



## Will Employers Be Left Holding the Check? "Card Check" Legislation Raises Concerns for Employers

by *Bob Sebris and Jeff James*

If you are an employer that has a "union shop," you may soon have more company - at least if the Democrats in Congress get their way. On March 1, 2007, the U.S. House of Representatives passed the proposed Employee Free Choice Act (EFCA). The Act is on its way to the Senate where opposition is expected to be more strenuous, and passage is viewed as less likely. So, should you be concerned? If you are a Washington employer and any of your employees are "non-union" - and you want to stay that way -- the answer is "yes."

**Background.** In our October 2005 Employment Law Note, we warned of aggressive tactics that were being used by unions around the country to organize new workplaces. This foreshadowed Labor's major rift within the AFL-CIO, and the creation of "Change to Win" by the SEIU, UFCW, Teamsters and others. CTW has aggressively been pushing organizing as their prime agenda ever since. Not only are they focusing on the workplace, they have shown great lobbying clout in Washington, D.C. and Olympia. In D.C., Labor's Democrats in the House and Senate are now at work to pass legislation that will make it easier for unions to force representation - without an election -- through the Employee Free Choice Act. While it will stand the American principle of secret ballot elections on its head, House Speaker Nancy Pelosi describes it as "the most important piece of labor reform in a generation." It is indeed.

**What's All The Fuss About?** Under the National Labor Relations Act ("NLRA"), unions obtain employee signed "authorization cards" as the first step in trying to organize a workplace. Once there is enough interest, a union typically files a representation petition with the National Labor Relations Board for a later election. The employer then has an opportunity to study issues and run a campaign in response to union organizing themes. Given a chance to fully and fairly hear both sides of the story, American workers have usually shown that having a union between them and the company is not in anyone's interest besides that of the union. The percentage of organized American workers has as a result plunged from about 35% after World War II to about 12% today. A well-informed voter using a secret ballot has been the keystone of the NLRA.

Now, Labor wants a "cram down" approach. Ignoring American principles of democracy and elections, unions and Democratic lawmakers argue that the NLRA is stacked against them. They don't like employees having time to get all the data they need to make a free choice. Under the EFCA, the NLRA would be amended to do away with the requirement that there be a secret ballot election. Instead, it would be sufficient for a union to collect signed authorization cards from a majority of the employees. Once that happened, the union could obtain NLRB certification as the employees' exclusive bargaining representative based solely on the cards! No analysis, no debate, no mandatory election. [Unions (not employees or employers) would still have the option of calling for secret ballot elections under EFCA - what do you think is the likelihood of that happening?]

**Old News (of sorts) for Public Employers in WA.** Washington public employers may view the Act as "*déjà vu* all over again." Though the idea of union representation without a secret ballot election seems radical to many, administrative regulations under Washington State's Public Employee Relations Act (PERA) already include a modified authorization card check provision that can result in union recognition without the benefit of an election when the union has signed up over 70% of the eligible bargaining unit. WAC 391-25-391(1). Even though only the union has presented issues and information up to this point, to our Public Employment Relations Commission, it doesn't matter.

**Practical Tips For Employers.** Although the EFCA has passed the House, it still has to get by the Senate and possible presidential veto to become law. Employer-driven lobbying efforts to defeat the Act are in full swing. Whether the Act becomes law or not, CTW and AFL-CIO union organizing efforts will continue to increase. To avoid a run-away organizing situation that catches you by surprise, now is the time to take stock of your situation and improve your union-avoidance environment.

**PREVENTIVE ACTION NOW.** It's opportunity time now. Consider these preventive steps:

1. **Comprehensive Employee Handbook.** Have an employee handbook with comprehensive coverage on human resources issues and compensation. Live by it and make it work better than a union contract for your non-represented employees.
2. **Progressive Discipline.** It is a hallmark for modern employers to utilize progressive discipline concepts. Build them into your human resources program, and apply them fairly and in a nondiscriminatory fashion. Don't let your practices give employees reason to seek union contract "just cause" provisions.
3. **Grievance Procedure.** Develop a true grievance procedure for your employees, and consider building some kind of alternative dispute resolution (ADR) process into it. Don't make your employees not represented by a union turn to the outside for problem solving.
4. **Management Team Structure.** Audit your "management team" now. Verify who your first level of supervision really is. Unions use "leads" or "foremen" as some of their most aggressive organizers. Under recent NLRB case law you have the opportunity to vest sufficient authority in this group to clearly make them management's first line and insulate this group.
5. **Market Wages and Benefits.** Provide competitive wages and fringe benefits for your staff. Push yourself on health insurance and retirement issues, so that your compensation program will not pale in comparison to union contracts in your industry for the same workers.
6. **Union-Free Philosophy.** Include an appropriate statement in your employee handbook and employee orientation sessions that makes clear that your business is opposed to outside third party unions and why. Employees need to know the employer's perspective. This can be presented effectively and legally under Section 8(c) of the NLRA. If some of your staff is "union," be sensitive to these dynamics.
7. **Train Managers.** Your managers and your supervisors are your eyes and ears in the organization. Train them about an employer's rights in this process, what they can do and can't do, and what signs to look for. Increasingly, time is of the essence in union organizing situations, and your management team has to be aware of symptoms and promptly sound the alarm if organizing might be developing.

If EFCA is passed or not, unions will continue to put pressure on rapid union organizing. This is when they are most effective. Take some wind out of their sails by being prepared. Influence your own destiny, by taking proactive steps now.

\*This Employment Law Note is written to inform our clients and friends of developments in labor and employment relations law. It is not intended nor should it be used as a substitute for specific legal advice or opinions since legal counsel may be given only in response to inquiries regarding particular factual situations. For more information on this subject, please call Sebris Busto James at (425) 454-4233.

© 2007 SEBRIS BUSTO JAMES

---

---