

A Critical Analysis of the Employee Free Choice Act (EFCA)

Responding to Organized Labor's Assault on Workplace Democracy.

By William R. Radford

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The power, prestige and popularity of the labor movement has suffered greatly in the last few decades as the number of employees represented by labor unions in the United States has steadily declined since the early 1950s. Since the mid-1970s, union membership has steadily declined from a high of 34.8% to a 2007 level of only 7.3 percent.

For years, organized labor has searched for ways to reverse this precipitous decline in union membership. They believe they finally have found a "magic formula" in the deceptively named "Employee Free Choice Act" (EFCA), which represents a radical change to federal labor law in order to make it easier for unions to organize employees.

Through the EFCA, organized labor would virtually eliminate the secret-ballot election as the primary means to determine whether employees want union representation. Under the EFCA, a union would be established for a work group without any election when it succeeded in securing a simple majority of employee signatures on authorization cards designating the union as the collective bargaining representative. It is uniformly accepted that this would achieve Big Labor's goal of significantly increasing union membership in every industry and in all sectors of the economy.

Eliminating the secret-ballot election would undermine the fundamental principles of workplace democracy and fly in the face of pronouncements made by the U.S. Supreme Court.

In *NLRB vs. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), the Court maintained that "secret elections are generally the most satisfactory — indeed the preferred — method of ascertaining whether a union has majority support."

The EFCA also would transform the process by which employers and unions negotiate initial collective bargaining agreements under the National Labor Relations Act. Under this scheme, if the parties fail to reach agreement within 90 days, either party may request mediation by the Federal Mediation and Conciliation Service (FMCS). If the parties still cannot reach agreement after 30 days of mediation, the FMCS would refer the dispute to an arbitration panel. The arbitration panel would have the ultimate power and authority to decide and impose the terms of the initial two-year collective bargaining agreement even if it is unacceptable to the employer and the employees.

In light of the potential impact of the EFCA, employers need to focus significant attention on traditional labor issues — more so than at any other time in the last 50 years. In light of the more aggressive labor movement, unprepared employers will find themselves increasingly more vulnerable to union organizing if they fail to take action.

Because most union organizing is issue-driven, it is critical that employers understand their employees' specific issues and concerns and develop effective strategies to resolve them. Management at all levels must have a commitment to positive employee relations. An employer should establish an employee relations model built upon (1) recognizing individual achievement and merit and (2) responding to employee issues and concerns before employees look outside the company for resolution of their concerns.

The national labor and employment law firm Ford & Harrison LLP has prepared a Critical Analysis of EFCA, including a Ten-Point Employer Strategic Action Plan for responding to EFCA. This document is available on AIF's website at www.aif.com. ■

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