

# EMPLOYEE FREE CHOICE ACT

## UNION ORGANIZING REBORN: EMPLOYER RESPONSE



**By Thomas P. Godar**

Labor & Employment Attorney  
Whyte Hirschboeck Dudek S.C.  
Madison, WI

With President Obama's victory and the Democrats strengthening their grip on the House of Representatives and the Senate, representation by union card-check rather than elections may not be far behind. Last year the Employee Free Choice Act ("EFCA") passed the House of Representatives, but was stopped in the Senate. Following Democratic victories on November 4, this will again come to a vote. If successful, the changes in union organizing and bargaining are so fundamental and sweeping that the employer-employee relationship change is hard to describe. The nearly unwavering support that unions have offered the Democratic Party candidates over the past several decades will call for a significant response by the Democratic controlled Congress and President. As this article is being drafted, a coalition of organizations, including FRANMAC and Yum! Brands, is working diligently to defeat the legislation

and needs your support. This article is to further acquaint you with the changes that the EFCA would make, and offer advice to union-proof your workplace.

The Employee Free Choice Act allows employees to merely present cards demonstrating a majority support by the employees in a bargaining unit in order to become union represented. There would be no campaign to inform employees and no secret ballot election, as is normally the case now. With a campaign informing employees about the real risks and uncertainty a union brings, unions only win about half the elections, even though they regularly start with more than 50% of the employees signing the union cards. The EFCA would take away the employee's right to have any election, and stifle employee access to both sides of the story before making a huge decision.

A stylized illustration at the bottom of the page. It features a purple background with a thick, wavy pink ribbon curving across the top. In the foreground, there are silhouettes of several people holding up signs. The most prominent sign is white with the letters 'EFCA' in large, bold, grey font. Other smaller, semi-transparent signs with 'EFCA' are visible in the background. The overall theme is a protest or demonstration against the Employee Free Choice Act.

EFCA

The Employee Free Choice Act allows employees to merely present cards demonstrating a majority support by the employees in a bargaining unit in order to become union represented. There would be no campaign to inform employees and no secret ballot election, as is normally the case now.

Following union certification, the EFCA would force employers to bargain within **ten** days of notice by the union, and failure to do so would be an unfair labor practice, with a large fine. Though many union organizing campaigns which are successful today wither under the process of bargaining, under the EFCA, failure to come to an agreement, even after mandated mediation, would result in binding arbitration beginning 90 days after the start of bargaining. The contract terms and conditions affecting an employer and its employees would then be decided by an arbitrator. The first contract would be for a minimum of two years, preventing any sort of action by the employees to throw the union out if it does not live up to its promises. This gives the union an opportunity to become institutionalized and protected.

Finally, the scope of penalties for an unfair labor practice is elevated significantly: a **\$20,000 fine** per willful or repeated violation of an employee's rights during an ongoing campaign or first-contact drive and **three times back pay** for an employee discharged or discriminated against during such a campaign or drive. Unions are pros at filing charges, and this change will surely intimidate employers into a weak position.

**EMPLOYER RESPONSE.** Virtually all employers, including Taco Bell franchisees, need to take stock of their employee-employer relationships and their vulnerability to a coordinated union assault. With the EFCA, employers should **not** expect to be given warning that a campaign is taking place. Hence, there is a need to engage in supervisory training **now** as though a union organizing campaign is inevitable. Each employer will have to determine whether it will also immediately engage in a preemptive, persuasive and educational series with its employees to warn them of the real downsides that may come with a union affiliation, where people give up

individual rights, costs can escalate, management control is lost, and the relationship becomes dependant upon third parties who thrive on conflict.

Of course, pro-employee training is not helpful merely in the face of the possibility that unions might knock on your door. Instead, it raises the awareness and sensitivity of your supervisors to employee issues. This training provides the opportunity to form deeper and more meaningful relationships with your employees and meet increasing employee loyalty and retention in the very competitive context of your business. In other words, this training, properly conducted, is a win for the employer, regardless of the ultimate fate of the EFCA.

The author's firm (and others) has long assisted clients regarding not only their legal rights and responsibilities in respect to employee issues, but has directly assisted employers in informing and training their supervisors and employees about the facts of a union environment. If you have any questions regarding the EFCA, its current legislative prospects or the possible impact of the EFCA, feel free to contact the author, or FRANMAC, as they will closely monitor this situation.

FRANMAC Legislative Affairs Contact: Ryan Israel, Butera & Andrews (202-347-6875 or risrael@butera-andrews.com)

The author, Thomas Godar, participated with government affairs specialists from FRANMAC and Yum! Brands in a panel discussion on this issue at the recent Franchise Forum in Anaheim. He may be contacted at Whyte Hirschboeck Dudek S.C. at 608-234-6064 or tgodar@whdlaw.com.