

## **Streamlining Union Certification - Increasing Penalties on Businesses**

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On March 10, 2009, the Employee Free Choice Act of 2009, commonly called "Card Check," was introduced in Congress. The goal of the EFCA is clear:

- Streamlining Union Certification (EFCA, Sec.2)
- Facilitating Initial Collective Bargaining Agreements (EFCA, Sec. 3)
- Strengthening Enforcement (EFCA, Sec. 4)

### **Employee Free Choice Act Applies to Small Businesses**

If enacted, the ECA will amend the National Labor Relations Act; known as the Taft-Hartley Act.

The NLRA has broad coverage. Generally, a non-retail business selling goods to consumers directly or indirectly in interstate commerce with annual sales above \$50,000 will be subject to the EFCA provisions. Retail businesses having sales (including sales tax) of \$500,000 or more will also be subject to the proposed legislation.

### **What The Employee Free Choice Act Does**

The EFCA amends the National Labor Relations Act on how unions unionize companies.

Under the "Card Check" provision of the proposed Act, the current practice of secret ballot voting by Employees to determine whether or not the employees have chosen a particular union as their collective bargaining representative is practically eliminated.

The proposed Act requires federal mediation between a business and the union to determine wages, benefits and work rules in the first contract.

If mediation is unsuccessful, a federally appointed arbitrator *will* decide the benefits and work rules that the business must give employees should the union and management fail to agree on an initial contract during the mediation period.

### **Streamlining Union Certification - Card Check Provision**

Section 2 of the proposed law is the "Card Check" provision.

As the law stands today, once a union has obtained the consent of at least 30% of the employees desiring a collective bargaining representation, the company can demand a secret ballot to determine if the employees will have a union bargaining on their behalf. Current law affords both the Union and Company the right to educate the workers on the advantages and disadvantages of union representation.

Under EFCA, once "collective bargaining cards" are signed by 50% of the work force, the Company has been unionized, and the Company must bargain with the union representative. No

secret ballot is required.

Under the Card Check provision, employees are not permitted to sign cards asking for an election. Once the employee signs the card, the card counts towards the majority needed for unionization.

While much debate is going on over whether or not Card Check eliminates the secret ballot, Section 2 of the EFCA requires that if the National Labor Relations Board: "...finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization...as their bargaining representative...the Board shall not direct an election but shall certify the individual or labor organization as the representative..." In short, no election need be held to decide unionization of a business.

### **Facilitating Initial Collective Bargaining Agreements -Mediation and Arbitration**

Mediation is the process of mutual negotiation between the respective union and company representatives in the presence of a facilitator who seeks to have both sides agree on the work rules and benefits employees receive in the first contract. The mediator is provided by the Federal Mediation and Conciliation Service.

EFCA also has an arbitration requirement. Unlike mediation, arbitrators issue a decision which *determines the work rules, wages and benefits employees will receive.*

The time line specified in the EFCA to reach a first collective bargaining agreement is short; 120 days from union organization of the workplace to the first collective bargaining agreement:

- 10 days after the union has been certified and the union requests to meet, the Parties "shall" meet.
- 90 days from the date bargaining commences, if the parties have failed to reach an agreement, federal mediation is required upon the request of the Union.
- 30 days after the request for mediation is made, and no agreement is reached, a Federal Arbitration panel will convene and decide the work rules, pay rates and benefits the Company must give the employees who are part of the bargaining unit.

### **EFCA Increases Penalties on Companies**

Section 4 of the EFCA raises the penalties on employers for unfair labor practices from the current \$5,000 per violation to \$20,000. No similar increase applies to labor Unions.

Another EFCA provision provides for an award against an Employer of Back Pay plus a penalty of 2 times the amount of Back Pay should the Employer be found to have discriminated against an employee during the union organization process and the time the first collective bargaining agreement is entered. No such provision is in the current law.

## **Impact of EFCA on Right to Work States and Employment At Will**

It can be anticipated that the passage of the EFCA will encourage labor unions to increase their organization attempts in the Right to Work States, primarily because of the Card Check Provision.

### ***Employment At Will***

Under the principle of "Employment at Will," an Employer can discharge any worker for any reason or for no reason at all; for good cause or bad cause or no cause. The converse is also true. An employee can determine how long to work for any given employer and when to quit. With a collective bargaining agreement in place, terminating employees covered by the agreement will be more difficult.

Employers should have in place "work rules" governing employee behavior prior to any unionization attempt. Work rules should be implemented with an [Employee Handbook](#) that complies with both federal and state law.