

---

# THE EMPLOYEE FREE CHOICE ACT RETURNS

---

© Copyright 2009 by Andrew J. Martone, Esq. and Bobroff, Hesse, Lindmark & Martone, P.C.

In 2007 (when he was just Senator Obama), President Obama was one of the co-sponsors of the misnamed “Employee Free Choice Act” (“EFCA”), legislation that represents the most drastic change to the National Labor Relations Act in over 50 years. EFCA was passed by the House of Representatives and was only stopped in June of 2008 by a Senate filibuster.

On Monday, March 10, 2009 the Employee Free Choice Act was reintroduced into both houses of Congress. There is little question that some version of EFCA will pass in the House of Representatives, and the only real barrier to EFCA’s passage will remain the possibility of a Republican filibuster in the Senate. Unfortunately, due to the decline in Republican representation in the Senate, it is substantially possible (if not likely) that any filibuster would be defeated and a version of EFCA will become law.

The following aspects of longstanding labor law would be changed by the current version of EFCA:

1. Union Certification Will No Longer Require a Secret Ballot Election.

In most cases today, to become the representative of a group of employees, a union has to collect signatures from the employees it wants to represent and file a petition for an election with the National Labor Relations Board (“NLRB”). After an election petition is filed, if the bargaining unit (the group of employees the union wants to represent) is appropriate, the National Labor Relations Board will usually schedule an election within approximately 6 weeks of the date that the petition was filed. This time period can be much longer if the employer challenges the propriety of the bargaining unit.

**THE EMPLOYEE FREE CHOICE ACT RETURNS**

By: Andrew J. Martone, Esq.

Date: March 16, 2009

Page: 2 of 5

During the time between the filing of the petition and the day of the election, the employer can campaign to persuade its employees to vote against the union. This means that an employer usually has more than a month to communicate with its employees before they vote in the election.

The election itself is conducted by a secret ballot, and employees vote in a screened voting booth. The union only wins if it receives a majority of the valid ballots cast, and the employer wins ties. It does not matter how many employees vote in the election – if only 3 out of 100 eligible employees actually vote, and if two of them vote for the union, the union wins the election and represents all 100 employees (including the 97 who did not vote).

If the employer (or the union) believes that the rules for elections were not followed, it can object to the election. Objections are decided by the NLRB's Regional Director, and if the employer disagrees with his/her decision, it can appeal to the NLRB in Washington, D.C. Then, if the employer disagrees with the NLRB's decision, it can appeal to a federal Court of Appeals. This process can literally take years, and employers typically refuse to recognize or negotiate with the union while the appeals are pending.

The Employee Free Choice Act would eliminate secret ballot elections<sup>1</sup> and replace them with a mandatory, binding "card check." In a card check, if the majority of employees in an appropriate unit signed valid cards (or a petition), the union would automatically win and represent the employees without a vote. While the NLRB will verify that employee signatures are authentic and that the bargaining unit is appropriate, it will not investigate whether the employees who signed the cards really want to be represented by the union.

---

<sup>1</sup> Except in cases where one union is "raiding" another union or where employees are attempting to decertify a union as their representative.

**THE EMPLOYEE FREE CHOICE ACT RETURNS**

By: Andrew J. Martone, Esq.

Date: March 16, 2009

Page: 3 of 5

By eliminating both the opportunity to campaign against the union and the secret ballot election, the Employee Free Choice Act makes it both easier and quicker for unions to organize employees. Under EFCA, a group of employees who meet with a union organizer in a tavern, engage in a few rounds of “refreshments” and sign a piece of paper on a clipboard could come to work a few weeks later and find themselves represented by a union.

2. Employers Could Have Their First Contract Imposed by an Arbitrator.

Today, if the union wins an election, the employer has a duty to negotiate in good faith with the union over a contract that covers the employees’ terms and conditions of employment. Typically, the employer and the union sit down on opposite sides of the bargaining table and exchange/discuss proposals and counterproposals until they agree on a contract or until negotiations are deadlocked. The process of negotiating a contract (particularly a first contract) can take a long time, and it is not unheard of for contract negotiations to take years.

During negotiations, the employer is obligated to bargain in good faith, but it is not obligated to agree to any of the union’s proposals. The only way the union can get what it wants at the bargaining table is to either persuade the employer to agree to its proposals or force the employer to accept the union’s proposals, typically by going on strike.

The Employee Free Choice Act would both dramatically speed up negotiations and would force employers to accept a first contract imposed by an outside arbitrator if it does not reach agreement with the union. EFCA requires that negotiations start within 10 days after a written request for bargaining is made and gives the parties only 90 days to reach agreement before going to mandatory (but non-binding) federal mediation. However, if the parties don’t reach agreement within 30 days of mediation, then the employer is forced to

**THE EMPLOYEE FREE CHOICE ACT RETURNS**

By: Andrew J. Martone, Esq.

Date: March 16, 2009

Page: 4 of 5

submit to binding arbitration to decide the terms of the contract that will be imposed on the employer for two years.

If this part of EFCA becomes law, it will be the single most drastic change in labor law history. Although of questionable constitutionality, under the forcible arbitration requirements, an employer could be required to pay wages higher than it is able to afford, change its current health insurance and/or agree to work rules that are impractical or even nearly impossible to comply with. Given that arbitration awards are extremely difficult to appeal, this mandatory arbitration provision in EFCA would be disastrous for employers.

3. Punitive and Liquidated Damages Will be Available for Unfair Labor Practice Charges.

Today, if an employer is found to have discriminated against an employee, that employee is entitled to compensatory damages. In a discharge case, this usually means that the employee is entitled to back pay and benefits (plus interest). There are no punitive damages.

EFCA would change the remedies available to employees in cases that occur during the union's organizing drive and during the negotiation of the first contract, first, by giving liquidated damages (equal to twice the amount of the back pay) to employees who are discriminated against and second, by making employers liable for civil penalties of up to \$20,000 for each unfair labor practice (under certain sections of the Act). As an example, if the NLRB finds that a supervisor threatened five separate employees during a union organizing drive, the employer could face civil penalties of up to \$100,000 (\$20,000 for each threat). These heightened enforcement sections are obviously designed to discourage employers from actively opposing union organizing.

**THE EMPLOYEE FREE CHOICE ACT RETURNS**

By: Andrew J. Martone, Esq.

Date: March 16, 2009

Page: 5 of 5

**Conclusion**

The misnamed Employee Free Choice Act would effectively undo more than 60 years of labor jurisprudence. It is specifically designed both to make it fast and easy for unions to organize employees (and obtain union-friendly contracts) and to discourage employers from opposing organizing. EFCA will make it extremely difficult for employers to either operate union-free or to operate effectively in a union environment.

Unfortunately, there is no simple solution to this problem. Employees have the right to choose whether or not they want to be represented by a union. Under the current law, employees who show interest in union representation (by signing a card or petition) have sufficient time to gather the facts, hear from both sides, and ultimately make an informed decision. Because the current version of EFCA would essentially strip employees of this opportunity, it will be important to communicate regularly with employees, to resolve workplace problems before they fester, and to educate employees, supervisors and management about the law and the consequences of their decisions. Today, good management is the most effective tool in the employer's box with regard to responding to a union organizing campaign. Under EFCA, proactive good management will be essential.

**If you have any questions or would like further clarification,  
please contact me at (314) 862-0608 or [andymartone@bobroffhesse.com](mailto:andymartone@bobroffhesse.com).**

**ANDY MARTONE  
BOBROFF, HESSE, LINDMARK & MARTONE, P. C.  
MARCH 16, 2009**