



The Employee Free Choice Act (EFCA): Are You Ready?

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Today's political and economic climate has set the stage for the biggest changes to federal labor law in decades. High on the Democratic and Union agenda is the Employee Free Choice Act (EFCA), which contains proposed amendments to the National Labor Relations Act (NLRA). EFCA will likely fundamentally alter the way unions are certified as the exclusive representative of employees, the negotiation of first contracts between newly certified unions and employers, and employers' potential financial liability for violations of the NLRA. There will undoubtedly be compromises in the final legislation, but employers need to prepare for these changes now.

EFCA was introduced in the United States Congress in February 2007. It easily gained passage in the House, but died in the Senate at the end of the 2008 Session. However, in 2009, with President Obama's clear support and a Democratic majority in the House and Senate, unions are in an ideal position to gain major changes to existing federal labor laws through EFCA.

EFCA's Proposed Changes to the NLRA

1. **Certification on the Basis of Signed Authorization Cards.** The current bill provides for certification of a union as the exclusive bargaining representative if the National Labor Relations Board (NLRB) finds that a simple majority of employees in an appropriate unit has signed authorizations designating the union as its bargaining representative. This change would *do away with secret ballot elections* that have been the backbone of labor law and democratic union elections for decades.
2. **First Contract Mediation and Arbitration.** EFCA also provides that if an employer and a union are engaged in bargaining for their first contract and are unable to reach agreement within 90 days; either party may refer the dispute to the Federal Mediation and Conciliation Service (FMCS) for mediation. If FMCS is unable to bring the parties to agreement after 30 days of mediation, the dispute will be referred to *mandatory interest arbitration*.
3. **Stronger Penalties.** The legislation provides new penalties for violations of the NLRA committed by employers during any period that employees are attempting to organize a union or to negotiate a first contract.
 - **Mandatory Applications for Injunctions:** EFCA would require the NLRB to seek a federal court injunction against an employer whenever there is reasonable cause to believe that the employer has discharged or discriminated against employees, threatened to discharge or discriminate against employees, or engaged in conduct that significantly interferes with employee rights under the NLRA during an organizing campaign or first contract drive.
 - **Treble Back Pay:** EFCA also increases the amount an employer is required to pay when an employer discriminates against an employee during an organizing campaign or first contract drive to three (3) times back pay.
 - **Civil Penalties:** Finally, the bill provides for civil fines of up to \$20,000 per violation against employers found to have willfully or repeatedly violated employee rights during an organizing campaign or first contract drive.

Employers Should Take Action Now!

Private sector unions are still strong in Washington State. We have the 5th highest percentage of organized employees in the nation at 20%. Unions here are well-funded and have been effective organizers in Olympia and the workplace. Employers should take preventative steps now to build a foundation against the possible changes that will result from EFCA's passage.

- *Adopt a Union-Free Policy Statement:* Adopt a clear policy toward unions. Emphasize that unions unnecessarily interfere with the relationship between employees and management. Communicate the policy and educate your employees.
- *Develop/Strengthen Management Team:* Identify and strengthen managers, supervisors, and "confidential employees." Be aware of and utilize bargaining unit "exclusions." Re-structure position descriptions appropriately and implement them immediately.
- *Review/Update "Communications" and other Policies:* Make clear distinctions between employees and outsiders. Review and update policies pertaining to solicitation and distribution, bulletin boards, internal mail systems, meeting room access, use of email, confidentiality, and outsider access to private property.
- *Beware of "Salting":* A salt is a person sent by the union to apply for a position with an employer for the purpose of organizing the company from the "inside," or eliciting unfair labor practice charges for a failure to hire or for termination based on union activity. Be aware of this possibility, review your hiring/work rules and enforce them consistently.

Some form of EFCA is on the way in 2009 and employers must be ready for changes to existing labor laws. In the meantime, we encourage you to seek out your labor relations professional as soon as possible to help you understand and prepare for EFCA.

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