

# Employee Free Choice Act (EFCA)

Presented for

Presented for Colorado Bar Association

Labor and Employment Law Section

Employment Law seminar

Thursday, April 16, 2009

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He served as the management-side co-chair of the Colorado Bar Association's Labor and Employment Law Section from 2002-2004.

He is an adjunct Professor of Law at the University of Denver, Sturm College of Law, where he teaches employment law.

He is a frequent author. His column, "Labor Law," appears in the Denver Business Journal. He is also a Contributing Editor to The Developing Labor Law.

He currently sits by appointment of the Colorado Supreme Court as a Board Member on the State of Colorado Supreme Court Board of Law Examiners.

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(Employee Free Choice Act)**

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**EFCA**

Employee Free Choice Act (EFCA) (HR  
1409, S560) has been introduced.

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If passed, EFCA would include three major changes to traditional labor law:

1. It would allow for cardchecks in lieu of secret ballot elections.
2. It would require mandatory interest arbitration between employers and unions who fail to negotiate a first contract within 90 days.
3. It would increase penalties for certain violations.

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## NLRMA

See also the alternative National Labor Relations Modernization Act (NLRMA) (HR 1355), which would include a mandatory interest arbitration clause, among other changes, but not a cardcheck clause like EFCA's.

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## Starbucks, Costco and Whole Foods' "Third Way"

Starbucks, Costco and Whole Foods, through Lanny Davis, former special counsel to President Clinton, have jointly suggested a "Third Way." The so-called Third Way compromise does not include EFCA's cardcheck provision or mandatory interest arbitration.

Instead, it would impose an unextendable deadline on elections, require employers to give union organizers "equal access" to the workplace, and increase penalties for various violations.

Congressional sponsors of EFCA quickly responded that the Third Way would, in their minds, only hurt workers in the long run.

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## 70-50-30

D.C. labor lawyer, Jay Krupin, on behalf of unidentified clients, has proposed a compromise that is being referred to as the 70-50-30 approach.

It would basically be EFCA, but,

If 30% of the workers sign cards, union employees would be allowed access onto company property.

If 50%, an election would be held within 15 days.

If 70%, the union would be immediately recognized with no election.

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## Political Status of EFCA

The issue remains largely partisan and yet to be fully engaged. A few Democrats have begun saying they would like to consider compromise language.

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## Status in Congress?

- Supporters had hoped that Sen. Arlen Specter (R-Pa) would provide a crucial vote for cloture on EFCA. On March 24, 2009, Sen. Specter announced that he would not support EFCA.
  - “Testimony shows union officials visit workers’ homes with strong-arm tactics and refuse to leave until cards are signed,” Sen. Specter explained, quoting Congressional Record, p. s3635 (Senate 3/24/09).

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### The Position of Colorado's Senators?

- Senators Udall and Bennet have yet to take formal positions on EFCA.

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### Who Opposes EFCA?

- A number of advocates for business (including the U.S. Chamber of Commerce) and individuals have, like Sen. Specter, announced they oppose EFCA. Concerns include the potential for coercion of individuals. Those are not the only voices that oppose EFCA.

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- The Denver Post has written an editorial opposing EFCA.  
"It's already hemorrhaging support as moderate senators have begun to voice their opposition. Colorado's senators, Michael Bennet and Mark Udall, need to stand up and publicly oppose this harmful legislation."  
• Source: "Congress Should Eliminate EFCA," The Denver Post (3/31/09).

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- Steve Sandherr, CEO of the Associate General Contractors, has made the point that EFCA will be bad for employees and their employers who are already union.
  - AGC's members include 33,000 business nationwide, 750 in Colorado.
  - Sandherr has urged union members to oppose EFCA.
  - His concerns include:
    - The potential for inter-union rivalries and especially the potential for EFCA to favor large multi-craft unions, which might claim work from the traditional craft unions.
    - The potential for unintended consequences, including creating an incentive for employers to hire independent contractors.
    - The impact that arbitrated first contracts might have on current negotiated rates, which could put already-unionized companies at a competitive disadvantage (or advantage).
- Source: "Associated General Contractors Chief: Card-check Bill Would Hurt Both Business, Workers," Ed Sealover, The Denver Business Journal (3/30/09).

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- Even George McGovern, 1972 Democratic Presidential candidate
  - "As a congressman, senator and one-time Democratic nominee for the presidency, I've participated in my share of vigorous public debates over issues of great consequence. And the public has been free to accept or reject the decisions I made when they walked into a ballot booth, drew the curtain and cast their vote. I didn't always win, but I always respected the process.
  - "Voting is an immense privilege.
  - "That is why I am concerned about a new development that could deny this freedom to many Americans. As a longtime friend of labor unions, I must raise my voice against pending legislation I see as a disturbing and undemocratic overreach not in the interest of either management or labor.
  - "The legislation is called the Employee Free Choice Act, and I am sad to say it runs counter to ideals that were once at the core of the labor movement. Instead of providing a voice for the unheard, EFCA risks silencing those who would speak."
- Source: "My Party Should Respect Secret Union Ballots," George McGovern, Wall Street Journal (8/8/08).

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## A Closer Look at EFCA's Features

- Before taking a closer look at EFCA, consider current recognition procedures.

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## Current Recognition Procedures

- The NLRA, sec. 9(a) and (c)(1), set forth two main mechanisms by which unions can be recognized:

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1. A secret ballot election. To request an election, a union can file a petition for representation. Such a petition is often called an "RC" petition because when the union files using NLRB form 502, it checks the box for "RC-Certification of Representative."

If the union produces authorization cards (or otherwise demonstrates worker support) by at least 30% of the workers it seeks to represent, that is called a "showing of interest," and it warrants the NLRB scheduling an election.

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Upon a showing of interest, the NLRB schedules the election to occur usually within 42 days.

Note: If there is an issue, the NLRB will hold a hearing, typically within 14 days, and without delaying the election. There are a number of issues that can arise. They include whether the unit that the union seeks to represent is "an appropriate unit," whether other conditions exist that bar an election, such as another collective bargaining agreement or negotiations.

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2. Voluntary Recognition. If the union provides proof (typically cards) evidencing that 50%+1 of the workers have asked for the union to be their exclusive bargaining representative, then the employer may – but is not required to – recognize the union.

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Note: That summary simplifies a rather complex set of rules. Those are for situations where the union is recognized at most kinds of workplaces. See NLRA sec. 9(a).

In 1959, Congress added a different procedure, which is available only to construction companies. See NLRA sec. 8(f). Under sec. 8(f), a construction employer may simply recognize a union in what is called a “prehire agreement.” In other words, a construction employer can agree, even before it hires any employees, that workers will be represented by a union.

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In 2007, the NLRB imposed as an additional requirement to any voluntary recognition that employees be given notice and an opportunity to file a petition to decertify within 45 days of the recognition. See Dana Corp., 351 NLRB No. 28 (September 29, 2007) and NLRB General Counsel Memorandum No. OM 08-07.

In so ruling, the NLRB said that elections were the most favored form of recognition because “employees can and do change their minds about union representation.”

Such a petition is not particularly easy for the employees. They must meet the 45 days window. They must prove a “showing of interest” (at least 30% of the workers must support decertification of the union).

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## EFCA

- With that background in mind, consider EFCA in greater detail. EFCA has three major components.

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## EFCA – Major Component #1

- EFCA’s first change to the NLRA would be to make voluntary recognition, mandatory.
  - The union would be able to file an RC-petition if it has cards from 50%+1 of the workers. EFCA sec. 2(a)(6).
  - The Board would “investigate” the petition, presumably by reviewing the cards, then certify the union if it does have a majority. EFCA sec. 2(a)(6).

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- How will the Board conduct the investigation?
- What language would an authorization card require?
- What role would an employer have in the process? Would an employer even have a role in the process?

EFCA sec. 2(a)(7) leaves all of that to the Board: “The Board shall develop guidelines and procedures” to effectuate this new form of mandatory recognition by cardcheck.”

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## EFCA – Major Component #2

- The next major change would be that either the union or the employer could notify the FMCS (Federal Mediation and Conciliation Service) if they are unable to negotiate a first contract within 90 days. EFCA sec. 3.
- This would apply to negotiations for a first contract after any form of recognition – whether by the new mandatory cardcheck process, an election, or voluntary recognition.

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- EFCA contemplates that the notice to the FMCS would include a request for mediation. EFCA sec. 3.
- The FMCS would attempt to mediate.

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- If mediation is not successful within 30 days, either party could request arbitration. EFCA sec. 3.
- Who would be the arbitrator? EFCA states that the FMCS would refer it to “an arbitration board” and then refers to “the arbitration panel.” EFCA sec. 3.
- EFCA does not explain who that board would be, how many arbitrators would be on it, etc.

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- The arbitrators decision would become the parties' first contract. EFCA sec. 3. It would have a term of two years, "unless amended during such period by written consent of the parties." *Id.*

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### EFCA – Major Component #3

- Not so much a change as a restatement. EFCA restates a variety of things would be illegal, such as retaliating against an employee for supporting a union during an organizing campaign. EFCA sec. 4. Charges alleging those violations would become priority matters for the NLRB. *Id.*
- EFCA would increase the current penalties, including by adding liquidated damages and "a civil penalty not to exceed \$20,000 for each violation." *Id.*

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### Are Secret Ballot Elections Good For The Goose But Not The Gander?

- In 2001, when Mexico discussed eliminating the need for secret ballot elections in their union process, sixteen U.S. Congressional members wrote to insist that the right of secret ballot elections be preserved.

"We understand that the secret ballot is allowed for, but not required, by Mexican labor law. However, we feel that the secret ballot is absolutely necessary in order to ensure that workers are not intimidated into voting for a union they might not otherwise choose."

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- Who authored that letter?
  - George Miller, who is now the main sponsor of EFCA.
  - Ten of the remaining signatories are, like Rep. Miller, still in office. They are all co-sponsors of EFCA.
  - The five remaining signatories are no longer in office, but their successors are all now co-sponsors of EFCA.
- Source: Letter, on official United States Congress letterhead, by G. Miller, et al. (8/29/01) (widely available on the Internet, including for example at, [http://www.employeeefreedom.org/downloads/mexico\\_letter.pdf](http://www.employeeefreedom.org/downloads/mexico_letter.pdf)).

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### But, was that because it was Mexico?

- Multiple unions require in their own constitutions the use of secret ballots in internal elections, such as votes on union officers.
- See also the United Nations affiliated International Labor Office, based in Geneva, which published in 2006 its "Freedom of Association: Digest of Decisions and Principles of Freedom of Association Committee of the Governing Body of the ILO" hailing "the safeguard of a secret ballot."
- Source: "Secret Ballots for Me, But Not for Thee," D. Murdock, National Review (3/20/09) (available on-line, <http://article.nationalreview.com/?q=YTFIMDEzNjkzMjc0MjMzNTk1ZTQ4OTIjYTk3ZTg4NmI=>).

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### Mandatory Interest Arbitration: When Negotiation Becomes Litigation

- Consider the difference between negotiation and litigation.
- What will a union's incentive be in negotiations if it knows that at the end of 120 days, it can go to arbitration and the arbitrator's award becomes its first contract?
- Will the union view its bargaining demands as a threshold for its litigation demands?
- What disincentive would a union have for not reaching agreement in the first 120 days?

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## Economic Impact of EFCA

- Economists share the concerns that EFCA will have unintended negative consequences. One recent study concludes that "every 3 percentage points" unions might gain in membership will equate to a "1 percentage point" increase in unemployment the following year "and job creation is predicted to fall by around 1.5 million jobs."

"Thus, if EFCA passed today and resulted in an increase in unionization from the current rate of about 12% to 15%, then unionized workers would increase from 15.5 to 19.6 million while unemployment a year from now would rise by 1.5 million, to 10.4 million. If EFCA were to increase the percentage of private sector union membership by between 5 and 10 percentage points, as some have suggested, my analysis indicates that unemployment would increase by 2.3 to 5.4 million in the following year and the unemployment rate would increase by 1.5 to 3.5 percentage points in the following year."

Source: "An Empirical Assessment of the Employee Free Choice Act: The Economic Implications," A. Layne-Farrar (3/3/09), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1353305](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1353305).

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## But don't the unions need EFCA? Aren't these elections nasty affairs?

- No. Secret ballot elections are government-monitored a process that let employees choose. Everyone gets to express their opinions.
- In 2007, over 85% of elections involved stipulations between management and the unions as to the scope of the unit and the date and time for election.

"The overwhelming majority of elections conducted by the NLRB resulted from some form of agreement by the parties on when, where, and among whom the voting should occur. Such agreements are encouraged by the Agency."

- Source: "Seventy-Second Annual Report of the National Labor Relations Board," by the NLRB for fiscal year ended September 30, 2007.

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## Well, aren't elections at least long and drawn out affairs?

- No. Average time for elections is 38 days. Over 95% are held within 56 days.
- Source: Memorandum GC 09-03, Summary of Operations for Fiscal Year 2008 (October 29, 2008), available at [http://www.nlr.gov/shared\\_files/GC%20M emo/2009/GC%2009-03%20Summary%20of%20Operations%20FY%2008.pdf](http://www.nlr.gov/shared_files/GC%20M emo/2009/GC%2009-03%20Summary%20of%20Operations%20FY%2008.pdf).

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### Don't unions lose most of the elections?

- No, actually unions win most representation elections.
- "Unions won 1,195 representation elections, or 55.7 percent."
- Source: "Seventy-Second Annual Report of the National Labor Relations Board," by the NLRB for fiscal year ended September 30, 2007.

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### What about employers coercing employees into listening to what the company thinks?

- Coercion by employers is already illegal.
- Employers do have the right to have an opinion about whether a union is or isn't right for their workplace, and they have the right to express that opinion. Such speech is not only protected by the First Amendment but also by the NLRA, sec. 8(c), "if such expression contains no threat of reprisal or force or promise of benefit." 29 USC 158(c).

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- The Board has developed many rules that permit the employer, the union and the workers to exercise their speech rights during an organizing campaign, so long as that speech does not cross the line of constituting a "threat of reprisal or force or promise of benefit," quoting sec. 8(c). The touchstone is the requirement to maintain "laboratory conditions." *General Shoe Corp.*, 77 NLRB 124 (1948), enforced 192 F.2d 504 (6<sup>th</sup> Cir. 1951).

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- Employers may require that employees attend a meeting during which the employer expresses its opinion. *NLRB v. United Steelworkers*, 357 US. 357 (1958).
  - These are often called “captive audience” meetings.
  - Again, though, during those meetings, employers may not say anything or engage in conduct that is threatening, intimidating, or otherwise coercive.

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- The NLRA does not just prohibit coercion by employers. It is also already illegal for an employer to retaliate against an employee (for example, by firing her) because she supported (or opposed) a union in its organizing campaign. NLRA, sec. 8(a)(3).

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- Therefore, if EFCA is designed to remedy the potential for coercion by employers, it, first, does not address that problem, and, second, is not necessary because coercion is already prohibited.
- As the Denver Post notes in its editorial of 3/26/09, *supra*:  
“(T)here are many laws governing those infractions. Enforce them.”

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- Additionally, any captive audience meeting must be conducted no later than 24 hours prior to the election. *Peerless Plywood Co.*, 107 NLRB 427 (1953).
  - The 24-hour rule is designed to insulate the election from campaigning, so that employees have ample opportunity to weigh their options, reflect, then cast a ballot according to their individual conscience.

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### So, why are workers rejecting unions in ever greater numbers?

- In a trend that is more than several decades old, American workers have consistently rejected unions. That trend not only continues, but American workers are rejecting unions in ever greater numbers.

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- Of the total workforce, including government employees, the percentage of workers who are represented by unions drops, as does the percentage who are actually members.

Year	% represented	% members
1979	27%	24.1%
1996	16.2%	14.5%
2008	13.7%	12.4%

Compare private sector only:  
2008      8.4%                      7.6%

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- Private sector/construction only:

Year	% represented	% members
1979	33.9%	31.8%
1996	19.2%	18.5%
2008	16.2%	15.6%

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- Private sector/manufacturing only:

Year	% represented	% members
1979	38.2%	35.4%
1996	18.3%	17.2%
2008	12.3%	11.4%

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- Source: "Union Membership and Coverage Database from Current Population Survey," B. Hirsch and D. McPherson, updated annually and available on the Internet at <http://unionstats.gsu.edu/>. See also the authors' article explaining their methodology, "Union Membership and Coverage Database from the Current Population Survey: Note," *Industrial and Labor Relations Review*, Vol. 56, No. 2, January 2003, pp. 349-54. For the Current Population Survey statistics, see the Bureau of Labor Statistics "Labor Force Statistics from the Current Population Survey," available at <http://www.bls.gov/cps/cpslutabs.htm>.

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- Why 1979, 1996, and 2008? Those three years range across the available data from the CPS, which runs annually with its first full set starting in 1977.
- Reminder:
  - Carter administration: 1977-1981
  - Clinton administration: 1993-2001
  - G.W. Bush administration: 2001-2009

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- Although one can debate the reasons why American workers reject unions, the Denver Post made a laser-sharp observation in its editorial on 3/26/09, *supra*.  
“A recent Rasmussen poll shows that only 9 percent of non-union workers have any interest in joining a union and 81 percent would not join even if they had the chance. So it is remarkably difficult to believe there is a widespread and unquenched yearning by workers to join unions.”

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Wait, I know I've read that supporters of EFCA say employees will still have the right to an election?

- EFCA sec. 2(a) specifically states that once the union demonstrates majority support by cards (or otherwise), “the Board shall not direct an election but shall certify the individual or labor organization as the representative.”

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## Questions?

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