AFL-CIO characterizes the EFCA as “the most important legislative proposal in 70 years.” Considering that the National Labor Relations Act (“NLRA”) was passed in 1935, the AFL-CIO apparently thinks the EFCA is the second most important piece of union-related legislation *ever*. This should tell employers everything they need to know about the EFCA.

**The Name Game**

As with many controversial pieces of legislation these days, creative naming has seemingly shielded the EFCA from any substantive evaluation of how it would impact employers. Who would oppose giving employees a “free choice” of whether they want to be represented by a union? In reality, however, employees have had a say on that issue for decades through the secret ballot election provisions of the NLRA. The “free choice” referenced by the clever title would, in most instances, be a choice made “free” of any input whatsoever from the involved employer.

**Card Check Certification**

If the EFCA becomes law as currently proposed, the National Labor Relations Board (“NLRB”) would be *required* to certify any union that can secure signed authorization cards from a majority

of employees in a potential bargaining unit. The potential negative impact of this proposed scheme on employers cannot be overstated.

The process by which unions get signatures on authorization cards often is anything but orderly and/or ethical. Union membership in this Country is shrinking steadily. Dues dollars, therefore, are decreasing steadily. The industrial and political power of unions has decreased as a result. Unions need new members and new dues dollars to survive. Not surprisingly, many national or regional unions prioritize their allocation of resources among local unions based on success in increasing membership – national unions will give large allocations to local affiliates that generate those new revenues. The incentives for a union organizer to do whatever is necessary to secure a signature on a card are very strong and the tactics used to secure signatures often must be seen to be believed.

In addition, the attempt to secure the signature often occurs in circumstances that are very public and subject to incredible peer pressure – a group of employees led by one or two strong personalities who buy into what the organizer is promising them. Many people sign the authorization card in the excitement of the moment because other employees are signing and, more importantly, watching whether they sign. They often sign to avoid the wrath of their fellow employees who support the organizing effort, fully intending to vote *against* the union when they have the chance to do so in a secret ballot election when nobody else is watching. Perhaps the single biggest flaw in the EFCA is that it is based on the incorrect premise that a signed authorization card accurately indicates the employee wants to be represented by a union.

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Once a card is signed and given to the organizer, it is almost impossible for an employee to revoke his or her signature, even under current law. This makes the NLRA secret ballot process critical to making sure employees get to express their true opinion regarding union representation.

The EFCA will require the NLRB to develop model authorization language and procedures for establishing the validity of signed cards. This aspect of the EFCA is of no real consequence.

These procedures will be implemented in NLRB regional offices around the country, where regional directors and personnel are notoriously pro-union and pro-employee. Even now, when analyzing authorization cards to determine whether a union has sufficient support to schedule and force a secret ballot election, the NLRB regional office personnel rarely, if ever, look behind the cards in any meaningful way. They literally look only for a signature within the last 12 months and attempt to verify that there is an employee with that name on the payroll. If so, the NLRB counts the card and does no checking or investigation of the circumstances under which the employee signed the card. No proof is ever shown to the employer who *never* sees the cards or a list of employees who signed them. The employer must take the word of the NLRB that the union has submitted a sufficient number of appropriately signed and “authenticated” authorization cards.

Under current law, this process results in a secret ballot election where employees can vote their mind outside the glare of a very public union organizing meeting. Under the EFCA, this would be the end of the issue.

#### **Arbitration of First Contract**

The EFCA will make it mandatory for employers and unions negotiating their first contract to arbitrate if they have not reached agreement after 120 days. The arbitrator will select the language that will be implemented in the contract and is not required to select either the employer’s or the union’s proposals. This would severely negatively impact employers.

Generally, employers are not required to agree to any specific provisions or to a contract as long as they bargain in good faith. Support for the union can be tested during initial negotiations by the

employer holding firm to its bargaining positions and showing the employees that the union may not be able to follow through on all of the promises of the organizing campaign. The union then faces a difficult choice – accept the employer’s proposals or engage in a strike. If the EFCA becomes law, unions apparently will not be permitted to strike following negotiations for a first contract.

Although a strike sounds like the union’s ultimate weapon, strikes often do more damage than good *for the union* because of negative consequences that flow from a strike. Particularly in the current difficult economic conditions, where public sympathy may be hard to come by, very few employees are likely going to be willing to engage in a work stoppage where they do not receive income, even for a short period of time. Eliminating strikes on a first contract likely means the union can be more aggressive during negotiations, knowing that it can go to mandatory arbitration where it is likely arbitrators will do a lot of “baby-splitting” and will effectively grant proposals aimed at achieving a balance – in the mind of the arbitrator – between the union’s proposals and the employer’s proposals. All the success the employer might achieve by holding firm during negotiations can be lost when an arbitrator selects contract language for implementation in the final agreement that is consistent with or at least favors a union’s proposal. Because of the mandatory arbitration provision the union now has nothing to lose and will likely go to arbitration and take what it can get.

#### **Fines and Penalties**

As if all that was not enough, the EFCA also contains provisions for imposing fines and penalties on employers, including possibly awarding triple back pay to reinstated employees as a result of employer conduct occurring during an organizing campaign or during negotiations for an initial contract. If an employer gets anywhere near the line, the union will immediately file an Unfair Labor Practice charge. Whether the employer will be subjected to fines, penalties, or triple back pay awards then is in the hands of the employee-friendly NLRB.

#### **EFCA Eliminates Employer Participation**

Once an employer learns a union organizing campaign is underway, the employer is allowed to

participate in the “dialogue” with its employees, although employers are limited in what they can say and/or do. The EFCA may effectively eviscerate all of those employer rights and make them meaningless.

Particularly with a small or medium-sized company, an employer may not know an organizing campaign is underway until the union has secured majority support. There may be nothing the employer can do to combat or react to an organizing campaign – it may be over before the employer knows it has started. For example, in a bargaining unit of 20 employees, it is certainly possible the union could secure signed authorization cards from 11 of the 20 employees in a single meeting. Solicitation of majority support could happen before the employer has any idea what is going on. And it is certainly possible that some employees will not know what they have done when they sign the card because they simply will not read it.

**Employer Actions**

Employers have a right to discuss and determine job terms and conditions directly with their employees when there is no ongoing union organizing campaign. It is no secret that the best way to keep employees from seeking union representation is to keep them happy or, at a minimum, to involve them in the discussion about their terms and conditions of employment. If the EFCA becomes law – perhaps before – employers should thoroughly evaluate their relationship with their employees to determine whether they believe a union organizing campaign is a legitimate threat. This could include things like employee satisfaction surveys. Employers should be aware of any issues their employees may have about their work lives, whether the employer ultimately changes any job terms or conditions or not. In short, now is the time to evaluate workplace policies and employee satisfaction levels.

Now is also the time to consider consulting appropriate legal counsel to gain a detailed understanding of employer rights and/or

restrictions in the event an organizing campaign occurs. These situations are very fact-driven. Advice can be difficult to give without a general understanding of the makeup of the workforce and of issues the employer is aware of or suspects may exist. These specifics should be discussed with counsel.

**Conclusion**

The AFL-CIO calls the EFCA “the most important legislative proposal in 70 years” for good reason. If passed as proposed, the EFCA will create a tremendous shift in power to labor unions which, for the most part, they will be able to exercise with virtually no oversight. We have seen those conditions before – they existed prior to the enactment in 1947 of the Taft-Hartley amendments to the NLRA that resulted almost directly from pervasive abuse of power possessed by unions with little or no oversight. Employers should not sit by and allow that type of unchecked power to be restored to the unions without aggressively participating in efforts to stop the EFCA from becoming law.

**For more information please contact:**

**Michael Anderton** 216.696.4835  
*michael.anderton@tuckerellis.com*

1150 Huntington Building, 925 Euclid Avenue  
Cleveland, OH 44115

*www.tuckerellis.com*

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