

# Management Alert

## Employee Free Choice Act Introduced In Congress

On February 5, 2007, U.S. Representative George Miller (D-CA), Chair of the House Education and Workforce Committee, formally reintroduced the Employee Free Choice Act (H.R. 800) (the EFCA) in the U.S. House of Representatives. The EFCA, commonly referred to as the "card check" bill, would establish a mandatory process whereby a Union is recognized as the representative of a group of employees by obtaining a majority of employees to sign union authorization cards without a secret ballot election.

With over 230 co-sponsors in the House, including several Republicans, the EFCA has received the support of various labor unions, civil rights organizations, the Democratic Leadership Counsel, and anti-poverty organizations.

The House is set to hold a hearing on the bill on February 8, 2007. The Senate is also expected to introduce its own version of the bill later this month.

### *What Does the Proposed Legislation Provide Regarding Elections and Card-Check Recognition?*

The EFCA would amend the National Labor Relations Act (NLRA) by establishing a new "card check" procedure for union recognition. Under this new procedure, the National

Labor Relations Board (Board) would automatically certify as a bargaining representative any union that presents to it a petition signed by a majority of employees of a particular employer indicating that the employees wish to be represented by a union. The Board would not have the authority to conduct an election in such circumstances. In essence, the EFCA would eliminate the secret ballot election process that has been in place for over 50 years and replace it with card-check recognition.

The EFCA also would require the Board to establish specific rules and guidelines for enforcing these new processes, including guidelines regarding the appropriate authorization language for the showing of interest. It also would require the Board to establish procedures for ensuring the validity of the signatures on the petition or authorization cards.

### *What Does the EFCA Provide Regarding New Remedies for Inappropriate Employer Conduct?*

In addition to establishing a new recognition procedure and a new mediation procedure, the EFCA would also change the remedies for certain violations of the NLRA. In particular, the EFCA would award any employee discriminated against in violation of Section 8 (a)(3) of the NLRA, during a union organization drive or prior to the

effective date of a first contract, backpay and liquidated damages in the amount of two times the employee's backpay.

Also, any employer who *willfully or repeatedly* engages in violations of Sections 8 (a)(1) or (a)(3) of the NLRA during a union organization drive or prior to the effective date of a first contract will be subject to a civil penalty not to exceed \$20,000 for each violation. The Board could exercise its discretion in determining the appropriate amount of the penalty, giving consideration to the impact and type of unfair labor practice violation.

### *What Does the Proposed Legislation Provide Regarding Bargaining an Initial Contract?*

The EFCA would also create strict guidelines for unions and employers who are negotiating their first collective bargaining agreement. For example, the EFCA would require that the parties must hold their first meeting to bargain regarding an initial agreement within ten (10) days after the union makes a written request for bargaining, although it does permit the parties to agree to an extension of this ten (10) day rule.

More significantly, the EFCA also would authorize unions or employers to request Federal Mediation and Conciliation Service (FMCS) intervention in the bargaining process for an initial collective bargaining agreement. After the expiration of 90-days from the date of the commencement of bargaining, either party may request mediation assistance from the FMCS and the non-requesting party then must participate.

If mediation is not successful in 30 days, then the FMCS could refer the bargaining situation to "an arbitration board" for settlement. The FMCS would create this

arbitration board, which would have the authority to issue a binding decision with a contract. The arbitration board's "contract" would be binding on the parties for two (2) years, unless the parties agreed otherwise.

### *What Is Motivating This Legislation?*

The primary impetus for this legislation is the decrease in unionized employees in the United States. As is widely-known, the percentage of unionized workers in the U.S. has consistently decreased in the last 30 years. Currently, only 7.4% of all U.S. private-sector employees are represented by a union, compared to 35% of private-sector employees in the 1950's. This "card check" recognition process is intended to reverse the decrease in unionization by making organizing easier for unions. The sponsors of the legislation also cite concerns about employer threats and intimidation of unions and employees as the purposes behind the new mediation procedures and penalties.

### *Why Is this Legislation Important to Employers?*

Since the 1930's, under the NLRA, the Board will conduct a supervised, union representation election after a union produces evidence that at least 30% of the employees it seeks to represent want to have an election. Unions typically gather this showing of interest by collecting authorization cards from employees. During the collection of these cards, union representatives frequently confront employees directly. Under these circumstances, employees can sign cards without knowing what they are signing or under pressure. There is no governmental supervision during this initial card gathering process. Currently, only after a union has made this initial threshold showing of interest does an employee gain the right to make his or her final decision about whether or not they

want a union to represent them through a government supervised secret ballot election.

“Card check” removes the secret ballot selection from this process. If the EFCA is passed and signed into law in its current form, employees would be forced to make a decision about union representation in front of a union representative or supporter. Unions could potentially use deception, intimidation, pressure tactics, and/or coercion to obtain employee signatures. Even when there is no deception, interference or coercion, employees still likely will feel pressured into making a decision about the union when a union official is standing before them asking them to make an immediate decision to sign the card or not.

Additionally, when cards are the final arbiter of a union’s majority status, union’s secret efforts to gather cards from employees can prevent an employer from communicating effectively in an organizing campaign. Long before an employer realizes a union is collecting cards from its employees, the union is already doing so and campaigning to get cards signed. Traditionally, under the NLRA, regardless of when an employer discovered that a union was collecting cards, an employer was always guaranteed approximately a 40 day campaign period after an election petition has been filed with the NLRB to share its views on unionization with employees prior to the election itself. “Card check” eliminates this guaranteed pre-election campaign period. Thus, the “card check” process and a particularly covert union campaign could result in an employer having a union at its facility before it even realizes a campaign has started.

Further, a hallmark of the U.S. labor relations model -- freedom to use economic leverage and ultimately to determine the terms of one’s own contract -- is replaced by EFCA’s provisions for mandatory mediation at the

request of only one party, thereby limiting employers’ and unions’ ability to utilize the two economic weapons the NLRA specifically gave to the parties: the right to strike and the right to lockout. By requiring mandatory mediation, the parties will no longer have the right to exert these weapons during bargaining of the initial contract. Similarly, a board of arbitrators, not the parties themselves, could eventually create the parties’ initial binding agreement. This will interject a disinterested governmental entity into the parties’ relationship and ultimately result in an agreement that is handed to the parties instead of negotiated by them.

### *What Will Happen Next?*

The House of Representatives will now hold hearings on this bill, which may eventually work its way to the floor of the House in this form or in an amended form. Similarly, the Senate is developing its own draft of legislation on this particular issue, which will likely proceed to committee and the floor of the Senate.

### *What Can Employers Do?*

Employers should make their opinion on the EFCA known to their Congressperson and their Senators. Employers should also work with employer or business groups such as the U.S. Chamber of Commerce in an effort to respond to this legislation.

*If you have any questions concerning this Management Alert, please contact the Seyfarth Shaw LLP Labor & Employment attorney with whom you work or any Labor & Employment attorney on the website at [www.seyfarth.com](http://www.seyfarth.com).*

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