

- ADMIRALTY & MARITIME
- ANTITRUST & TRADE REGULATION
- APPELLATE LITIGATION
- AVIATION
- BANKING & FINANCIAL SERVICES
- BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
- BUSINESS & COMMERCIAL LITIGATION
- BUSINESS & COMMERCIAL TRANSACTIONS
- CLASS ACTION DEFENSE
- COMMERCIAL LENDING & FINANCE
- CONSTRUCTION
- CORPORATE & SECURITIES
- CORPORATE COMPLIANCE & WHITE COLLAR DEFENSE
- ECONOMIC DEVELOPMENT
- EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
- ENERGY
- ENVIRONMENTAL & TOXIC TORTS
- GAMING
- GOVERNMENT RELATIONS
- HEALTH CARE
- INTELLECTUAL PROPERTY
- INTERNATIONAL
- LABOR & EMPLOYMENT
- MERGERS & ACQUISITIONS
- PRODUCTS LIABILITY
- PROFESSIONAL LIABILITY
- PROJECT DEVELOPMENT & FINANCE
- PUBLIC FINANCE
- REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
- TAX (INTERNATIONAL, FEDERAL, STATE & LOCAL)
- TELECOMMUNICATIONS & UTILITIES
- TRUSTS, ESTATES & PERSONAL PLANNING
- VENTURE CAPITAL & EMERGING COMPANIES

EMPLOYEE FREE CHOICE ACT— A UNION’S DREAM AND AN EMPLOYER’S NIGHTMARE

By: *Sidney F. Lewis, V and H. Mark Adams*

Introduction

The recently concluded Presidential and Congressional elections have organized labor salivating over the likely passage of the so-called and grossly misnamed Employee Free Choice Act (“EFCA”). EFCA, which actually would eliminate “employee free choice” concerning unionization, is at the very top of organized labor’s very aggressive legislative agenda and enjoys the strong support of President-elect Barack Obama. You cannot underestimate how dramatically the enactment of this misguided and ham-handed legislation could change your workplace and jeopardize your business and the livelihoods of your employees. The proposed law is nothing short of a power grab by unions. At this point, EFCA is still only proposed legislation, and no one knows exactly what form it will take upon final passage. One thing is certain, however: with strong Democrat majorities in both the House and Senate, and a President who is eager to sign the legislation, EFCA is certain to become law in some form, and employers need to begin preparing for it now.

Overview of EFCA

The Employee Free Choice Act (“EFCA”) aims to “amend the National Labor Relations Act to establish an efficient system to enable employees to form, join or assist labor organizations, to provide for mandatory injunctions for unfair labor practices during organizing efforts, and for other purposes.”

Under current law, the U.S. National Labor Relations Board (“NLRB”) will certify a union as the exclusive representative of employees if it is selected by either a voluntary card check process (when an employer agrees to bargain with a union if a majority of employees sign union cards) or by secret ballot election, which is held if more than 30% of employees in a bargaining unit sign cards asking for representation by a union.

Employers rarely recognize a union through a card check process, even if the union claims they have a majority of employees signed up. The typical response from the employer is to let the NLRB conduct a free and fair election.

Usually, a campaign lasts six weeks, beginning from the date the petition is filed and ending the date a secret ballot election is held.

During this time, employers are allowed to hold captive audience meetings, wherein they discuss with employees the company benefits the employees currently enjoy, the risks associated with union representation, and other information related to the specific union seeking to represent them.

- ADMIRALTY & MARITIME
- ANTITRUST & TRADE REGULATION
- APPELLATE LITIGATION
- AVIATION
- BANKING & FINANCIAL SERVICES
- BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
- BUSINESS & COMMERCIAL LITIGATION
- BUSINESS & COMMERCIAL TRANSACTIONS
- CLASS ACTION DEFENSE
- COMMERCIAL LENDING & FINANCE
- CONSTRUCTION
- CORPORATE & SECURITIES
- CORPORATE COMPLIANCE & WHITE COLLAR DEFENSE
- ECONOMIC DEVELOPMENT
- EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
- ENERGY
- ENVIRONMENTAL & TOXIC TORTS
- GAMING
- GOVERNMENT RELATIONS
- HEALTH CARE
- INTELLECTUAL PROPERTY
- INTERNATIONAL
- LABOR & EMPLOYMENT
- MERGERS & ACQUISITIONS
- PRODUCTS LIABILITY
- PROFESSIONAL LIABILITY
- PROJECT DEVELOPMENT & FINANCE
- PUBLIC FINANCE
- REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
- TAX (INTERNATIONAL, FEDERAL, STATE & LOCAL)
- TELECOMMUNICATIONS & UTILITIES
- TRUSTS, ESTATES & PERSONAL PLANNING
- VENTURE CAPITAL & EMERGING COMPANIES

Over the past few decades, the unions have typically won 50% of the elections they have participated in, which belies organized labor's claim in support of EFCA that change is needed to restore balance in labor-management relations.

Proponents of EFCA claim the election process is unfair in that it identifies employees who are in favor of the union and, invariably, those employees are subject to adverse treatment due to their support.

The above argument completely ignores the facts that, under current law, employees can vote in a secret ballot election (and thereby exercise their "free choice" about whether they want a union) and that neither the employer nor the union will know how they vote. Current law also allows employees who support unionization to file unfair labor practice charges if they feel they have been discriminated against or coerced or intimidated by their employer and provides them with a very sympathetic ear at the NLRB. There is no such protection of employees from union coercion under either current law or EFCA.

If EFCA Becomes Law

Under EFCA, a union would have the right to be recognized as the exclusive bargaining representative of your employees if a majority of employees in the representative bargaining unit sign authorization cards.

Under EFCA, if a majority of employees sign cards, an employer must begin bargaining within 10 days after the union is certified. If the union and the employer cannot agree upon the terms of a first collective bargaining contract within 90 days, the matter is referred to a federal mediator. If, after 30 days of mediation, the union and employer still have not agreed on a contract, a federal arbitrator would be empowered to determine the terms of the agreement, and your employees would lose their current right to ratify the terms of the agreement.

EFCA also would provide for liquidated damages of three times back pay if employers were found to have unlawfully terminated pro-union employees. In addition, EFCA would impose a \$20,000 penalty on employers per occurrence if the NLRB and/or court deems a violation willful or repetitive.

Current EFCA Status

During the last Congress, EFCA passed the House of Representatives but the measure was killed by a Republican-led filibuster in the Senate.

Democrats have increased their majority in the Senate after the recent national elections but still lack a filibuster-proof majority, which is all that stands in the way of EFCA's passage. It seems certain that EFCA will become law in some form, but many questions remain concerning what form the law will finally take.

- ADMIRALTY & MARITIME
- ANTITRUST & TRADE REGULATION
- APPELLATE LITIGATION
- AVIATION
- BANKING & FINANCIAL SERVICES
- BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
- BUSINESS & COMMERCIAL LITIGATION
- BUSINESS & COMMERCIAL TRANSACTIONS
- CLASS ACTION DEFENSE
- COMMERCIAL LENDING & FINANCE
- CONSTRUCTION
- CORPORATE & SECURITIES
- CORPORATE COMPLIANCE & WHITE COLLAR DEFENSE
- ECONOMIC DEVELOPMENT
- EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
- ENERGY
- ENVIRONMENTAL & TOXIC TORTS
- GAMING
- GOVERNMENT RELATIONS
- HEALTH CARE
- INTELLECTUAL PROPERTY
- INTERNATIONAL
- LABOR & EMPLOYMENT
- MERGERS & ACQUISITIONS
- PRODUCTS LIABILITY
- PROFESSIONAL LIABILITY
- PROJECT DEVELOPMENT & FINANCE
- PUBLIC FINANCE
- REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
- TAX (INTERNATIONAL, FEDERAL, STATE & LOCAL)
- TELECOMMUNICATIONS & UTILITIES
- TRUSTS, ESTATES & PERSONAL PLANNING
- VENTURE CAPITAL & EMERGING COMPANIES

Moreover, there is some speculation that, although supported by both President-elect Obama and Vice President-elect Joseph Biden, EFCA may take a back seat to other more pressing economic issues. Don't expect the unions to let that happen—they strongly supported the Obama-Biden ticket in addition to Democrat Congressional candidates, and they expect payback.

What You Should Do Now

Despite the unanswered questions, all employers should prepare themselves for the passage of this Act and the possibility that they could be forced to recognize a union without going through the election process.

Card signing can be very dangerous. Unions can fly under cover of radar and pressure or persuade employees to sign union cards without the employer's knowledge and without the employer being able to give any counter-information.

For decades, employees have signed cards under the mistaken impression that they had nothing to lose, or because a friend asked them to, or because of peer pressure. Once employees signed the cards, they would never get them back from the union. The major inconvenience for an employer vis-à-vis card signing was that the employer would have to go through the election process. Typically, however, in a well-run campaign, the employers were able to put out enough information to dissuade the employees from voting for the union or even proceeding to the actual election.

Under EFCA, employees could be taking on a union without understanding the full risks associated with union representation, i.e., without getting both sides of the story, unless employers engage in proactive training and education on a year-round basis.

As a result of this new threat, employers should immediately begin a process of orientation, training, and vigilance. A prudent approach might involve the following:

- Educate human resources personnel and all upper management on the new rules, the logistics of any card signing campaign, and any unresolved company/employee issues that may make the company vulnerable;
- educate all supervisors as to the company's desire to stay union-free, their role in any union card-signing campaign, and what they can and cannot say to employees regarding union organizing and union representation;
- prepare an orientation program for all new employees in which the company's union-free status is explained; further education through the use of videos and DVDs about the dangers of unionization and the advantages of remaining union-free could be very helpful at this stage;

- ADMIRALTY & MARITIME
- ANTITRUST & TRADE REGULATION
- APPELLATE LITIGATION
- AVIATION
- BANKING & FINANCIAL SERVICES
- BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
- BUSINESS & COMMERCIAL LITIGATION
- BUSINESS & COMMERCIAL TRANSACTIONS
- CLASS ACTION DEFENSE
- COMMERCIAL LENDING & FINANCE
- CONSTRUCTION
- CORPORATE & SECURITIES
- CORPORATE COMPLIANCE & WHITE COLLAR DEFENSE
- ECONOMIC DEVELOPMENT
- EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
- ENERGY
- ENVIRONMENTAL & TOXIC TORTS
- GAMING
- GOVERNMENT RELATIONS
- HEALTH CARE
- INTELLECTUAL PROPERTY
- INTERNATIONAL
- LABOR & EMPLOYMENT
- MERGERS & ACQUISITIONS
- PRODUCTS LIABILITY
- PROFESSIONAL LIABILITY
- PROJECT DEVELOPMENT & FINANCE
- PUBLIC FINANCE
- REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
- TAX (INTERNATIONAL, FEDERAL, STATE & LOCAL)
- TELECOMMUNICATIONS & UTILITIES
- TRUSTS, ESTATES & PERSONAL PLANNING
- VENTURE CAPITAL & EMERGING COMPANIES

- conduct initial and follow-up meetings with employees to discuss the risks of union representation and current news items regarding union problems around the country such as strikes, violence, and corrupt union bosses;
- make sure your solicitation and distribution policies and procedures are in order, and make sure the company protects its property rights at all times by not allowing third parties on the premises for solicitation purposes; and
- maintain constant vigilance and immediately react if faced with evidence that a union is pressuring your employees to sign cards.

Conclusion

No matter what form EFCA finally takes upon passage, it will dramatically shift the balance in favor of unions in their ability to organize your employees and cause problems for your business. This means you will have to adapt your workplace practices and strategies for remaining union-free to meet this new and very serious threat. The time to act is now. If you wait until EFCA's passage, it could be too late. The unions already are engaging in active card signing campaigns in anticipation of EFCA's passage. The unions aren't waiting to see what form EFCA finally takes, and you shouldn't either. Contact your labor attorney now to begin developing a strategy to combat the certain union onslaught that will follow EFCA's passage.

- ADMIRALTY & MARITIME
- ANTITRUST & TRADE REGULATION
- APPELLATE LITIGATION
- AVIATION
- BANKING & FINANCIAL SERVICES
- BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
- BUSINESS & COMMERCIAL LITIGATION
- BUSINESS & COMMERCIAL TRANSACTIONS
- CLASS ACTION DEFENSE
- COMMERCIAL LENDING & FINANCE
- CONSTRUCTION
- CORPORATE & SECURITIES
- CORPORATE COMPLIANCE & WHITE COLLAR DEFENSE
- ECONOMIC DEVELOPMENT
- EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
- ENERGY
- ENVIRONMENTAL & TOXIC TORTS
- GAMING
- GOVERNMENT RELATIONS
- HEALTH CARE
- INTELLECTUAL PROPERTY
- INTERNATIONAL
- LABOR & EMPLOYMENT
- MERGERS & ACQUISITIONS
- PRODUCTS LIABILITY
- PROFESSIONAL LIABILITY
- PROJECT DEVELOPMENT & FINANCE
- PUBLIC FINANCE
- REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
- TAX (INTERNATIONAL, FEDERAL, STATE & LOCAL)
- TELECOMMUNICATIONS & UTILITIES
- TRUSTS, ESTATES & PERSONAL PLANNING
- VENTURE CAPITAL & EMERGING COMPANIES

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

Sidney F. Lewis, V
Labor & Employment Practice Group Leader
Jones Walker
201 St. Charles Avenue
New Orleans, LA 70170-5100
ph. 504.582.8352
fax 504.589.8352
e-mail slewis@joneswalker.com

Labor & Employment Practice Group

H. MARK ADAMS	MARY ELLEN JORDAN
KEVIN O. AINSWORTH	TRACY E. KERN
JENNIFER L. ANDERSON	JENNIFER F. KOGOS
TIMOTHY P. BRECHTEL	CELESTE C. LABORDE
SUSAN K. CHAMBERS	JOSEPH F. LAVIGNE
LAURIE M. CHESS	SIDNEY F. LEWIS, V
AMY C. COWLEY	JOSEPH J. LOWENTHAL, JR.
ANITA B. CURRAN	CHRISTOPHER S. MANN
JENNIFER L. ENGLANDER	EDWARD A. R. MILLER
REBECCA G. GOTTSEGEN	JAMES REBARCHAK
VIRGINIA W. GUNDLACH	OLIVIA S. REGARD
JANE H. HEIDINGSFELDER	KIRKLAND E. REID
CORNELIUS R. HEUSEL	VICTORIA J. FRANKLIN SISSON
THOMAS P. HUBERT	DAVID K. THEARD
JOSEPH R. HUGG	PATRICK J. VETERS
R. SCOTT JENKINS	ROBERT B. WORLEY, JR.

This newsletter should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own attorney concerning your own situation and any specific legal questions you may have.

To subscribe to other E*Zines, visit
<http://www.joneswalker.com/ecomunications.html>