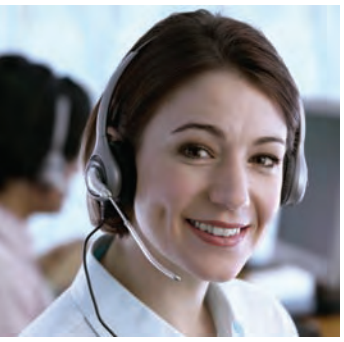
FACTS ABOUT THE
EMPLOYEE FREE CHOICE ACT





An overview of EFCA's impact on employees, businesses, and the economy

What's In This Toolkit

On March 10, 2009, the Employee Free Choice Act (EFCA) was re-introduced in the U.S. Congress with 223 House and 40 Senate co-sponsors. The legislation is highly controversial, and Congress thus far has been reluctant to move it. However, there are powerful forces pushing for the legislation, and it will remain under active consideration by Congress until some kind of resolution is reached. For that reason, it is of the utmost importance that employees, companies, policy makers and the general public educate themselves about the impact it could have on our businesses.

Enclosed are materials that the HR Policy Association has developed to better inform its members and the public about the Employee Free Choice Act and its provisions. These materials include:

- Fact sheets on key components of EFCA
- Research findings on the impacts of EFCA
- Information about how EFCA can affect the American public
- Sample letters to Congress

At HR Policy Association, we are dedicated to providing the most up-to-date and fact-based information on HR public policy and practices in the United States and globally. In the United States right now, there is no bigger piece of labor legislation than EFCA.

To keep up with the latest changes to the legislation, we have also launched www.EFCA-info.org , an interactive website. The website will provide visitors with a balanced view of EFCA and its implications, and allow visitors to sign up for updates on the legislation and other resources.

We hope you will find this information useful. For comments or suggestions, please email info@EFCA-Info.org .

EFCA Would Tilt Labor Laws to Promote Union Organizing

Bill Seeks to Strengthen Union Organizing Through Card Check Certification, Compulsory Arbitration of First Contracts, New Employer-Only Penalties

Using the rationale of protecting "employee free choice," Congress is considering the most significant change to the nation's labor laws in 60 years. In fact, the Employee Free Choice Act (EFCA) would eliminate employee choice over union representation and substitute government dictation of wages and benefits for voluntary collective bargaining in newly unionized workplaces.

Workers have traditionally decided the important question of being represented by a union through a federally supervised private-ballot election process. This process ensures that employees hear all sides and are ensured confidentiality and protection against coercion at the critical moment when each employee indicates his or her preference. If a majority chooses the union, it serves as their representative at the bargaining table in the attempt to reach an agreement with the employer on an initial collective bargaining agreement.

This is how the system has worked since the end of World War II. When unions thrived in the post-war era, few alterations were considered. If anything, the system was often viewed as unfairly tilted in favor of labor. Only when labor's representation started to decline as a result of a globalized economy, increased workforce mobility, expansion of government regulation of the workplace, and other factors did labor begin to complain that the system was broken.

Current Procedures Ensure Uncoerced, Informed Choice

Under existing National Labor Relations Board (NLRB) procedures, a union representation election typically takes place after the union has demonstrated to the NLRB that at least 30 percent of those it is seeking to represent wish to have an election. This interest is usually demonstrated by signed union authorization cards that typically indicate a desire by the employee to be represented by the union or to have an election to determine that issue. After a campaign period that typically lasts 40 days — in which employees hear all sides of the issue from the union, the employer and co-workers — an election is held, supervised by the NLRB, which ensures that employees cast their ballots in a confidential manner with no coercion by either management or the union.

Under EFCA, union authorization cards would be signed in the presence of an interested party — a pro-union co-worker or an outside union organizer — with no governmental supervision as described in the chart below. Even where there is no coercion, as Chief Justice Earl Warren acknowledged: "The unreliability of the cards is … inherent, as we have noted, in the absence of secrecy and the natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees."[1]

[1] NLRB v. Gissel, 395 U.S. 575, 602 n.20 (1969).

Why the Employee Free Choice Act Should Be Defeated

The Employee Free Choice Act (EFCA) is legislation being considered by Congress that would change the methods for establishing how a union becomes the representative of the employees in a workplace, and the process for determining the initial contract, or collective bargaining agreement, between the employer and the union.

If EFCA were enacted it would:

- **Eliminate a secret ballot election for union representation**, if the union organizers are able to obtain signed cards from 50% plus one of the workers.
- **Replace collective bargaining with binding arbitration,** imposed by a government appointed arbitrator.
- **Add additional penalties on employers only,** during the unionization and bargaining period.
- **Apply to small businesses**, all business over $500,000 of annual revenue would be affected.
- **Permit unionization of individual departments within a business,** rather than organizing an entire business unit, which makes it easier for unions to gain recognition.

EFCA is bad for business and employees, and it should be defeated. It takes away the privacy rights of employees, puts important decisions affecting the lives of workers and the health of the business in the hands of the government, adds costs to small businesses and hurts the global competitiveness of American industry. For more details, regular updates or to make your voice heard, visit www.EFCA-info.org.

Section 1
The Employee Free Choice Act:
An Overview

The Employee Free Choice Act: An Overview

The Employee Free Choice Act (EFCA) is legislation being considered by Congress that would (1) change the methods for establishing how a union represents employees in a workplace, and (2) the process for determining the initial contract, or collective bargaining agreement, between the employer and the union.

"Card Check" Provision

Under current labor law, the U.S. National Labor Relations Board (NLRB) certifies a union as the exclusive representative of employees if the union is elected in a secret-ballot election conducted by the NLRB. The election is held if more than 30 percent of employees sign statements asking either for representation by a union, or for such an election. After a campaign period typically lasting 40 days—in which employees hear all sides of the issue from the union, the employer and coworkers—the election is held, supervised by the NLRB, which ensures that employees cast their ballots in a confidential manner with no coercion by either management or the union.

Assuming EFCA became law, here's what would happen.

If 50 percent of the employees plus one signed cards indicating they support the creation of a union, that would require the NLRB to certify the union as the official representative of the employees. There would be no secret ballot election. EFCA would not explicitly prohibit elections, but votes would only take place if a union or a group of employees filed a petition with authorization cards signed by less than a majority of the workers, which rarely occurs under current law.

Additionally, there are no time limits on card collection. The unions would be able to collect the signed cards from employees and independent contractors for as long as it takes to get the 50 percent plus one majority. Once a card is signed, it gets counted, even if employees change their minds. Employees never get their cards back. In fact, because of the lack of time limit, it is possible that some unions have already started collecting signed cards in anticipation of the passing of EFCA.

Here's a chart that explains the whole thing.

Current Process	Card Check
Union gathers signatures of at least 30% to have an election Employers and unions mount informational campaigns to present both sides NLRB supervises a private-ballot election If majority approve union in the election, NLRB certifies the union	Union gathers card signatures of at least 50% + 1, unsupervised by NLRB, and a union is formed (no private ballot, no election)

"First Contract Arbitration" Provision

Under current law, once a union is elected, the union and the employer negotiate to reach a collective bargaining agreement. That agreement that will define the wages, benefits and other critical workplace issues, such as seniority, promotions, overtime, job classifications, grievance procedures, compulsory union agency fees (except in "right-to-work" states) and myriad other issues.

Both parties are required by law to bargain in good faith to try to reach an agreement.

Under EFCA, bargaining would begin within 10 days after the union requested it. The union would serve as the exclusive bargaining representative for an appropriate unit of employees via the card check process.

If the union and employer cannot agree upon the terms of a first collective bargaining contract within 90 days, either party could request federal mediation. If after 30 days of mediation, there is no agreement, a panel of arbitrators appointed by the Federal Mediation & Conciliation Service would write the contract.

Where government arbitration determines terms of the agreement, employees would not have a right to ratify the terms of that agreement. In other words, whatever the arbitrator writes, that's what everyone gets whether they like it or not, no matter how unfair it is. The terms of these agreements would include the arbitrator's decisions on wages, hours and all other work-related issues, including how people get promoted, what people's job descriptions are, how work gets assigned and who gets overtime.

Current Process	First Contract Negotiation
Union and management are required to negotiate in good faith to try to reach an agreement that is decided entirely by the parties	Union and management begin bargaining within 10 days of the union's request Union and management have 90 days to negotiate If no agreement after 90 days, mediator works with union and management for 30 days to try to reach agreement If mediation fails, government appoints panel of arbitrators to write the contract which will govern all workplace employment issues for two years

Penalties

Finally, EFCA would provide for liquidated damages of three times back pay if employers were found to have unlawfully terminated pro-union employees. Under current law, the employer only owes back pay. EFCA also would impose a $20,000 penalty on the employer each time the NLRB and/or a court decides the violation was willful or repetitive and the violation occurs either while the union is seeking to organize the employer's employees or the while the employer and union are negotiating the initial contract.

Under the proposed legislation, unions would not face any fines for similar violations. In other words, the penalty provisions in EFCA are completely one-sided.

Section 2
Who Does EFCA Impact?

Who Does EFCA Impact? Small Businesses Are at Greatest Risk

There is a widespread misperception that the Employee Free Choice Act (EFCA) would not apply to small businesses. Some have even gone as far as to say "the corner grocery probably won't face an organizing drive."

However, nearly every business in America could potentially be impacted by EFCA.

Currently, small businesses are covered by a small business exemption in the National Labor Relations Act (NLRA). EFCA amends the NLRA and, under EFCA, there is no small business exemption.

Although there is no exception in the statute based on business size, the NLRB has adopted standards based on an annual minimum dollar volume of business. These amounts generally range from $100,000 (office buildings, radio or television stations) to $500,000 (hotels, restaurants, country clubs, and casinos).

Right now, the Service Employees International Union (SEIU) is currently positioned as the fastest growing union. That means businesses such as restaurants, catering companies, hotels, motels, franchisees, and retailers stand to face the greatest impact if EFCA is enacted. These businesses are typically small, and locally owned and operated. They could face heavy financial burdens as a result of lengthy mediation and arbitration processes.

Some of the industries and businesses that would be impacted by EFCA include:

- Hotels
- Restaurants
- Franchisees
- Retailers
- Catering companies
- Landscapers
- Hospital administrators
- Telecommunications industry
- Gaming industry
- Temp agencies
- General contractors
- Grocery stores
- Manufacturers
- Airline industry
- Trucking industry
- Radio industry
- Farming industry
- Grain mills
- Theater industry
- Iron industry
- Steel industry
- Blacksmith industry
- Technical engineering
- Electrical industry
- Bricklaying industry
- Plumbing industry
- Utility companies
- Carpentry companies
- Security companies
- Pizza delivery drivers
- Graphics designers
- Janitorial companies
- Painting companies
- Textile companies

Small Businesses Would Be Covered by the Employee Free Choice Act

Current NLRB Threshold, Which Is Not Changed By EFCA, Covers Most Small Businesses

There is a widespread misperception that the Employee Free Choice Act (EFCA) will not apply to small businesses, with at least one commentator concluding that "the corner grocery probably won't face an organizing drive."[1] Wrong. The reality is that small businesses will be covered by EFCA.

Currently, small businesses are covered by the National Labor Relations Act (NLRA). While EFCA amends the NLRA, it does so without exempting small businesses. So if you are small business owner and want to know how EFCA will affect you, please read on.

Low Jurisdictional Standard Established in 1959

Under the NLRA, the National Labor Relation Board (NLRB) has jurisdiction over labor disputes including elections, bargaining, and unfair labor practice questions. This applies to large and small businesses alike. Though there is no exception in the statute based on business size, the NLRB has adopted jurisdictional standards that cover small businesses under the Act.

These standards are based on an annual minimum dollar volume of business (as opposed to profit), which varies for different enterprises or industries, with separate thresholds for over 30 different categories of businesses. These generally range from $100,000 (office buildings, radio or television stations) to $500,000 (hotels, restaurants, country clubs, and casinos).

These standards have not been adjusted for inflation for 50 years and, because they are so low, the NLRB casebooks are filled with cases involving small businesses. For example, in a case called Pit Stop Markets, 279 NLRB 1124 (1986), the NLRB applied the retail business standard asserting jurisdiction over an employer operating a convenience store/gas station. This store averaged about $100,000 in gross sales of groceries and $1 million in gross gasoline sales even though the employer received a mere $43,000 in commissions from the gasoline distributer. The Board determined that "it is the gross volume sales amounts to which the Board looks to determining jurisdiction, not profit margin or some other yardstick."[2]

Even the Small Grocery Store Is Covered by EFCA

The Board's meager jurisdictional standards would not be amended under EFCA. Contrary to commentators' claims, EFCA would apply to all but the smallest small businesses including the "local corner grocery." For example, in a case called Tonnor Brother Foods, Inc., 200 NLRB 409 (1972), a grocery store with a total of 20 employees (eight of whom

[1] Matthew Cooper, Labor Pains, *Conde Nast Portfolio*, Jan. 6, 2009.
[2] Id. at 1125.

were part-time high school students) was covered under the NLRA. This corner grocery met the jurisdictional threshold in 1972, and the result would be the same today if EFCA were to be enacted. More recently, the NLRB, in J. Shaw Associates, 349 NLRB 939 (2007) asserted jurisdiction over an Exxon station and Blimpie stand with nine to 13 employees. The result would be the same if EFCA passed. The legislation simply does not exempt small businesses.

In Summary, the Negative Impact on Small Business Cannot Be Overstated

The fact that most small businesses would be covered by EFCA is no small matter. As is noted by University of Chicago Professor Richard Epstein in *The Case Against the Employee Free Choice Act*:

> Small businesses, which as a group are the largest source of new jobs in the country … often operate on small budgets, without the assistance of full-time lawyers. Under EFCA, their first exposure to unions could come at the conclusion of a secret campaign, which requires them to both hire and acquire expertise on contentious matters for which they are ill-equipped to deal, at a cost which they can ill afford to bear. These calls for unionization will divert management from the essential tasks of product development, marketing and sales on which their business models necessarily depend.

So, if you are small business owner, this law probably covers you.

Section 3
Frequently Asked Questions

Card Check

What is card check?

Card check is the term used for a method of organizing employees into a labor union. It is a concept that would become the primary way that union organizers would form workers into a union under legislation called the Employee Free Choice Act (EFCA). Under card check, a union would be formed if a majority of employees (50 percent plus one) sign union authorization forms or cards.

What is an authorization card?

An authorization card is typically a three by five card that a union organizer asks employees to sign. The printing on the card typically states, at a minimum, "I hereby designate the [NAME OF UNION] to as my collective bargaining representative."

How are unions formed currently?

Under current labor law, the National Labor Relations Board (NLRB) certifies a union as the exclusive representative of employees if it is elected through a secret-ballot election conducted by the NLRB. That election is held if more than 30 percent of employees sign cards asking either for representation by a union or for such an election to be held.

After a campaign period that typically lasts 40 days—in which employees hear all sides of the issue from the union, the employer and coworkers—an election is held that is supervised by the NLRB to ensure employees cast their ballots in a confidential manner with no coercion by either management or the union.

Current law also allows the union to become the employees' exclusive representative if the employer chooses to forego an election and recognize the union when a majority of the employees have signed cards authorizing the union to be their representative (called a "card check process").

How would card check change the way employees currently choose union representation?

Under EFCA, if a union files a petition with the NLRB and presents authorization cards signed by a 50 percent-plus-one majority of the employees, the NLRB would certify the union as the collective bargaining representative and the employer would be required to bargain with the union without an election. Unlike the secret-ballot election process currently in place, the NLRB would not directly supervise the card-signing process, and there is no time limit under EFCA for collecting the authorization cards.

EFCA would not explicitly prohibit elections, but an election would only occur if a union or a group of employees filed a petition with cards signed by fewer than 50 percent of the workers, which rarely occurs under existing law.

Current Process	Process Under Card Check
Union gathers signatures of at least 30% to have an election Employers and unions mount informational campaigns to present both sides NLRB supervises a private-ballot election If majority approve union in the election, NLRB certifies the union	Union gathers card signatures of at least 50% + 1, unsupervised by NLRB, and a union is formed (no private ballot, no election)

Why do unions want to implement card check?

The simplest answer is that card check would make it much easier for union organizers to form workers into unions and that it would give unions a large increase in membership. A large increase in membership also means an increase in membership dues, or funding for the unions. Unions plead for card check rules because they claim employees suffer at the hands of employers as a result of NLRB elections. However, unions continue to enjoy just about the same rate of victory—typically, 55 to 60 percent, but as high as 67 percent in the first half of 2008—in secret-ballot elections as they did in 1965. This relatively constant success rate suggests that labor's disappointment with election results likely has more to do with the waning desire of employees to be union members than actions by employers.

Why should card check not be implemented?

Workers have traditionally decided the important question of whether to be represented by a union through a secret-ballot election supervised by the NLRB. The secret-ballot process ensures a number of protections for employees.

- First, **employees get to hear all sides in a campaign-style setting.** They can gather information from their employers, coworkers, and the union to help inform their decision on how to vote. Because card check drastically shortens the time in which a union can be formed and certified, employees would not have the opportunity to make an informed decision.

- Second, **the secret-ballot process ensures employees are not coerced by management or the union at the critical moment when the employee indicates his or her preference.** Under EFCA, authorization cards would be signed in the presence of an interested party—a pro-union co-worker or an outside union organizer—with no governmental supervision. Card check would make employees susceptible to pressure from union organizers or their peers.

- Finally, **holding a secret-ballot election is a process that is a cornerstone of American democracy that has worked in NLRB elections for decades.** According to the Bureau of National Affairs, unions won 67 percent of private-ballot representation elections in the first six months of 2008. EFCA would take away employees' right to a secret-ballot vote, free from coercion or intimidation. The way employees vote, either for or against forming a union, should be their own personal business, and no one else's—just like on Election Day.

First Contract Arbitration

What is first contract arbitration?

The Employee Free Choice Act (EFCA) would substantially alter the process for establishing a collective bargaining agreement in newly unionized workplaces. The bill would require that a panel of government arbitrators impose the first collective bargaining agreement on the parties if they could not reach agreement within a 120-day timetable.

How are contracts agreed upon currently?

Where a union has been recognized by the employer or certified by the National Labor Relations Board (NLRB) as representing the employees, the National Labor Relations Act (NLRA) requires employers and unions to engage in good faith collective bargaining.

This process requires that the parties negotiate with the intent of trying to reach an agreement unless and until they reach a deadlock. That negotiation process is called “free collective bargaining” because neither party has to agree to a proposal or concession, and the government does not interfere with the bargaining process unless there is a violation of law.

If a party fails to negotiate in good faith, it will be prosecuted by the NLRB for committing an unfair labor practice. In addition to the prospect of legal sanctions, the parties are motivated to reach an agreement in order to avoid economic pressure by the other party either through a strike or a lockout. This process forces each party to prioritize important issues and find ways to achieve them through trade-offs or compromises. The end product reflects these trade-offs in a way that only the parties themselves can achieve.

How would EFCA change the process?

Under EFCA’s first contract arbitration provision, employers and unions would bargain for 90 days, followed by 30 days of mediation if either party requests it. If that mediation fails, the Federal Mediation and Conciliation Service (FMCS) would appoint a government arbitrator to settle the contract for the parties.

The government arbitrator’s decision which becomes the contract between the employer and employees would be binding on the parties for two years. Thus, EFCA’s first contract provision would mandate that government arbitration panels dictate the terms and conditions of employment such as wages, benefits, and other working conditions for newly organized employees if the parties cannot reach agreement within 120 days.

Why should EFCA's first contract arbitration provision not be enacted?

- **EFCA imposes unrealistic time frames** for employers and employees to negotiate the terms of a first contract, which can take many months to get right. For employees, contracts are about training and education, vacation and sick leave policies, healthcare and other benefits, the ability to work overtime, and grievance processes—an entire set of rules that will govern the relationship between employees and employers for years to come.

  First contracts are complex and set the tone for all future contracts to follow. If the first contract is done too quickly to meet an arbitration deadline, it could lock in arrangements that harm employees and the company, for years to come.

- **EFCA discourages good-faith bargaining.** Because EFCA would automatically impose arbitration at the request of either party, there is a big risk that companies and employees would face. Rather than earnestly seeking agreement, both parties are likely to spend the 130-day period positioning themselves for the upcoming arbitration with proposals unlikely to be accepted by the other party. That is, employers and unions would take positions so extreme that they know the other party wouldn't accept them, knowing that a government arbitrator would eventually impose a "middle ground" solution. There would be little or no incentive for the parties to develop reasonable proposals, prioritize important issues, and engage in the give-and-take that is part of the collective bargaining process.

- **EFCA is vague leaves many questions unanswered.** EFCA is vague and provides no details on who the government arbitrators will be, how they would be chosen, or what their qualifications are. Arbitrators could be unfamiliar with the industries and businesses they are assigned to work with even though they would be determining salaries and benefits for employees who have highly specialized jobs or work environments. Finally, EFCA provides no standards for how an arbitrator is to make his or her decisions. Because labor contracts are important components of a business strategy, an arbitrator's unfamiliarity could be detrimental to a business's ability to execute its strategy and compete.

- **EFCA will create substantial economic harm to employers and their employees.** EFCA would put government-appointed arbitrators with little or no business experience in charge of making fundamental decisions affecting the company's costs and way of doing business. This could add substantial costs that the company's competitors will not have to incur, thus causing a potential loss of business along with the employees' jobs that depend on that business.

Unions

What is a union?

Labor unions, sometimes called trade unions, are organizations that represent employees in a particular workplace. Unions are formed when groups of employees seek to negotiate the terms of their employment as a group, rather than individually. While it is not always the case, a group of employees will typically elect a union that also represents other workplaces with employees who perform similar work (e.g., nurses, autoworkers, etc.).

What do unions do?

Unions are legally certified to act as the employees' official representative to a company's management, and they help negotiate the terms and conditions of employment—which includes issues such as grievances, labor disputes, wages, rates of pay, vacation time, sick leave, hours of employment, or work conditions—into a legally binding contract.

Unions also take an active role in politics, lobbying Congress for legislation establishing new workplace requirements and mobilizing their members to campaign for candidates they support.

Who can join a union?

Most workers in the United States have the right to join or form a union. While there are a number of laws and statutes governing who can organize, as well as when and how a union can be formed, the National Labor Relations Act of 1935 is the legislation that applies to most American workers.

Unions represent employees at companies of all sizes, and in a number of industries and professions, both blue-collar and white-collar. In the United States, there are hundreds of unions representing a variety of industries and skills, including those for construction workers, professional baseball players, pilots, police officers, nurses, actors, miners and postal workers.

Most states allow "union shops," which require represented employees to pay union dues or fees within a set time after being hired. However, 22 states have legal restrictions, called "right-to-work laws," that prohibit requiring payment of union dues or fees as a condition of employment.

How are unions formed?

A federal government agency called the National Labor Relations Board (NLRB) oversees union organizing in the United States for all private-sector and U.S. Postal Service employees. In addition to investigating unfair labor practices, one of the NLRB's chief duties is holding elections to determine whether employees want to form a union or be represented by an existing one.

Currently, in order to be certified by the NLRB as the representative of employees at a company, a union must first file a petition with the NLRB showing support from at least 30 percent of the employees they wish to represent. Usually, the union will present authorization cards, or individual forms each employee signs to state that he or she wishes to be represented by the union. Almost always, the union will wait to file the petition until well over 50 percent of the employees have signed cards. This is because, up to that point, employees typically have only heard the union's side and, after the election process is triggered, both sides of the question will be aired.

Once the NLRB has confirmed that at least 30 percent of employees support the petition, it will organize a secret-ballot election in which all employees vote on whether or not to be represented by the union. If a majority of employees vote in favor of the union in this election, the NLRB certifies the union to represent the employees to management. The election process does not occur if the employer agrees to recognize the union based on a majority of the employees signing union authorization cards. In those instances, the union is not certified by the NLRB but the employer is required to bargain with the union and treat it as the exclusive representative of its employees.

According to the Bureau of National Affairs, unions won 67 percent of private-ballot representation elections in the first six months of 2008.

How are unions organized?

Larger unions typically have a national leadership that sets the policy and administrative direction for the union nationally. These unions usually are divided further into "locals," or chapters in a state or city.

Many unions also are united into national federations, which affiliate with their international counterparts. Most unions in America are affiliated with one of two federations, the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) or the Change to Win Federation, although many remain independent.

How long have there been unions in the United States?

While unions have been around in some form for hundreds of years, the first national union in the United States, the National Labor Union, was created in 1866, followed closely by the American Federation of Labor (AFL), in 1886.

By the mid-1950s, approximately 36 percent of American workers were represented by unions. Today, about 15.4 million Americans (or 12.4 percent of the workforce) are members of a labor union.

Section 4
Tilting Labor Laws

Bargaining Ensures Realistic Agreement Balancing Employer and Employee Needs

If a union is elected, the union and the employer negotiate over a collective bargaining agreement that will define the wages, benefits, and other critical workplace issues, such as seniority, overtime, job classifications, grievance procedures, compulsory union agency fees (except in "right-to-work" states) and myriad other issues. Because the employer has the best understanding of its business model and competitive needs, and the union is presumed to have the best understanding of the employees' wishes, only the parties themselves can determine whether the terms of the agreement are realistic.

The role of the law is to ensure that they are negotiating in good faith with the goal of reaching agreement. For a variety of reasons, agreement is not always possible, especially where the union in its campaign has raised unrealistic expectations amongst the workers, thus precluding it from settling for far less in the face of the economic realities of the business enterprise.

EFCA Places Critical Workplace Decisions in Government Arbitrators' Hands

The Employee Free Choice Act provides that, where a new union and an employer have failed within 120 days to arrive at a collective bargaining agreement, the contract dictating all terms and conditions of employment in the workplace will be decided by an arbitration panel designated by the Federal Mediation and Conciliation Service (FMCS). Thus, instead of genuine bargaining, the parties would more often position themselves to obtain the most favorable arbitration decision.

This would dramatically transform the role of arbitrators from interpreting the contract negotiated by the employer and the union to actually writing the contract, making critical economic decisions impacting the employer's business model and ability to remain competitive. Employers would be given no right of review, and employees, already denied the right to a secret ballot election on union representation, would further be denied the right to vote on the contract mandated by the arbitration panel.

As has been noted by former NLRB Chairman Peter Hurtgen, who also served as Director of the FMCS: "The negotiation of a collective bargaining agreement is the search for mutually resolving each side's interests. It must be done with tradeoffs and separate prioritizing. Only the parties can do that. There are no standards for arbitrators to apply. There is no skill set for arbitrators to use. Solomon is simply unavailable."

New Penalties for Employers But Not Unions

The bill abandons the traditional "make whole" approach of the NLRA by adding new and enhanced enforcement provisions and penalties in situations where employees are being organized or first contract negotiations are taking place. Make whole means the employee is put back in the same position and paid the same amount of money ("backpay") as if the employer had not violated the law. The Employee Free Choice Act would provide triple backpay,

fines of $20,000 per violation and automatic injunctions for employer violations occurring during union organizing and first contract negotiations. Significantly, these provisions would only apply to employer — not union — violations, even though unsupervised card check organizing lends itself to coercive union tactics.

Forced, Not Free, Choice

Throughout the 70-year history of the NLRA, both management and labor have had complaints about how it works and have proposed changes. Yet, for all of its flaws, its centerpiece is the ability of employees to register their vote in private, with government supervision to ensure privacy and the absence of coercion or other activities that would taint that vote. Moreover, once that preference has been expressed, if the union is selected, it has been left to the parties to negotiate the agreement that will decide mutually satisfactory conditions in the workplace. That's called collective bargaining.

With a few brief provisions, the EFCA would fundamentally alter these basic tenets while soundly contradicting the very title of the legislation.

Section 5
Sample Letters to Congress

Make Your Voice Heard: Sample Letters to Congress

The following are sample letters for you to send to your Senators or Congressmen and women. Feel free to use the text as is, supplement it with your own personal story, or write your own letter telling Washington why EFCA would hurt you, your town, and the American economy.

I. I am an EMPLOYEE, who is not represented by a union

Dear Member of Congress:

I am against the Employee Free Choice Act. As an employee who is not represented by a union, I have a lot at stake. EFCA would take away my right to a private ballot vote, the ability to get information from my employer and the union – and hear arguments from both sides. If my coworkers and I were to decide to have a union, it would be so that our employer and our union could decide the terms of our contract. I certainly would not want the company or the union knowing how I voted nor do I want to have government-appointed bureaucrats deciding my contract terms and intervening in my workplace. I do not believe EFCA or more labor laws that give more power to the unions would help the Middle Class. We can't afford EFCA. Please vote against it and any other labor laws that could hurt workers and cost jobs. Thank you.

II. I am an EMPLOYEE, who is represented by a union

Dear Member of Congress:

I am a member of a union and I do not support the Employee Free Choice Act. Under existing labor laws, employees like me can decide whether to have a union by casting our votes privately. Employees have access to information from both the union and the company so they can make the decision that is best for themselves. I want these rights protected. Also, I worry that any new labor laws that give more power to unions and government-appointed arbitrators could hurt my company financially and, by extension, cost me my job. We can't afford EFCA. Our labor laws our working. Please vote against EFCA and any other labor legislation that would take away rights from workers, hurt businesses and cost jobs. Thank you.

III. I am a SMALL BUSINESS OWNER, with more than $500,000 in annual revenue

Dear Member of Congress:

As a small business owner, I am opposed to the Employee Free Choice Act and any other labor laws that would interfere with my relationship with my workers and my ability to grow my business and continue to provide good jobs. The fact is, I can't afford EFCA. The costs associated with the mandatory first contract arbitration process – a process that is vague and without defined standards – would be crippling. And pay, benefit, and work rule provisions decided by government-appointed arbitrators unfamiliar with my business would likely be unsustainable. I'm aware of economic studies that estimate EFCA would result in 600,000 jobs lost in the first year of enactment alone. Greater power for unions and more government intervention in the workplace won't help Main Street and those of us who are working hard to make a living and provide good jobs. Over the past 50 years, Congress has passed more than 30 significant changes in our workplace laws. We do not need unnecessary legislation that will hurt my business and, by extension, by ability to provide and create jobs. We need less bureaucracy, not more. Please vote against EFCA and any other labor laws that could hurt business owners like me. Thank you for your careful consideration.

IV. I am a BUSINESS EXECUTIVE, of either a union or a non-union workforce

Dear Member of Congress:

I am writing to express my opposition to the Employee Free Choice Act and any other labor laws that would negatively impact my company and its ability to compete, generate profits and, by extension, provide good jobs and benefits to our employees – both union and non-union – who depend on a financially strong enterprise for their economic well-being.

The fact is, EFCA's provisions – particularly those associated with the mandatory first contract arbitration provision – are intrusive, unrealistic, vague and unfair. With increased competition in today's global economy, we simply can't afford to have government-appointed arbitrators unfamiliar with our business strategy intrude in and make final decisions about the terms of our labor agreements - one of our most significant costs. Moreover, we know from experience that the 120-day deadline is unrealistic; first contracts are simply too complex to be responsibly developed within that artificial timeframe. The process's lack of guidelines and standards is vague and therefore fraught with risk.

Finally, the legislation, considered in its entirety, is unfair and undemocratic for the following reasons:

- Imposing additional penalties on companies, but not unions;
- Limiting employees' ability to hear from all sides of the issue as to whether to form a union; and
- Replacing employees' right to a private vote with the card check process unfairly upsets the balance of power between a company and a union to the detriment of our workers and our ability to compete in the global marketplace. Our current laws are working, as evidenced by the fact that unions win well over half of NLRB-conducted elections.

To be clear, we are not anti-union. We have enjoyed constructive relations with our unions for many years and we respect and support our employees' right to determine for themselves – through the free and fair election process currently stipulated by federal labor laws – whether or not they want to be represented.

What we cannot support are any new labor laws that would fundamentally change the way we do business and will most assuredly result in the unintended consequence of damaging our company, our ability to compete and provide jobs, and ultimately, our economy. We cannot afford EFCA and urge you to oppose it.

Thank you in advance for your most careful consideration of this matter.