

2009: The Employee Free Choice Act and Other Potential Changes to Federal Law

A White Paper prepared by the Employers Group and Cruz & Associates to provide companies with practical information to understand the changes that may be coming, and how to prepare for them.

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Introduction

Now, four months into the Obama administration, attention is focused squarely on the debate for amending the law regarding union organizing. At the heart of the debate is the Employee Free Choice Act (EFCA), which was introduced in both the U. S. House of Representatives and the U.S. Senate on March 10, 2009.

Although the Employee Free Choice Act was first proposed in 2003, it received little publicity. There are three basic elements to the Act, and each will impact how employers, unions and employees interact.

1. The first provision is described as “card check.” Instead of a secret ballot procedure to certify a union, a union would only need to collect a majority of signed union cards to certify a union as the exclusive legal bargaining representative for that particular business unit.
2. The EFCA also includes requirements for binding arbitration for a collective bargaining agreement if no agreement is reached between the employer and employee in a prescribed period of time.
3. Finally, if the employer interferes with union organizing activities, there are significant new penalties that can be levied to deter such behavior.

While hearings were held in 2005 and 2007 by the House Labor Committee, EFCA clearly did not have the political support to override a filibuster in the Senate or a threatened Presidential veto. Consequently, it was not until it became clear just how huge the changes would be as a result of the 2008 elections that the EFCA began drawing attention..

In the past several months, we have seen a number of scholarly works, White Papers if you will, published by lawyers, professors and other experts in the field that have done an admirable job of tracing the developing labor law in the United States since the early 1900's, and articulating just what operating under EFCA would require of the employer community. Our purpose here is not to duplicate the works of these individuals, but to complement them by approaching the subject in a completely practical, hands-on way.

At the same time, it is critical to note that we cannot limit our discussion to the EFCA. We must also explore the impact of other legislation that we expect will be proposed, as well as examine how change may occur to the union-organizing process simply by the leadership of the National Labor Relations Board and other federal agencies using their decision-making, rule-making and other administrative authority.

Recognizing that union membership as a percentage of the workforce has been on a steady decline since reaching its peak of about 35% in the mid-1950s to about 7.6% of the private sector workforce today, it should come as no surprise that many human

resources and business leaders alike have had no direct experience dealing with union organizing, and even less have direct experience dealing with a unionized workforce. For that reason, it would be prudent to trace the foundation of our labor laws and to discuss the factors that led to the decline in union membership and spawned the radical “fixes” that organized labor is pushing for.

The main thrust of this document will be to present how each law or initiative will change the rules and tilt the field progressively more in favor of organized labor. We will then explore approaches and strategies that can and should be considered to stay one step ahead in preserving a direct and positive relationship with your employees.

Finally, no matter how wide the gates are swung open in making it easier for unions to represent your employees, the unions themselves do not have the resources to organize every company on “day one.” There are limits to how many effective organizers can be put in the field at any given time. There is also the potential of bottlenecks in the negotiation process that could stall the type of immediate payback in terms of new members that organized labor is anticipating.

Will unions focus their organizing efforts on companies or industries that already have a high concentration of unionized employees? Will unions go after big retail chains? Will they target geographic areas? Regardless of the strategies, when faced with so many targets of opportunity to obtain new dues-paying members, unions must adopt some kind of target-market strategy or their efforts could become chaotic. Assuming unions adopt one of the above models, or even a combination of them, there still must be a decision to focus on Company A and leave Company B for another time. The Company A’s of the world will likely be the “*low hanging fruit*,” the easiest and first to be picked.

How do employers keep from becoming the first-picked *low hanging fruit*? The answer to that lies in a term that we have borrowed from our friends who work tirelessly to prevent the annual forest fires in our state from growing out of control and devouring homes in their path. It is called “*creating defensible space*.” In this context, *creating defensible space* means staying connected with your employees. It means anticipating the needs of your employees and providing for them without having to have a union to tell you to do that.

Of course, no company can provide for every need or every desire of its employees, so it also means communicating with your employees so that they understand the realities of your industry and your business plan. It also means having a well-trained supervisory team that understands that its job is to not only direct the workforce but to be their advocates as well. And possibly most of all, *creating defensible space* means developing and living by a strategic employee relations plan that allows you to identify critical areas for maintaining a healthy, connected workforce, and to track your progress in strengthening the relationship between your organization and the employees who work hard to make you a leader in your industry.

Rise and Decline of Unions

Unions have fulfilled an important role in the growth of the economy in the United States as it transformed from an agrarian and craftsman economy into an industrial society. Clearly, there was a time during this transformation when people were simply human machines to be worked until they broke and then replaced by other human machines. In the early 1900's there were a series of laws enacted that recognized the fundamental rights of workers to join together to improve their lot. While beyond the scope of this paper, please see: *The Case against the Employee Free Choice Act*, Richard A. Epstein - The Law School, The University of Chicago, January 2009.

The National Labor Relations Act (NLRA, also known as the Wagner Act) was passed in 1935 giving American workers for the first time a mechanism to designate a union as their exclusive representative for collective bargaining. The NLRA established the National Labor Relations Board (NLRB) to administer the law, including its most important provision, conducting secret-ballot elections to determine whether or not a majority of employees in an appropriate bargaining unit wished to be represented by a union of their own choosing.

Following the passage of the NLRA, and continuing for the next 25 years, unions thrived, eventually growing to represent one-third of the American workforce. This level of unionization was achieved in the post-World War II era when much of American heavy industry enjoyed near monopoly conditions in the world economy. By the 1960s, however, the rebuilding of the Japanese and European industrial bases began to show the first signs of the coming global economy. Increased competition, both national and international, would soon begin to take a heavy toll on America's unionized industries.

For example, in 1980 Congress de-regulated the trucking industry. Prior to de-regulation, hundreds of Teamster-represented trucking companies charged the same tariff and all paid their employees virtually the same compensation. De-regulation allowed non-union trucking companies to charge lower rates. Unionized trucking companies signatory to the Teamster National Master Freight Agreement quickly began to lose market share to non-union operators. From 1980 to 2003 Teamster membership declined from 2.1 million to 1.3 million members; at the same time, de-regulation resulted in a lowering of the cost of goods and an overall expansion of our economy.

Meanwhile, with organized labor's support, Congress and the states enacted dozens of new laws from Fair Labor Standards to Workers' Compensation and Unemployment to ERISA and mandated leaves, giving all American workers significant rights and protections without union membership.

Other changes mirrored societal changes. As a customer-driven economy evolved, companies learned (some more quickly than others) that "job one" was meeting customer needs. Enlightened employers realized that they had to provide the same level of customer service to their most important internal customers, their employees, as they provided to their external customers. Add the rise of voluntary arbitration procedures and

“wrongful termination” lawsuits that dramatically reduced “at-will” terminations that might be perceived as unjust or unfair, and unions lost a key rallying point – protection against unreasonable treatment and unjustified discipline.

There were also changes within the labor movement itself. While there are certainly many honest union officials, nearly every major union has had its share of those who have either been accused or convicted of unlawfully enriching themselves at the expense of the membership. In today’s information age, our more sophisticated workforces have much freer access to news of the corruption within organized labor.

Faced with this downward spiral, organized labor realized it needed to implement a rescue plan before its power, influence and relevance deteriorated further. The answer: the Employee Free Choice Act, which was first introduced in 2003 and re-introduced in the next two Congressional sessions. Realistically, when it was previously introduced, EFCA had little chance of becoming law. With support almost rigidly along party lines, there were simply not enough votes to halt a filibuster in the Senate or override a presidential veto. Now that there is a U.S. President who not only had pledged to sign the Employee Free Choice Act if passed, but who served as a sponsor of the Senate bill in 2007, organized labor has again made the EFCA its highest priority.

The Case for EFCA and Other Major Labor Law Reform

Understandably, organized labor has worked feverishly to create a justification for EFCA. The most widely known and debated provision of the bill is eliminating the right to vote in a secret-ballot election. For most American workers, this is a concept so foreign to the American experience that organized labor must draw down to the very foundation of the current process to attack it. Labor’s answer – the whole system is broken. Unions allege that employer abuse of the system is so rampant that even employees who would like to vote for a union are intimidated enough that they will not even cast a “yes” in a totally confidential secret-ballot election conducted by federal agents of the National Labor Relations Board.

While organized labor has bandied about several studies that purport to show how badly employees would like to join unions “if they only could,” there is a true absence of real data to support the assertion that Congress needs to take the secret ballot away from employees to protect them so that they can make a free choice.

Labor’s other approach to justify the EFCA is to point to the decline in union membership as a percentage of the private workforce. Unions argue that this decline is proof on its face that the secret ballot is not working.

The Case against EFCA and Other Major Labor Law Reform

The secret-ballot election is by far the strongest evidence that a society operates upon true democratic principles. Our entire political system is based upon the right to vote in a secret-ballot election. Americans have fought and died for the right to vote in secret for more than two centuries.

Clearly, the thrust of the EFCA is to deny American workers the right to make an informed decision. Clandestinely organizing workers without any mechanism that allows them to hear any opposing views virtually eliminates the chance for vigorous debate that is a hallmark of democracy. Taking away the secret ballot would not only deprive workers of a fundamental right, but would overturn more than 70 years of legal precedent. Other laws, namely consumer protection laws, recognize that individuals can be caught up in the moment and persuaded to make commitments that are truly not in their best interest.

The NLRB has articulated its position clearly and consistently: the role of the Board is to guarantee the process, not the outcome. Unfortunately, guaranteeing the outcome is precisely what the proponents of the EFCA would like to achieve. This is why the EFCA does not stop with simply eliminating the secret ballot election. Mandatory binding arbitration is every bit as necessary to “guaranteeing the outcome” as eliminating the secret ballot election, if not more so.

What will the results of EFCA produce? Bernard Marcus, co-founder of Home Depot, opined:

This legislation is so harmful that it is nothing short of a “hostile takeover” of American business and will result in making the United States uncompetitive in the global world.

It will ship millions of jobs overseas.

Labor Law Reform: A Preview

In the introduction to this paper we talked about not only the EFCA, but about other potential changes, both legislative and administrative, that we anticipate. In this section of our paper we will explore each of these by explaining how it works presently, how it would change and discuss the potential consequences of the change.

The Employee Free Choice Act

The Employee Free Choice Act, if passed in its present form would:

1. Facilitate unions becoming the exclusive certified bargaining representative of a group of employees who constitute an appropriate bargaining unit.
2. Ensure that every newly certified union was able to successfully negotiate the critical “first contract.
3. Implement substantial penalties for management actions found to unlawfully interfere with the organizing process.

Becoming the Certified Bargaining Representative of the Employees

How it works now

The first step in the process of a union achieving its ultimate goal of getting more dues-paying members is for the union to file an “RC” petition requesting to become the certified bargaining representative of a “bargaining unit,” a group of employees who share a “community of interest.” Under current law, when a union files a petition to represent a certain group of employees as a potential bargaining unit, there is provision to hold an administrative hearing to determine the scope of the potential bargaining unit if the employer and union cannot voluntarily agree.

For a union to gain representation rights, it typically must win a secret ballot election. While the secret-ballot election is the most common means of certification, currently the election may be bypassed under two scenarios. First, the employer may *voluntarily* agree to recognize the union as the employees’ representative pursuant to a “card check” where a neutral third party determines whether or not the union has obtained authorization cards from a majority of the employees in an appropriate unit.

Although a card check under these circumstances is considered “voluntary,” employers, particularly in the hospitality and healthcare sectors, are often subject to intense “corporate campaigns” to force them to *voluntarily* agree to the card check.

The second way that a union may become the employees’ exclusive bargaining representative without winning an election is if the union has obtained authorization cards from a majority of the bargaining unit employees and the employer commits egregious and pervasive unfair labor practices resulting in the NLRB determining that a fair election is impossible. Under those circumstances, the NLRB may issue an order that the employer must recognize and bargain with the union, based upon the union’s card majority rather than a secret-ballot election. This ruling, known as a Gissel Bargaining Order, was first articulated in the 1969 Supreme Court case *NLRB v. Gissel Packing Co.*

Assuming the employer neither agrees to a card check nor engages in conduct resulting in a Gissel bargaining order, the union must file a petition with a regional office of the NLRB. The minimum “showing of interest” that the union must produce is cards from 30% of the employees in the petitioned for unit. That is all that is required to hold an election.

Practically speaking, few petitions, if any, are filed with less than 50 % of the employees having signed authorization cards on behalf of the union. Once a petition is filed, current

NLRB guidelines require that the election be conducted within 42 days of the filing date. This timeframe may be extended if there are genuine issues that must be resolved regarding the scope of the petitioned-for unit.

During the 42-day-period, both sides typically conduct campaigns to convince the employees to either vote “Yes” for union representation or “No” to remain non-union. The NLRA contains Section 8 (c), known as the free-speech provision, which provides that either party can make arguments and communicate its position, provided that there is no promise of benefit or threat of reprisal. (In a twist of logic, the NLRB has relaxed the “no promises” rule by allowing unions to make promises, claiming that employees understand that a union cannot make those promises come true without the agreement of the company.)

At the end of the 42-day-period, the NLRB conducts a secret-ballot election on the employer’s premises. The outcome of the election is determined only by those who actually cast ballots. For the union to prevail it must receive a majority of the valid votes cast. In a tie the union loses.

There are provisions for challenging the results of the election (Objections) based upon the conduct of the parties. While the filing of Objections could lead to a re-run election, further discussion is beyond the scope of this document.

If the union is successful in having 50% +1 of the valid votes cast in favor of unionization, the union receives a Certificate of Representative that simply requires management to bargain in good faith with the union upon demand.....nothing more.

How it would work under EFCA

Under EFCA the secret ballot election would be replaced by a mandatory card check provision. While a union could still file a petition if it had 30% but less than 50% of the bargaining unit sign authorization cards, in reality, it is hard to imagine why any union would file for an election with less than 50% knowing that it could avoid the vote once the union obtained 50% and that it would lose the election if it did not have support from 50% of the employees. To be clear, the union would only need to produce cards from 50% plus one of the employees and the company would be required to commence negotiations within ten days.

Potential consequences of the card check provisions of the EFCA

The consequences of the card-check provisions of the EFCA are severe. This provision would take away the right of American workers to vote in a secret-ballot election, a right that has existed for more than 70 years. While proponents of the bill claim that the secret-ballot election mechanism would still exist, as noted above, it would be impractical for unions to file for an election with less than 50% support.

The true concern about the EFCA is that organizing and card signing could take place in secret with no way of ensuring that employees would ever have an opportunity to hear “both sides” before signing a legally binding and likely irreversible authorization to be

represented by the union. While the NLRB under EFCA would be responsible for developing guidelines regarding the solicitation of the cards, it is difficult to imagine that employees would be protected from the intimidation, peer pressure, irresponsible promises, or other means of intimidation that the secret-ballot process is intended to prevent.

Achieving a First Contract

How it works now

Once a union becomes the certified or recognized bargaining agent, the employer must, upon request, meet and negotiate with the union in good faith.

The duty to bargain in good faith as set forth in Section 8 (d) of the National Labor Relations Act states in pertinent part:

“For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession....”

Thus, there is no mandate that an employer agree to any union proposal it deems is against the best interest of the company or its employees. (Similarly, there is no mandate that a union agree to an employer proposal that it deems is against the best interest of the union.) Absent such a mandate, the employer has the right to reject any union proposal it believes is not in the best interest of the company or its employees. While management has the right to say “no,” the duty to bargain in good faith prevents the employer from sabotaging the negotiations by simply rejecting anything the union proposes. Thus, management is required, in good faith, to work toward achieving a contract.

Labor practitioners generally agree that there are three ways to make agreements in collective bargaining negotiations:

1. Agree on items that are mutually beneficial – Provisions like ensuring a safe work environment, non-discrimination and adherence to state and federal laws are typically the first terms agreed to in negotiations. These are items where the self-interest of the union, the employees and management are easiest to reconcile.
2. Compromise and trade-offs – Most of the progress made in collective bargaining negotiations results from narrowing the gap between the initial stance of the company and the union, and then developing terms that are acceptable to both sides. During this process, the priorities of both sides become evident. Management may give on one issue, but hold firm on a term more important to the company and vice versa.

3. The stronger party imposes its will upon the weaker party – Even though there may be significant progress made by mutual agreement, compromise and trade-offs, there frequently remain key issues that keep the company and the union from reaching a full agreement. At that point, the two sides must consider using their economic strength to force the other side to accept their position.

After exhausting all of the progress to be made in paragraphs 1 and 2 above, critical issues such as pay, benefits and the question of union security or union shop often remain. Union security is a provision, permitted in a non-right-to-work state such as California, requiring all members of the bargaining unit to pay dues and initiation fee to the union as uniformly required of all employees as a condition of continued employment. In other words, pay dues or be fired. The union shop or union security clause is typically the highest priority that a union seeks in negotiating a first contract.

Assuming that key issues cannot be resolved at the bargaining table and the negotiations become firmly deadlocked, technically called “*impasse*,” the company has the right to implement any elements of its “last, best and final offer” that it has made at the bargaining table. While a union has the right to strike the company at virtually any point in the negotiations, strikes for a first contract frequently are not called prior to reaching *impasse*.

At this point in the negotiations, both sides assess their respective economic strength. The union assesses whether it can compel the employer to agree to its economic and non-economic demands by the threat of a strike or a strike itself. The employer assesses whether the employees really would strike, and, if so, what the potential outcome would be on the company.

If the company holds firm on both its economic package and non-economic items such as union shop and implements that package at *impasse*, the union typically has three options:

1. Sign a contract, and accept the company’s economic and non-economic proposals.
2. Try to call a strike;
3. Walk away or abandon the unit.

Thus, currently, whether or not there will be a contract, and what that contract says, is ultimately contingent upon the economic strength of the parties to hold to their positions.

This is the ultimate free-market process. It is intended to produce an outcome that accurately reflects the relative economic strength of the company and the union. Of course, one of the potential outcomes is that the union does not have the economic strength to conduct an effective strike and chooses not to sign a contract that has either no measurable gains or does not have a union shop. In that case, while the union would have won the election, they would have failed to get a contract and therefore, failed to have gained any new members.

According to the most recent data available from the Federal Mediation and Conciliation Service (FMCS) (FY 2004 Annual Report) unions were only able to get signed contracts in 55.2% of negotiations for an initial contract. Thus, a major goal of EFCA would be to not only make the organizing process easier for unions, but to ensure that the union was able to achieve a first contract.

Achieving a first contract under EFCA

Under EFCA, the union would be virtually assured of achieving a first contract. The bill provides that negotiations are to start within 10 days of the union being certified. There is then an initial period of only 90 days to reach full agreement on a comprehensive labor agreement covering virtually every facet of pay, benefits and other terms and conditions of employment before the case could be referred to non-binding mediation under the FMCS. If no agreement is reached after only 30 days of mediation, the matter would be settled under binding interest arbitration. While the bill requires that the FMCS develop procedures for the mediation and arbitration phases, since voluntary interest arbitration currently exists, we can gain some insight as to how interest arbitration might work under EFCA.

Currently, companies and unions may voluntarily agree to engage in binding interest arbitration where both recognize that having a (hopefully) neutral third party make a final judgment is superior to the potential strife that could be caused by a strike or lockout. Voluntary binding interest arbitration typically occurs under relatively rare circumstances. By way of example, assume that the company provides contracted school bus services to a public school district. If there were to be a strike, the victims would be the school children and their parents.

A strike under such circumstances could easily lead to a backlash against both the company and the union, leading to a call for the school district to stop doing business with the particular bus company. Obviously, if the company lost the school district contract, the union and its members would suffer as well. Under those circumstances, the company and the union may *voluntarily* agree to submit any open issues to binding interest arbitration. The *quid pro quo* in voluntary binding interest arbitration is that the union gives up its right to strike while the employer agrees to have the arbitrator set at least some of its terms of employment.

Consequences of the mandatory arbitration provisions of the EFCA

While the EFCA has been referred to as the card-check bill, it is actually the mandatory arbitration provision that is potentially the most critical change. It would literally give a third party the power to determine how that company would operate for at least a two-year period. The arbitrator or arbitral board would be empowered to decide pay rates, grievance procedure, an attendance policy, a disciplinary policy, the cost and type of employee benefit plans, whether or not all employees would be compelled to pay dues to the union to keep their jobs, and, ultimately, to determine even whether or not the employer made a profit, and if so, how much.

With interest arbitration being voluntary as it currently is, companies and unions that agree to submit open issues to binding arbitration have the right to negotiate a submission statement, which typically defines the extent of the arbitrator's authority, and more importantly, the methodology the arbitrator is to use to reach his or her decision. For example, if the issue being submitted to interest arbitration is pay, the parties may agree on which other organizations the arbitrator may consider in determining a competitive level of pay for the employees in question. If the company and union are unable to agree as to which other companies might be "valid comparators," then they will likely not submit to binding arbitration. The important concept is that both employer and union must voluntarily choose to use interest arbitration or it does not happen.

Under EFCA as proposed, there is no provision that would allow the company and union to either establish boundaries or otherwise limit the scope of the interest arbitration. Thus, the two main provisions of EFCA would virtually force unionization upon the overwhelming majority of employers should the union choose to target that organization, and then have an outsider determine the wages and benefits and non-economic items that an employer would be forced to live by for a two-year period.

The current state of the economy also presents some interesting questions as to what might occur in interest arbitration. In 2003, when the EFCA was first proposed, the Bureau of Labor Statistics had consistently reported first-year contract settlements of about 3%. Given the economic downturn, we have already seen concession contracts where pay and benefits retreat (to help to preserve jobs) rather than increase.

Thus, a union could seek binding arbitration only to find the employer present a persuasive argument that pay and benefits should be reduced in the arbitration award. This could become even more problematic if the union, as we expect, seeks union shop requiring employees to pay on average two to two-and-one half hour's pay per month in union dues. Clearly, the radical change that EFCA could bring could have unintended negative consequences even for the unions themselves.

New Penalties against Management under the EFCA – Allegations that the company discharged an employee for union activities

How it works now

If an employee is terminated during organizing activity, the employee or the union may file a charge under Sections 8(a)(1) and (3) of the NLRA alleging that the employee was fired for engaging in union activities rather than for performance or other legitimate reasons. The NLRB investigates the case and, if it appears that discharge was in whole or in part motivated by the employee's protected union activities, the NLRB seeks to settle the case by asking the employer to reinstate the employee and to pay the employee back pay (with interest) for any loss of earnings.

This is known as a "make-whole remedy." If the employer refuses, the NLRB will issue a complaint and an Unfair Labor Practice trial will be held before an Administrative Law Judge (ALJ) who works for the NLRB's Division of Judges. The ALJ, after hearing the

case, may either dismiss the complaint or issue a make-whole remedy as described above. The party that loses may appeal to the NLRB in Washington D.C and in the federal courts. This can be a long and costly legal process.

Under current procedures, certain Unfair Labor Practice cases are designated for priority handling. Typically cases involving the discharge of a single employee do not receive priority handling. There is also a procedure known as a 10(j) injunction in which the NLRB seeks a “cease and desist” order and other remedies from the federal courts if it appears that a violation has taken place and that irreparable harm will occur if the injunction is not issued. While the use of 10(j) injunctions has increased somewhat over the past several years, it is still relatively rare for the NLRB to seek a 10(j) injunction.

Alleged discharge for union activities under EFCA

Under EFCA, 8 (a) (3) cases involving discharges would be elevated to “priority” status. There would also be increased use of the 10(j) to reinstate a discharged employee before the case was fully adjudicated by the NLRB and the courts. In addition, the current “make-whole” remedy of reinstatement and back pay with interest would be increased by an additional two times back pay. The result would be reinstatement and triple back pay for an unlawful discharge.

Consequences of the EFCA Provisions regarding Employees Allegedly Discharged for Union Activities

Employers could find that they would be ordered by a federal court to reinstate a terminated employee who could merely show that he or she supported the union and was then terminated. The union would then use the reinstatement to demonstrate its power over the employer. Should the employer agree to settle the case to avoid the cost and disruption of litigation, the employee would be in a position to parade around the workplace showing all his fellow employees his check for triple back pay.

While the provisions of the EFCA described in this section are not nearly as drastic as the card check and binding arbitration provisions of the bill, these provisions further erode the due process rights of the employer community and tilt the playing field even further in favor of organized labor.

Civil Penalties

How it works now

There are no civil penalties under the NLRA.

Civil penalties under EFCA

For the first time there would be civil penalties of up to \$20,000 per violation for an employer’s willful or repeated interference with union organizing activities. As proposed, EFCA contains no other detail to help us understand what is meant by willful or repeated or how this provision would be applied (monitored, enforced, investigated, etc.)

EFCA contains no provision for the imposition of civil penalties on unions who violate the law.

Consequences under EFCA

As with other provisions of the bill, extreme penalties or remedies could put an employer into such financial and organizational jeopardy that it could force many companies to consider settling cases they might otherwise litigate.....and win under today's rules. Simply stated, companies may be forced to simply surrender even though they have not committed the offenses with which they have been charged.

Other Legislation Likely to be Introduced

Radical Change to the Nation's Labor Law is Not Limited to the Passage of the EFCA. Legislation will likely be Introduced that will Further Contribute to Organized Labor's Agenda.

While there are numerous labor-backed initiatives that may be introduced during the current administration, two have surfaced as being highest on the union's agenda. These are the RESPECT Act and the Repeal of Section 14 (b) of the NLRA.

The RESPECT Act

The RESPECT Act was introduced in the 110th Congress in March 2007, but was never voted upon. As detailed below, the RESPECT Act would amend the definition of a supervisor under the NLRA to reduce the number of individuals who would be considered supervisors under Section 2(11) of the NLRA.

Under the NLRA, individuals who possess supervisory authority are *not* considered employees under the NLRA. They are not eligible to be part of a union bargaining unit. In fact, they are considered to act with the same authority as the president of the company. The company generally is held strictly accountable for the acts of its supervisory personnel. Statutory supervisors bind the employer by their words and actions.

Any person who is a supervisor under the NLRA owes an absolute duty of loyalty to the company. It follows that a supervisor who violates his or her duty of loyalty to the company is not protected by the law and may be discharged for supporting the union. In addition, if a statutory supervisor assists the union organizing efforts by, for example, obtaining union authorization cards, those cards may be invalidated and a petition that relies on those tainted cards to make a showing of interest may be dismissed.

Considering the critical role that first line supervisors fill it is easy to understand why unions would want as many of these individuals to be union eligible as possible. They may either identify with management or with employees, or somewhere in between. As leaders of the workforce, they can be extremely influential with the employees. It

typically benefits a union to have as many of these frontline supervisors as possible be considered not as supervisors, but as employees. This not only can swell the ranks of those the union seeks to organize, but presents the union with a core of well-placed, well-connected senior employees that can potentially be convinced to support the union.

Expect the RESPECT Act to be re-introduced as part of the pro-labor legislative agenda.

Repeal of the right to work provision, Section 14(b) of the NLRA

When the Taft Hartley Amendments were enacted into the NLRA in 1947, Section 14 (b) was added to give states the right to enact laws prohibiting the inclusion of a union shop in a collective bargaining agreement. These are known as “Right to Work” laws. A union shop is a provision in a collective bargaining agreement that requires employees to pay dues (or agency fee) to the union or be terminated. Since 14(b) was enacted, 20 states have passed Right to Work laws. These are known as “Right to Work States.”

Right to Work states have been a thorn in the side of organized labor. Without the authority to force employees to financially support a union, union membership has typically been much lower than membership in non-Right to Work states. What is even more troubling to organized labor is that the bulk of the Right to Work states are located in the southern and western states, which have seen steady population and job growth over the past several decades. This growth has come at the expense of the non-Right to Work states in the Northeast and Midwest, often referred to as the “rust belt” where unions have had their traditional strength.

Thus, the repeal of Section 14(b) is high on labor’s agenda, so that unions would be able to negotiate union shop clauses in all 50 states that would require employees to pay dues or agency fee to the union.

Change may come administratively, not only legislatively

While much emphasis has been placed upon the EFCA, change to the law of organizing that could significantly tilt the playing field in favor of organized labor does not necessarily have to come in the form of passage of the EFCA or other legislation discussed above. In just the first month of the Obama administration, our new President had already begun to use his authority to undo Bush-era executive orders and to enact other union friendly regulations consistent with his strong pro-union agenda.

As of this writing, Obama has already issued four Executive Orders applicable to federal contractors. These Executive Orders:

- (1) Prohibit federal contractors from using government funds to finance the costs of opposing union organizing;
- (2) Require federal contractors to offer employment to qualified workers of a predecessor employer;
- (3) Require federal labor laws to be posted in the contractors' workplaces; and

(4) Call on federal contracting agencies to use union only “project labor agreements” for large, federally funded construction projects.

While these Executive Orders are focused on federal contractors, they certainly send a signal of the type of activism we can expect from this Administration in the not too distant future with regard to the private sector.

Other potential changes to the NLRB Process that could be Enacted Administratively rather than Legislatively, include:

Reversing Dana Corporation

In September 2007, the NLRB issued its decision in *Dana Corp.* Mindful of the abuses that have resulted from the current voluntary-card-check procedure, the NLRB used its authority to give employees the right to undo a card check by filing for a secret-ballot “de-certification” election after the employer has granted voluntary recognition. *Dana Corp.* requires that an employer who grants voluntary recognition based on a card check must post a notice advising the employees of their right to file for a secret-ballot election within 45 day after the “voluntary” recognition takes place.

This rule seems fair and balanced in that it retains voluntary card check as a means to expedite recognition and bargaining when appropriate. But, it also gives workers the democratic right to overturn the granting of voluntary recognition when union representation was not the true desire of a majority of the employees in the bargaining unit. Expect the Dana Corporation rule to be among the first to go away.

Shortening the time between the filing of a petition and the election

There are many facets of the election process itself that can be modified to tilt the advantage in favor of organized labor even without the passage of the EFCA. The most obvious of these would be to administratively shorten the time from the filing of the petition to when the vote takes place. In the late 1970’s elections were routinely conducted within about 60 days. This time period was later shortened to the 42-day standard that exists today. There has already been conjecture that the time from filing of the petition to the date of the election will be further reduced to as little as ten days.

The impact of such a reduction in the time from the filing of a petition to the vote taking place is enormous. Typically, the first week to 10 days after the filing of a petition are taken up with issues around the scope of the voting unit and establishing a game plan. This still leaves four weeks to conduct an informational campaign with the potential voters. Losing an additional three full weeks would literally eliminate the opportunity to truly inform the voters of the significance of their vote in any rational way without bringing production to a complete stop.

Requiring the employer to provide names and addresses of employees the union seeks to organize

In 1966, in *Excelsior Underwear*, the NLRB held that the employer was required to turn over to the union a list of names and addresses of eligible votes within seven days after

the election was set. Might a labor friendly dominated NLRB in Washington decide that having the names and addresses only after the election is set denies the union access to employees? Might it order employers to turn over a list of names and addresses of employees in a potential bargaining unit at a much earlier stage in the organizing process?

Forcing the employer to allow direct access to employees

Under the *Babcock* and *Lechmere* cases, a non-employee union organizer cannot ordinarily gain access to the employer's property for the purpose of organizing the employer's employees. The organizer can only gain access in the exceptional circumstance where the employees are not reasonably accessible except by trespass on the employer's premises.

While this rule has typically been used in limited circumstances, it is not inconceivable that the NLRB will broaden its approach and further erode the private property rights of the employer. Might an activist new pro-labor majority on the NLRB decide that union organizers have every bit as much right to hold meetings on the employer's premises during work time as the employer has today?

Moreover, except in limited circumstances, an employer that allows outside third parties access to its facilities to solicit its employees for even beneficial or charitable activities may find that it must allow access to union organizers on the same basis. Similarly, an employer that maintains a valid non-solicitation rule must rigorously enforce that rule or it may find that it has lost the right to enforce it with regard to pro-union employees soliciting their fellow workers in violation of the rule in the workplace.

Increased use of 10(j) injunctions

While the EFCA mandates increased use of 10(j) federal court injunctions, we apparently would not have to wait for EFCA to pass before increased use of 10(j) injunctions would be ordered. In fact, over the past several years the NLRB has become more active in its use of 10(j) injunctions. Certainly, there is the possibility that the guidelines for when the NLRB Regional Director should seek 10(j) could be expanded even further without legislative action.

Decision making in representation and unfair labor practice cases

Each NLRB Regional Director is invested with the authority to make the initial determination on the merits of an Unfair Labor Practice charge, on the scope of the bargaining unit and on making the initial ruling on objections filed to overturn an election. The system relies on the integrity of each of the Regional Directors. However, reasonable people may disagree, and historically there have been certain Regional Directors whose decisions have earned them a reputation for being significantly tilted toward organized labor.

The appointment of Regional Directors is the duty of the NLRB General Counsel, a position which is, itself, a political appointment. Assuming the appointment of a strongly pro-labor General Counsel of the same ilk as the Secretary of Labor Hilda Solis or NLRB

Chair Wilma Liebman, might that new General Counsel appoint “like minded” Regional Directors? Even without these potential new appointees, might the General Counsel issue both written and unwritten guidelines that further tilt the day-to-day decision making further in favor of organized labor.

A Call to Action

Today, we are experiencing change in our country that none of us could have ever imagined we would see in our lifetimes.

The economic crisis we face today goes to the very core of our financial and economic institutions. Although we were aware of issues in the sub-prime real estate market and growing dependence on foreign oil, who would have predicted that we would be facing such calamitous events as the potential bankruptcy of our major corporations and nationalization of our banking system.

Those who are responsible for developing and implementing the plan that will hopefully return our nation to stability and prosperity have repeatedly said that dramatically increasing the percentage of American workers who are unionized is a key component of their strategy. While it is difficult to follow, they claim that unions “winning” higher pay and better benefits for workers is a key to our economic recovery. In the midst of rapidly increasing unemployment and business failures, it is difficult to follow their logic. Nevertheless, the political majority in our country seems totally committed to pushing forward with radical change to force unionization back into the workplace.

There will likely be constitutional challenges to many of the more drastic changes that are anticipated. While those legal challenges are pending, however, companies will still be faced with making critical decisions on how to proceed to protect their interests and the interests of their employees.

Given this reality, waiting to prepare until organized labor targets your company will simply not work. The changes we can expect, either legislatively or administratively, will accelerate the process, increase your cost and severely limit your options. Staying aware and informed, taking an active role in influencing your elected representatives and developing a proactive plan are the ONLY true defenses.

What you can Do NOW

Using your Organization’s Voice in the Democratic Process

- Have a plan and prepare
- Evaluate, analyze, then define next steps in a strategic plan
- Twelve things to consider when preparing
 1. Create a quality of work life culture that maintains high employee satisfaction.

2. Recruit, hire and train new employees to reflect the standards and values of your organization.
3. Develop effective communications systems and monitor/validate their effectiveness.
4. Establish mechanisms to solicit, capture and act on input from your employees.
5. Ensure that a competitive wage and benefit program is implemented and kept current.
6. Ensure all of management completes basic supervisory skills and positive employee relations training.
7. Define your Human Resources function as an employee advocate; not the “enforcer.”
8. Establish mechanisms to evaluate your organization’s strengths, vulnerabilities and opportunities.
9. Ensure all rules and policies relating to employee relations are valid and enforced appropriately.
10. Create a “watch list” of upcoming events that could trigger employee relations issues.
11. Track trends in your area(s) and industry to stay one step ahead.
12. Have an action plan to react immediately to indications of potential issues.