

The Employee Free Choice Act — Is Your Organization Prepared?

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The proposed Employee Free Choice Act ("EFCA") would dramatically alter the landscape of labor-management relations in favor of unions seeking to organize employees of non-union employers. Businesses that do not prepare soon for the impact of this prospective law, as well as their employees, will be significantly affected.

Impact: The EFCA contains the most sweeping set of amendments to the National Labor Relations Act ("NLRA") in the NLRA's 74-year history. The EFCA will make it easier for unions to organize employees, provides for arbitrators to impose labor contracts on the parties and increases the penalties for employer violations of the NLRA. This law is likely to have far-reaching effects on employers across all industries, including those that have never before been the target of a successful union organizing campaign.

Passage Likely: Some version of the EFCA is expected to be enacted into law in 2009. The same bill was passed by the U.S. House of Representatives last year. The Democratic Party Congressional Leadership has provided strong and vocal support for the EFCA, and as a result of the most recent election, there is a near filibuster-proof U.S. Senate to support passage. The EFCA is the labor movement's top legislative priority, and President-Elect Barack Obama co-sponsored the EFCA last year.

Prepare Now: Given the potential significant impact on all non-union employers, it is imperative for employers with non-union facilities to understand the challenges and related business costs this legislation presents and *prepare now* for the union-organizing efforts their company may face in upcoming months. As it may take substantial time to assess and effectively address vulnerabilities in your workplace that can be exploited more easily by an organizing effort under the EFCA, prompt action should be considered. Below is an overview of the EFCA's key provisions and a list of actions each employer should consider to address these issues.

EFCA Key Provisions:

- **No Secret Ballot Election.** A union can bypass a secret ballot election and obtain representation of employees solely on the basis of signed "authorization" cards it obtains from employees. Unions typically obtain cards without notice to the employer or open discussions of the facts and issues that the employees could use to make an *informed* choice. A union may secure enough cards to organize your employees *before* you know anything about it, or *before* you have a real chance to discuss the issues with your employees and seek to persuade them not to sign.
- **Imposition of First Labor Contract.** If a first labor contract is not negotiated within 120 days of the union's demand for recognition, the union may request the appointment of an arbitrator, who will have authority to impose a two-year labor contract on the parties, regardless of its impact on the business.
- **Increased Penalties.** EFCA increases the penalties for alleged violations by employers during periods of union organizing activity, such as: (i) mandatory injunctions against alleged actual or threatened discriminatory actions or actions that may interfere with employee rights, (ii) treble backpay in cases of discrimination, and (iii) civil penalties of up to \$20,000 per violation for willful or repeated violations. As a result, a significant increase in litigation before the National Labor Relations Board is expected.

Top Ten Steps To Consider:

1. Developments: Keep up-to-date on the status of this proposed law. In conjunction with Duane Morris Government Affairs LLC, our firm's affiliated governmental consulting entity, we are monitoring political developments on this bill and can send you periodic updates via email.

2. Conduct Vulnerability Assessments: Under this new legislation, nearly all employers are at risk for an aggressive union organizing drive. Employers should examine their workforces to determine:

- The vulnerability of its employees to lawful union efforts, as well as unlawful organizing tactics (*e.g.*, fraud, misrepresentation, harassment, threats, coercion, etc.). Some employees may be particularly vulnerable to harassment, intimidation or coercion to sign a union authorization card. Others may be vulnerable to misleading statements by organizers, misrepresentation or fraud. They may lack a full understanding of the significance of signing a union card, for example due to language issues or a lack of sophistication of their rights or the implications of unionization,
- The vulnerability of the company and its various facilities to organizing efforts based on its operational structure, workplace practices, policies and relationships with its employees, and
- The vulnerability of business plans that may impact operations and personnel and, in so doing, could be viewed as unlawful or subject to injunctive relief if implemented during an organizational campaign.

3. Documentation of Business Planning: In this current economic climate, many employers may be contemplating or planning discipline, changes in compensation or benefits, a transfer of work to another facility, layoffs or other restructuring. If any of these are implemented during an organizational effort (perhaps one you may not even be aware of at the time of your planning), or an organizational effort is started *in reaction to* word of your impending plans, the union may charge that implementing such plans during an organizational campaign would be discriminatory or interfere with employee rights. The EFCA may require the NLRB to seek an injunction to stop implementation of your plans. Treble backpay awards and costly civil penalties could be sought if any such changes in this period are later found to be discriminatory (*i.e.*, motivated, in whole or in part, by anti-union animus). Careful documentation of personnel decisions and planned business changes, and the timing and reasons for those actions, may be critical.

4. Implement and Maintain Best Practices: Since unions will likely seek to organize and get employees to sign cards before you are aware of their activity, an employer's best defense may be to create a workplace, through the implementation of Best Practices in Human Resources, so that employees will be more likely to reject unionization when approached. Evaluate current personnel policies and practices to determine whether your workplace and your current relationships with employees will make it harder or easier for unions to persuade employees to organize. Examples of Best Practice issues include full compliance with applicable law ("respect for employee rights"), fair and non-discriminatory treatment of employees, eliminating actual or perceived favoritism in personnel decisions, prompt and accurate communications on issues that affect employees, managed employee expectations, effective processes for promptly resolving disputes in-house and competitive compensation and benefits.

5. Develop Response to Union Organizing Strategies: In the event your employees may be subject to "mischief" by union organizers, such as noted above, you should adopt a strategy to assist your employees in dealing with this misconduct. This can include training your employees on what to do if they feel harassed or coerced in any way to sign an authorization card. It would also include a strategy of providing them with a source of information and a place they can go to get answers to questions they may have about their employment, the union organizing effort or related matters. Consider adopting a strategy to manage the impact of union organizing efforts, *e.g.*, promulgating lawful no-solicitation/no-distribution rules, evaluating operational and organizational issues that affect the scope of the "appropriate" unit and identifying those who will qualify as "supervisors" and therefore be part of the management team to deal with organizing efforts. This team will train employees, gather intelligence on vulnerabilities to organizing and organizing activity and advocate the company position on organizing. The correct identification of supervisors will be critical if the RESPECT Act, another bill backed by organized labor that is designed to narrow the scope of who are supervisors exempt from the NLRA, is passed.

6. Training of Supervisors: One of the most important steps an employer should consider taking immediately is to train its supervisors to handle their increased responsibilities and broad role in dealing with the implications of the EFCA. That training regimen should include:

- **Communicating Best Practices.** Supervisors need to understand and implement their vital role in implementing the employer's Best Practices in Human Resources, including developing effective communication skills and relationships with subordinates.
- **NLRB Rules.** The NLRB's rules governing the conduct of supervisors both before and during an organizational effort are often counter-intuitive - common sense and good motives may not be enough to avoid violations. In light of the EFCA's significantly increased penalties for NLRA violations by supervisors, supervisors need to be keenly aware of the rules governing their conduct more than ever.
- **Warning Signs.** Supervisors should be trained to recognize the earliest signs of employee unrest and union card-signing drives in order to provide the maximum amount of time to react and persuade employees on the issues.
- **Training the Trainers.** Your human resources and supervisory personnel should be trained on their roles in the training of non-supervisory employees, as discussed below.
- **Campaigning on Substantive Issues.** If you are fortunate enough to learn of an organizing event in sufficient time to persuade the employees, your supervisors should be prepared to provide employees with information they need to make an informed decision and which the union is unlikely to provide them. They also should be prepared to deliver the company's message, to listen to the employees' concerns and questions so a proper response is prepared and discuss the issues in a knowledgeable, confident manner in order to be persuasive. You may not have a great deal of time for this training if you wait until you first learn of an organizing drive in your workplace.

7. Training Employees: The EFCA provides the union a roadmap to organizing without an opportunity for the employer to provide information, discuss the issues and persuade the employees on their choice. Thus, the EFCA puts a premium on effective action by the employer before an organizing campaign starts. Employers should consider providing training in advance for their current employees, and new hires during their orientation, on the following:

- **Best Practices.** Explain, even if the word "union" is never used, why the employees do not need a union. Employees can be helped to understand and appreciate the employer's Best Practices, so that the union will have difficulty offering them anything of sufficient value to sign a union card.
- **Union-Free Philosophy.** Explain the company's union-free philosophy and why/how that is likely to benefit the employee.
- **EFCA and Authorization Cards.** Help employees understand the true legal significance of the cards and the implications of signing. Employees should know of their right to a secret ballot election and to make an informed choice by having access to all information and a discussion of issues before voting.

- **Dealing with Harassment, Coercion, Misrepresentation, Lack of Information/Discussion.** If employees may be subject to "mischief" by union organizers, prepare them for how to deal with such misconduct, how the employer can help protect them, and what resources you are providing to correct misinformation and answer questions.
- **Campaign Issues.** Review the facts and arguments on the key issues the employees can and will consider in deciding whether to sign an authorization card, or decline to do so ("campaign issues"). Since the "election campaign" as we know it may be a thing of the past after the EFCA, each employer may have to decide when the time is right to schedule this training for the employees.

8. Rapid Response Team: For most employers, their first awareness of a union organizing campaign will come long after the union started the effort. Thus, the employer likely is starting from behind. Employers therefore should be prepared in advance of a card-check campaign to respond quickly and capably to be most effective. Employers should establish a quick response task force composed of a small number of trained and prepared members of your management team. That team will have worked with outside counsel to prepare a well-thought-out plan to respond to a union organizing effort in the most effective manner.

9. "Campaign in a Can": Since the employer will likely need to communicate with its employees on the campaign issues, and will have little time to prepare these materials, the Rapid Response Team should have a set of materials prepared and ready to go in the event an organizing effort is discovered.

10. Preparation for Bargaining/Interest Arbitration: Under the EFCA, the time period for negotiating a first contract is extremely short, and employers may have little time to prepare. In the likely event the union will use the availability of arbitration to be stubborn in negotiations, the employer will need to be prepared for "interest arbitration," *i.e.*, an adversarial hearing before an arbitrator where the arbitrator's "decision" will be to impose the terms of a two-year labor contract on the parties. In such proceedings, the employer's preparation of its contract proposals and its documented defense of the reasonableness of those proposals is important. Bargaining strategy can be considered early, including steps the employer can take to document its exercise of management rights that will support its position that the same should not be restricted in a labor contract.

Prompt action is likely to be necessary to prepare your company and workforce for the implications of the EFCA.

About Duane Morris

Duane Morris' team of experienced labor relations and employment lawyers are prepared to assist clients to identify vulnerabilities, develop strategy and train supervisory personnel to implement plans for dealing with the EFCA. In addition, Duane Morris Government Affairs LLC, a wholly-owned subsidiary of the firm, lobbies Congress on this and similar bills on behalf of their clients.

For Further Information

If you have any questions regarding the issues presented above, please contact any [member](#) of the [Employment & Immigration Practice Group](#), [Duane Morris Government Affairs LLC](#) or the attorney at Duane Morris with whom you are regularly in contact.