

## **THE EMPLOYEE FREE CHOICE ACT WILL USHER IN A NEW ERA OF UNIONIZATION, BUT HOW QUICKLY WILL IT BECOME LAW?**

by Travis Gemoets

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For thirty years, the number of unionized employees in the American workforce has been in decline. Across the United States, unions leaders hope — and businesses fear — that the historic inauguration of President Barack Obama will quickly change all that.

Federal legislation known as the Employee Free Choice Act ("EFCA"), co-sponsored by President Obama when he was a US Senator in June 2007, would do away with long-established procedures designed to ensure that employees make the choice to unionize — or to reject a union — free from coercion and intimidation, such as the current requirement that the National Labor Relations Board ("NLRB") hold a secret ballot election to determine the employees' choice. On the campaign trail, Obama promised to sign EFCA into law. Candidate Obama said, "We will pass the Employee Free Choice Act. It's not a matter of if, it's a matter of when." (Chicago Tribune, 3/4/07). In June 2007, Obama said, "[EFCA] will allow workers to form a union through majority signup and card-checks, and strengthen penalties for those employers who are in violation. The choice to organize should be left up to workers and workers alone. It should be their free choice." (Obama Senate Press Release, 6/20/07). As President, however, he has taken a less strident tone. In a recent interview with the Washington Post,

he suggested he would not aggressively push for EFCA. "If we are losing half a million jobs a month, then there are no jobs to unionize."

We know the battle to secure passage of EFCA will be a hard-fought one. As the debate rages on let's examine how EFCA, if it becomes law, will affect the workplace.

**UPDATE:** On March 24, 2009, Senator Arlen Specter (R-PA) reversed his support for EFCA, reasoning that the struggling economy made this the wrong time to push the bill. Without Sen. Specter's support, there are insufficient pro-EFCA votes in the U.S. Senate to overcome a Republican filibuster. EFCA supporters must decide whether to compromise on the bill or hope for a filibuster-proof Democratic majority during the next session of Congress.

### **EFCA: UNIONIZATION BY "CARD CHECK"**

The Employee Free Choice Act would change federal law which currently requires secret ballot elections, supervised and conducted by the NLRB, where employees democratically choose union representation. If the new legislation passes, unions will be able to unionize the workforce by obtaining a simple majority of employee signatures on authorization cards —

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known as a "card-check" process — which substitutes a signature for a secret ballot vote.

Once a majority of signed "authorization" cards are obtained and presented to the employer, the union will be entitled to receive legal recognition as the employees' exclusive bargaining representative. The employees are not given the opportunity to vote. While organized labor, which has spent millions lobbying for the passage of the law, claims the law is a fairer system designed to avoid delays created by legal barriers during a union campaign, the new law may, in fact, remove the employee's "free choice" by permitting a system in which an employee's signature, perhaps given under pressure from union representatives or co-workers, counts as the employee's "final answer" on the question of unionization.

Labor activists prefer to collect cards rather than contest elections. In an organization by card check, employers have little opportunity to inform workers about the costs of unionization or unionization's "down side." Moreover, union organizers know which workers have signed the cards and use various forms of persuasion to win signatures. The AFL-CIO organizing handbook admits that employees often sign cards to "get the union off [their] back." Without secrecy or NLRB supervision, unions are able to pressure employees on the basis that they "will know" who supported them or not, once they are the employees' representative. Coworkers will also know who has signed and who has not, thereby allowing for significant peer pressure. Since unions can press employees for their signatures before and after work, during their

breaks and even at their homes, signatures are sometimes given just to get the union to "get off their back" and move on to the next employee.

Presently, the card-check process is only used in instances when the employer has signed a "neutrality agreement" in which the employer has agreed to accept a card-check process in lieu of an NLRB-supervised secret ballot election. In the last five years, unionization has occurred at a much higher rate whenever signed cards are used instead of the secret ballot process. Although they comprise less than 10% of the workforce, 25% of new union members come from employers bound by the card check process.

Although the labor movement is loathe to admit it, some of the strongest arguments against EFCA's card check procedure come from its supporters. Labor activists finally believe in elections when workers are seeking to *decertify* unions. The AFL-CIO itself argues "that a secret ballot representation election 'is a solemn... occasion, conducted under safeguards to voluntary choice'" and that a "representation election system provides the surest means of avoiding decisions which are 'the result of group pressures and not individual decision.'"

A Zogby poll found that union members support representation elections by a margin of 84 to 11 percent.

### UNDER EFCA, AN ARBITRATION PANEL CAN SET THE TERMS OF EMPLOYMENT

Allowing unionization by card-check is the

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element of EFCA which gets the most press. But there is another component to EFCA which causes even greater concern among the business community. In its current form, the proposed legislation contains a section entitled "Facilitating Initial Collective Bargaining Agreement." Under this section, a collective bargaining agreement must be reached within 90 days after a demand is made by the union to commence negotiations following a successful card-count. If an agreement is not reached, the parties must submit the negotiation process to mediation and thereafter, if there is still no agreement, to a federal arbitration panel. That arbitration panel settles the negotiations by determining the terms of a binding two-year agreement, setting wages, benefits, hours, work-rules and all that other terms of employment.

Under current law, the parties are permitted to reach an impasse after bargaining "in good faith." This triggers various options for both parties. For example, upon declaration of an impasse, the employer may implement its last, best and final offer and the union, in turn, may live with those terms or call a strike, depending on its assessment of the pros and cons of each course of action. EFCA would wipe out these options by requiring a third party to decide wages, benefits and working conditions and effectively decide the fate of the business. This turns the NLRB on its head "it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement." *H K. Porter v. NLRB*, 397 U.S. 99, 103-04 (1970).

Furthermore, EFCA significantly reduces the legal challenges available to the employer, and greatly increases monetary penalties for engaging in unfair labor practices. How far the arbitration panel will exercise its right to write the collective bargaining agreement for the parties is also unclear.

### IT'S THE ECONOMY, STUPID

Historically, workers turn to unions for security in an economic crisis. According to many pundits and prognosticators, we currently find ourselves in one such "crisis." Well OK, these pundits and prognosticators include the US Treasury Department, stock market experts and observers, think tanks and business schools across the country, every single person who holds elected office at any level, and your laid-off brother Louie. We're in a recession dating back to December 2007, and no one knows how much longer it will last. Unions often base organizing efforts on employee fears during a difficult economy. With job losses, wage and benefit reductions, and declining retirement plans, unions find themselves in a favorable environment in which to pitch their services to a workforce ready to believe those who will promise better times. The economy alone is enough to give unions a significant edge in union organizing efforts. Coupled with the passage of EFCA, the labor movement is likely to see unprecedented success in the increase of its membership. Andy Stern, head of the Service Employees International Union, estimates that ECFA's passage would cause unions to "grow by 1.5 million members a year, not just for five years but for 10 to 15 straight years."

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### HOW SOON IS NOW?

Union leaders are hoping EFCA is passed this spring, much to the chagrin of another important Obama constituency, the business sector. This conflict is not lost on members of the Obama camp. "The problem [President Obama] is going to face is that card check is a top priority of the unions, who feel they were left out in the cold during the Bush administration, but it is a lightning rod to the business community, which believes it is anti-democratic and will increase the cost of doing business," according to Bob Sherman, a member of Obama's transition team. It may very well depend on whether the current Republican Senate minority is strong enough to sustain a filibuster against EFCA, as it did in 2007. There are now just 41 Republicans in the Senate, and each of these votes is needed to maintain a filibuster.

In a January 2009 Op-Ed piece, former Labor Secretary Robert Reich cited a recent Hart poll which claims that 57 million workers would want to be in a union if they could have one. But a recent Gallup poll found that only one-third of Americans want unions to have more influence. Reich went on to say, "those who try to form a union, according to researchers at MIT, have only about a 1 in 5 chance of successfully doing so," although by the NLRB's own records, between 50 and 55 percent of secret ballot elections favor the union. Clearly, there is strong pro-labor support for EFCA and a strident call for its immediate passage. When will that occur? To paraphrase the last Democrat to hold the highest office before Obama, I suppose that depends on what your meaning of "when" is.



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