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## Employee Free Choice Act

Labor and Employment White Paper Series

by Mark S. Filipini and Angela Kopolovich<sup>1</sup>

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# Employee Free Choice Act

The legal framework for labor and management relations is set to change dramatically in the new administration. This White Paper explores the current legal framework and proposed changes, open issues on implementation, and practical tips for employers to consider.

In 2007, Sen. Ted Kennedy (D-Mass.), together with Reps. George Miller (D-CA) and Peter King (R-NY), introduced what is arguably the most substantial amendment to the National Labor Relations Act (“NLRA”) since its inception in 1935. Championed by organized labor, the Employee Free Choice Act (“EFCA”) would make it considerably easier for labor unions to expand their reach and represents a major departure from at least two core NLRA principles: the primacy of the secret ballot election and labor contracts negotiated from scratch by the parties. Although the EFCA stalled in the Senate after passing the House of Representatives in a largely party line vote,<sup>2</sup> the 2008 national electoral success of Democratic party candidates suggests the EFCA will be back in 2009. Indeed, while President Bush made it clear he would veto the EFCA if it reached his desk, President-elect Obama was one of the original co-sponsors of the bill in the Senate and pledged his continued support on the campaign trail.<sup>3</sup> Given that labor has made passing the EFCA its top priority – and that unions claim to have spent \$450 million helping to elect Mr. Obama<sup>4</sup> – we anticipate that the EFCA will be a front-burner issue for the next administration.

As currently drafted, the EFCA would amend the NLRA in three significant ways. First, it would remove an employer’s right to insist on a secret ballot election conducted by the National Labor Relations Board (“Board”) when a union attempts to organize its employees.<sup>5</sup> Instead, the Board would be forced to certify a union as the employees’ representative based solely on unreliable evidence

of majority support – typically, authorization cards presented by the union. Second, the EFCA would allow either party to force the other to mediation and interest arbitration unless they can agree on the terms of an initial labor contract within 120 days after collective bargaining negotiations begin.<sup>6</sup> The arbitrator(s) would be empowered to impose substantive contract terms that would be binding on the parties for two years.<sup>7</sup> Third, the EFCA would increase penalties on any unfair labor practices committed by employers during union organizing drives or contract negotiations.<sup>8</sup> Despite the increased importance it would place on authorization cards collected with virtually no safeguards against misrepresentation or coercion, the EFCA is curiously silent on stiffer penalties for union misconduct.

Proponents argue that the EFCA is needed to bypass an election process that favors employers and fails to safeguard employees’ rights.<sup>9</sup> As any employer that has been through an organizing drive can attest, however, it certainly does not seem to us that the deck is stacked in management’s favor. In fact, the percentage of representation elections won by unions is actually *increasing*, up to 66.8 percent in the first six months of 2008, from 58.5 percent for all of 2007 and 47.9 percent in 1980.<sup>10</sup> We believe the real thrust behind the EFCA is that it represents organized labor’s best chance to reverse the drastic decline in private sector unionization over the past several decades. Currently, the percentage of the American private sector workforce represented by labor unions is 7.5 percent, as compared to 24.2 percent in 1973, and the all-time high of 39.2

<sup>1</sup> The authors also wish to thank Ramie O’Neill for her contributions.

<sup>2</sup> Rep. Miller introduced the EFCA in the House in February 2007. In March 2007, the House passed the EFCA by 241 to 185. Employee Free Choice Act, H.R. 800, 110th Cong. [2007] [cited hereinafter as EFCA]. Only two Democrats opposed it and 13 Republicans supported it. The bill was introduced in the Senate later that month but was removed in late June 2007, when a motion to invoke cloture and end a Republican filibuster failed. Joel Havemann, *GOP Senators Block Bill to Ease Union Organizing*, L.A. TIMES, June 27, 2007, at A15, available at <http://articles.latimes.com/2007/jun/27/nation/na-union27>. The tally, 51-48, was divided along party lines with all Democrats and two Independents supporting the bill. *Id.* Among Republicans, only Senator Arlen Specter (R-Pa.) broke ranks, suggesting that a debate on this issue was essential. Arlen Specter & Eric Nguyen, *Policy Essay: Representation Without Intimidation: Securing Workers’ Right to Choose under the National Labor Relations Act*, 45 HARV. J. ON LEGIS. 311, 319 (2008).

<sup>3</sup> In March 2007, speaking to a gathering of 1500 labor supporters in Illinois, then-Senator Obama said: “We will pass the Employee Free Choice Act. It’s not a matter of if – it’s a matter of when. We may have to wait for the next President to sign it, but we will get this thing done.” Bernard Marcus, *A Hostile Takeover of American Business*, BUSINESSWEEK, Sept. 22, 2008, available at [http://www.businessweek.com/print/bwdaily/dnflash/content/sep2008/db20080919\\_897469.htm](http://www.businessweek.com/print/bwdaily/dnflash/content/sep2008/db20080919_897469.htm). Speaking to the AFL-CIO in Philadelphia in April 2008, Senator Obama said: “We’re ready to play offense for organized labor. It’s time we had a president who didn’t choke saying the word ‘union.’ A president who strengthens our unions by letting them do what they do best: organize our workers ... I will make [the EFCA] the law of the land when I’m president of the United States.” Donald Lambro, *Obama Supports Union Play to Drop Secret Ballots*, TOWNHALL, Aug. 8, 2008, [http://townhall.com/columnists/DonaldLambro/2008/08/08/obama\\_supports\\_union\\_play\\_to\\_drop\\_secret\\_ballots](http://townhall.com/columnists/DonaldLambro/2008/08/08/obama_supports_union_play_to_drop_secret_ballots).

<sup>4</sup> Steven Greenhouse, *After Push for Obama, Unions Seek New Rules*, N.Y. TIMES, Nov. 9, 2008, available at <http://www.nytimes.com/2008/11/09/us/politics/09labor.html>.

<sup>5</sup> EFCA § 2.

<sup>6</sup> EFCA § 3.

<sup>7</sup> *Id.*

<sup>8</sup> EFCA § 4.

<sup>9</sup> See *Strengthening America’s Middle Class through the Employee Free Choice Act: Hearing on H.R. 800 Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Education and Labor*, 110<sup>th</sup> Cong. [2007] (statements of Rep. Robert Andrews (D-NJ), Chairman, House Subcomm. on Health, Employment, Labor and Pensions and Nancy Schiffer, Assoc. General Counsel, AFL-CIO) [cited hereinafter as *Strengthening America’s Middle Class*].

<sup>10</sup> Bureau of Nat’l Affairs, *News in Brief: Union Win Rate Up*, 24 COLLECTIVE BARGAINING BULLETIN, Nov. 2008, 141.

percent in 1954.<sup>11</sup> There are many reasons for this drift unrelated to the NLRA, including the gradual transition to a service-based economy, the effects of technology and globalization on industries that have historically been union strongholds (e.g., manufacturing, steel, and automotive) and the rise of federal and state legislation protecting individual employee rights in the workplace.<sup>12</sup> These contradictory trends, with unions performing better in elections as the pool of interested targets contracts, suggest to us that any problem organized labor has in recruiting new members lies with the message and not the process. Regardless, if the EFCA is enacted as currently written, it will likely lead to a dramatic reversal in the unionization rate and signal a new era in labor relations.

We examine below the current legal framework under the NLRA and how the EFCA proposes to change it. Because the EFCA has left many questions as to how it would be implemented, we also note open issues throughout our analysis. Finally, we offer tips for prudent employers to consider to prepare for the EFCA's potential impact.

## The NLRA's Commitment to Self-Determination

Under the NLRA, it is the employees themselves – not employers or unions – who decide whether or not to unionize.<sup>13</sup> Section 7 of the NLRA guarantees employees the right to “self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and...to refrain from any or all of such activities...”<sup>14</sup> The NLRA allows a union to become the exclusive representative of a group of employees only if a majority of the employees in an “appropriate unit” affirmatively designate the union as their bargaining representative. The U.S. Supreme Court recognized almost 40 years ago that a secret ballot election conducted by the Board is the “most satisfactory – indeed the preferred – method of ascertaining whether a union has majority support.”<sup>15</sup>

## The Role of Authorization Cards

While the EFCA would not, on its face, alter the concept of majority rule for union representation, it would significantly elevate the importance of the authorization card, a particularly unreliable gauge of union support. These cards authorize a union to represent an employee for purposes of collective bargaining with his/her employer regarding wages, hours and other terms and conditions of employment. Under current law, a union that obtains signed cards from more than 50 percent of the employees in a proposed bargaining unit can demand recognition from the employer as the employees’ collective bargaining agent. The employer is then presented with two choices – it may agree to voluntarily check the cards offered by the union or insist upon a secret ballot election conducted by the Board.<sup>16</sup>

In recent years, unions have been increasingly pressuring employers to agree to card checks in lieu of secret ballot elections. Often utilizing “corporate campaigns” consisting of coordinated attacks on the public relations, legal and political fronts, unions have had limited success with this approach in the private sector.<sup>17</sup> Rather than leaving unions to whatever leverage they might have to secure card check agreements on an employer-by-employer basis, the EFCA would allow them to go directly to the Board once they have cards signed by a majority of the proposed bargaining unit. If the Board’s card count indicates majority support, the Board would then be required to certify the union as the employees’ collective bargaining representative without the benefit of an election. Although some commentators have noted that the EFCA would not technically eliminate the secret ballot election as an option,<sup>18</sup> we have no doubt that rendering the election a matter of union discretion will effectively ensure its quick extinction.

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<sup>11</sup> Press Release, Bureau of Labor Statistics, U.S. Dep’t. of Labor, Economic News Release (Jan. 25, 2008), available at <http://www.bls.gov/news.release/union2.nr0.htm>; Union Membership and Coverage Database, [www.unionstats.com](http://www.unionstats.com) (last visited Dec. 31, 2008); William T. Dickens & Jonathan S. Leonard, *Accounting for the Decline in Union Membership, 1950-1980*, 38 INDUS. AND LABOR RELATIONS REVIEW 3 (1985).

<sup>12</sup> See generally Samuel Estreicher, *Think Global, Act Local: Workplace Representation in a World of Global Labor and Product Market Competition* 1 (NYU School of Law Working Paper Series, Public Law Research Paper No. 08-32 and NYU Law and Economics Research Paper No. 08-45, 2008), available at <http://ssrn.com/abstract=1292369>. The need to effectively monitor compliance with the plethora of laws now regulating the workplace also stimulated the creation of professional human resource departments, many of which are also tasked with developing employee-friendly policies and procedures to aid in recruitment and retention. As a result, the need or desire for third-party intervention by a labor union, with its attendant monetary and time commitments, has likely significantly diminished.

<sup>13</sup> A limited exception exists in the building and construction industry, where an employer and union may enter into an agreement even before employees are hired. See 29 U.S.C. § 158(f).

<sup>14</sup> 29 U.S.C. § 157.

<sup>15</sup> *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969).

<sup>16</sup> See generally *Linden Lumber Div. v. N.L.R.B.*, 419 U.S. 301, 308 (1974). If the employer agrees to examine the authorization cards in order to ascertain whether the union truly has majority support, then the employer waives its right to an election. See *Research Mgmt. Corp.*, 302 NLRB 627, 638 (1991); *Fred Snow*, 134 NLRB 709, 710-11 (1961). Given that a union presumably will not approach an employer with a demand for recognition unless it has double-checked its math, this waiver rule operates as a trap for unwary employers. See generally *Harding Glass Indus. Inc.*, 216 NLRB 331 (1975). We have not seen an EFCA proponent mention this fact.

<sup>17</sup> See Ryan Ellis, *Unions Use Smear Tactics in ‘Corporate Campaigns,’* HUMAN EVENTS, Apr. 23, 2007, <http://www.humanevents.com/article.php?id=20366> (discussing success of corporate campaigns within hotel, restaurant and janitorial service industries but lack of success with Wal-Mart).

<sup>18</sup> See, e.g., *Strengthening America’s Middle Class*, *supra* note 9, at 8. (statement of Nancy Schiffer, Assoc. General Counsel, AFL-CIO).

Placing such heavy significance on the authorization card contradicts decades of legal precedent extolling the virtue of the secret ballot election over reliance on a card check.<sup>19</sup> At one point, Congress itself recognized the risks inherent in the frequently freewheeling card collection process, as it amended the NIRA in 1947 to remove the Board's ability to certify a union based on a card check. Talking about some of the more extreme methods used to obtain signed cards, the House report on that bill noted that "the American workman has been deprived of his dignity as an individual. He has been cajoled, coerced, intimidated, and on many occasions beaten up [and] forced to join labor organizations against his will."<sup>20</sup> While the conduct of both unions and employers has likely improved since then, there are still no protections in place to engender confidence that signatures are the result of legitimate employee interest rather than false pretenses, intimidation or peer pressure.<sup>21</sup> A former union organizer testifying before the House of Representatives on the EFCA reported:

A "card check" campaign begins with union organizers going to the homes of workers over a weekend, a tactic called "housecalling," with the sole intent of having those workers sign authorization cards... In most cases, the workers have no idea that there is a union campaign underway. Organizers are taught to play upon this element of surprise to get "into the door." They are trained to perform a five part house call strategy that includes: Introductions, Listening, Agitation, Union Solution, and Commitment. The goal of the organizer is to quickly establish a trust relationship with the worker, move from talking about what their job entails to what they would like to change about their job, agitate them by insisting that management won't fix their workplace problems without a union and finally convincing the worker to sign a card.

At the time, I personally took great pride in the fact that I could always get the worker to sign the card if I could get inside their home. Typically, if a worker signed a card, it had nothing to do with whether a worker was satisfied with the job or felt they were treated fairly by his or her boss. I found that most often it was the skill of the organizer to create issues from information the organizer had extracted from the worker during the "probe" stage of the house call that determined whether the worker signed the card.<sup>22</sup>

The Board's historical reluctance to police the card collection process developed alongside the presumption that the secret ballot election (and the attendant campaigns by employers and unions) serves as the best check against uninformed consent or unsavory tactics. The EFCA would essentially eliminate this key democratic safeguard in favor of a vague direction to the Board to promulgate guidelines to ensure the validity of authorization cards.<sup>23</sup> This would be a particularly daunting task given the number of issues the Board would need to address, including at least the format of acceptable cards, the methods by which valid cards are distributed, signed and collected, protecting employees from deception and coercion, providing employees who wish to revoke their signatures a reliable avenue to promptly do so and guarding against stale or fraudulent signatures. We believe the EFCA should, in fairness, force nothing short of a total reexamination of prior decisions in this area by the Board and the courts.

The Canadian experience with the card check process is also instructive. Under Canadian law, each of the ten provinces is free to enact its own labor legislation. Up until the late 1980s, nine of the ten provinces allowed union recognition based upon evidence of majority support via authorization cards. In the twenty years since then, there has been a steady shift away from the card check process in Canada, as documented fraud cases demonstrated the unreliable nature of the exercise.<sup>24</sup> Today, six out of the ten provinces have abandoned card check in favor of secret ballot elections.

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<sup>19</sup> See *Gissel Packing*, 395 U.S. at 602 (noting that a secret ballot election is the "most satisfactory – indeed the preferred – method of ascertaining whether a union has majority support... [authorization cards are] admittedly inferior to the election process"); *N.L.R.B. v. Village IX, Inc.*, 723 F.2d 1360, 1371 (7th Cir. 1983) ("Although the union in this case had a card majority, by itself this has little significance. Workers sometimes sign union authorization cards not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back, since signing commits the worker to nothing."); *J.P. Stevens & Co. v. N.L.R.B.*, 441 F.2d 514, 522 (5th Cir. 1971) ("Authorization cards are often a hazardous basis upon which to ground a union majority."); *N.L.R.B. v. S.S. Logan Packing Co.*, 386 F.2d 562, 565 (4th Cir. 1967) ("It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check,' unless it were an employer's request for an open show of hands. The one is no more reliable than the other."); *N.L.R.B. v. Flomatic Corp.*, 347 F.2d 74, 78 (2d Cir. 1965) ("It is beyond dispute that [a] secret [ballot] election is a more accurate reflection of the employees' true desires than a check of authorization cards collected at the behest of a union organizer.").

<sup>20</sup> H.R. Rep. No. 245, at 4 (1947).

<sup>21</sup> See, e.g., *Plant City Welding*, 119 NLRB 131 (1957) (finding that unions visiting the homes of employees does not interfere with employee free choice); *Uniroyal Tech Corp. v. N.L.R.B.*, 98 F.3d 993, 996 (7th Cir. 1996) (finding that where an employee "indicated that he was unsure whether he was interested in signing [a] card," it was acceptable for an in-plant volunteer organizer to tell his co-worker "that unless he . . . were to stand up against the company and support the Union, he would be the same kind of person who would end up taking the "Mark of the Beast" in the last days . . . leading up to judgment day").

<sup>22</sup> *Strengthening America's Middle Class*, supra note 9 (statement of Jen Jason, Former UNITE HERE Organizer). See also *Testimony Before the Subcomm. on Employer-Employee Relations, Comm. on Educ. and Work Force*, 108th Cong. (2004) (statement of Clyde H. Jacob III, Esq.), available at <http://republicans.edlabor.house.gov/archive/hearings/108th/eeer/laborlaw042204/jacob.htm> ("Some employees, when solicited at their homes by union representatives, said, "No," to signing a card; yet, they reported repeated, frequent home visits by union representatives continuing to try to secure their signatures, and they complained to the company of this harassment . . . One employee reported that the union representatives exited their vehicle and approached his home with a video camera recording him, which he believed made him a marked man.").

<sup>23</sup> EFCA § 2.

<sup>24</sup> See, e.g., *CUPE, Local 41 v. AUPE and Westview Reg'l Health Auth.*, [2002] Alta. L.R.B.R. 174 (During a sign-up drive, the union fraudulently misrepresented the purpose of the petition by instructing employees that by signing the petition they were merely requesting information rather than supporting certification.); *R.C. Purdy Chocolates Ltd. v. CEP, Local 2000*, [2001] B.C.L.R.B. No. 412; (Four authorization cards relied upon by the union for certification were actually forged and the B.C. Labor Relations Board ordered the union's certification cancelled.); *Fabricland Pac. Ltd. v. I.L.G.W.U. Local 287*, [1999] B.C.L.R.B. No. 53 (A union organizer knowingly collected an authorization card from an employee who had signed on behalf of another without authorization. The B.C. Labor Relations Board cancelled the union's certification entirely, reasoning that such a flaw in the union's application undermined the integrity of the entire system.).

## The Election Process

Although the NLRB's election machinery has been the favorite target of EFCA supporters, the reality is significantly different than the hype. Not only does the election process guarantee employees the greatest freedom to exercise their Section 7 rights, but it provides unions with several distinct advantages over employers. A brief (and simplified) overview of certain key facets of the process highlights the misperceptions underlying the common rationale for the EFCA as well as the open issues left by the bill.

### Filing the Petition

Whether or not it makes a demand for recognition directly upon the employer, a union that obtains authorization cards from at least 30 percent of the employees it wishes to represent may file a petition with the Board to seek an election.<sup>25</sup> The filing of this representation petition sets into motion a series of events that culminates in a secret ballot election. The EFCA debate has focused considerable attention on the time between the filing of the petition and the election, with unions and their supporters claiming that employers use this window to convince employees to vote against representation through any means necessary.<sup>26</sup> While we strongly disagree with this broad-brush characterization and believe that an employer must be given a reasonable opportunity to lawfully campaign, the notion of an expedited election procedure has been floated by Sen. Arlen Specter (R-PA) as a possible alternative to the EFCA's card check provisions.<sup>27</sup> Regardless, statistics demonstrate that the Board has shortened this window over the years, with the median number of days between the filing of a petition and the date of election dropping from 48.7 in 1990 to 39 in 2007.<sup>28</sup>

### Determining an Appropriate Unit

Upon receiving a representation petition from a union, the Board sends a copy of the petition to the employer and requests a list of employees in the petitioned-for unit and their job classifications.

At this initial stage, the Board must ensure that the union has the support of at least 30 percent of the employees in an "appropriate unit." While the ultimate determination of whether the unit described in the petition is "appropriate" rests solely with the Board, the employer and union may stipulate that a particular unit is appropriate for representation purposes. If they cannot agree, the Board will hold a representation hearing to determine the issue.<sup>29</sup> The Board applies a community of interests test to decide whether an appropriate unit exists and to set its parameters.<sup>30</sup> Because the NLRA excludes certain positions from its coverage – including supervisors, managers, confidential employees and independent contractors – the Board also uses the hearing to identify and remove such individuals from the proposed unit.

One of the mysteries surrounding the EFCA is what would happen to the representation hearing. Although unions and employers are often able to stipulate to an appropriate unit, the hearing serves a critical role when they cannot. The EFCA conditions certification via card check to petitions where "the Board finds that a majority of the employees *in a unit appropriate for bargaining* has signed valid authorizations."<sup>31</sup> Presumably, the Board would provide an employer with an opportunity to both explore a stipulation with the union and, if that effort fails, to present evidence that the unit proposed by the union is over- or under-inclusive. However, that clarity of detail is absent from the current legislation.

### Setting the Election Date

When a petition goes to hearing and the Board determines that a valid question concerning representation exists, it will issue a Decision as to the appropriate unit and a Direction of Election setting the election date. Board rules indicate that the election generally should be held no more than 30 and no less than 25 calendar days after the Direction of Election.<sup>32</sup> Contrary to the depiction of a lengthy election process, there is not much time for employees to educate themselves with information provided by the employer, which very well may not have known about the organizing drive until the union filed its representation petition.

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<sup>25</sup> As noted above, current law allows an employer presented with a demand for recognition to insist that the union file a representation petition in order to resolve the question of whether or not its employees desire union representation. *Linden Lumber*, 419 U.S. at 308-10. Alternatively, the employer may instead file its own representation petition at that time. The EFCA would essentially provide a third alternative – a card check conducted by the NLRB. See EFCA § 2.

<sup>26</sup> See, e.g., *Strengthening America's Middle Class*, *supra* note 9 (statements of Rep. Robert Andrews [D-NJ], Chairman, House Subcomm. on Health, Employment, Labor and Pensions and Nancy Schiffer, Assoc. General Counsel, AFL-CIO).

<sup>27</sup> Specter & Nguyen, *supra* note 2, at 332.

<sup>28</sup> Memorandum GC 98-01 from the Office of the General Counsel, NLRB, to All Employees (Dec. 5, 2007), available at [http://www.nlr.gov/shared\\_files/GC%20Memo/2008/GC%2008-01%20Summary%20of%20Operations%20FY%2007.pdf](http://www.nlr.gov/shared_files/GC%20Memo/2008/GC%2008-01%20Summary%20of%20Operations%20FY%2007.pdf); Memorandum GC 91-5 from the Office of the General Counsel, NLRB, to All Employees (June 18, 1991), available at [http://www.nlr.gov/research/memos/general\\_counsel\\_memos.aspx](http://www.nlr.gov/research/memos/general_counsel_memos.aspx).

<sup>29</sup> A representation hearing may address other issues as well, for instance, whether the Board has jurisdiction over the employer, whether the petitioning union is a labor organization under the NLRA and whether there is a current labor contract covering the employees. See NLRB, CASEHANDLING MANUAL, PART TWO, REPRESENTATION PROCEEDINGS § 11187.2 (2007), available at <http://www.nlr.gov/nlr/legal/manuals/CHM2/CHM2.pdf> [cited hereinafter as CASEHANDLING MANUAL II].

<sup>30</sup> The Board's "community of interests" test examines factors such as: (i) similarity of duties, skills, wages, fringe benefits, hours, interests, and working conditions; (ii) amount of interchange among employees; (iii) the employer's organizational structure; (iv) integration of the work flow and interrelationship of the production process; (v) extent of union organization; and (vi) the desires of the petitioner. See *Capital Bakers, Inc.*, 168 NLRB 904 (1967).

<sup>31</sup> EFCA § 2 (emphasis added).

<sup>32</sup> CASEHANDLING MANUAL II, *supra* note 29, at § 11302.1. For Board elections conducted pursuant to agreement between the parties, the NLRB has instructed that they be held no later than 42 days after the petition is filed. See Memorandum GC 09-03 from the Office of the General Counsel, NLRB, to All Employees (Oct. 29, 2008), available at [http://www.nlr.gov/Research/Memos/general\\_counsel\\_memos.aspx](http://www.nlr.gov/Research/Memos/general_counsel_memos.aspx).

## The Election Campaign

The campaign process lies at the crux of the debate surrounding the EFCA. Painted by organized labor and its allies as a virtually unfettered opportunity for employers to strong-arm their employees into voting against union representation, in reality the campaign is an intense, brief period for employees to ask questions, gather information and hear the employer's position. The NLRA guarantees an employer the right to communicate with its employees during the campaign period.<sup>33</sup> We regularly counsel employers how to lawfully use this precious time to truthfully answer questions, provide relevant data, counter union misinformation and explain its position regarding unionization.

However, the employer may *not* engage in a wide range of speech or conduct during an election campaign. For instance, an employer may not threaten employees with reprisals for supporting the union or otherwise exercising their Section 7 rights.<sup>34</sup> This prohibition includes dire predictions about the effect unionization might have on the employer's business or the employees' jobs. Nor may an employer question or surveil its employees to determine how they intend to vote or even who signed authorization cards, attended union meetings or is otherwise supporting or opposing the union.<sup>35</sup> Promising employees benefits if they vote no is also off limits, including not only improved wage or fringe benefit terms, but also offering to fix whatever problem(s) may have led to the organizing drive in the first place.<sup>36</sup> Of course, an employer is also forbidden to discipline, discharge or in any way discriminate or retaliate against an employee based on protected union activity or sentiment.<sup>37</sup>

In contrast to the restrictions current law places on employers during the election campaign, unions enjoy much greater latitude in their speech and actions. Regardless of whether it ultimately delivers, a union may promise employees higher wages, improved fringe

benefits, protections against discharge, a seniority system and almost any other item it believes will garner votes or even signed authorization cards.<sup>38</sup> Unions may also contact and visit employees at their homes<sup>39</sup> and repeatedly inquire and cajole them, through union organizers or sympathetic co-workers, as to how they intend to vote.<sup>40</sup>

While employers facing their first organizing drive are often surprised by what they perceive as a campaign field blatantly tilted against them, EFCA proponents see it quite differently. Hammering on the fact that a small minority of companies break the law during election campaigns, some commentators focus on anecdotal evidence of discharged union advocates and employers threatening to close down plants if workers unionized.<sup>41</sup> Others claim that employees would more often than not choose to organize but for fear of reprisals by the employer for participation in the organizing activity.<sup>42</sup> Regardless of the angle, it appears that most if not all EFCA supporters believe that the only way to remedy the alleged flaws in the process is to essentially eliminate the employer's ability to effectively campaign.

Although the EFCA does not on its face outlaw an employer's right to communicate with its employees, in practice it would likely often do so since the union can gather authorization cards in secret and present them to the Board without prior notification to the employer. We do not see a realistic opportunity for the employer to campaign during whatever mechanism the Board might develop to address appropriate unit questions, as the union would likely cry foul (and argue for the application of EFCA's heightened penalties) if the employer asked employees to revoke their authorization card signatures. Perhaps the Board or the courts could offer an equitable solution eventually,<sup>43</sup> but none appear in the current draft of the EFCA. Since only about eight percent of the private workforce is unionized today, many workers are entirely inexperienced when it

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<sup>33</sup> 29 U.S.C. § 158(c); *Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53, 62 (1966) (noting that "the enactment of [§ 158(c)] manifests a congressional intent to encourage free debate on issues dividing labor and management").

<sup>34</sup> 29 U.S.C. § 158(a)(1).

<sup>35</sup> *Id.*

<sup>36</sup> 29 U.S.C. § 158(c); see also *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 408-10 (1964) (illustrating that an employer commits unfair labor practice when it promises benefits in order to induce employees to vote against a union).

<sup>37</sup> 29 U.S.C. § 158(a)(3).

<sup>38</sup> See *Smith Co.*, 192 NLRB 1098, 1101 (1971) ("Union promises ... are easily recognized by employees to be dependent on contingencies beyond the union's control and do not carry with them the same degree of finality as if uttered by an employer who has it within his power to implement promises of benefits."). See also *Fleet Boston Pavilion*, 333 NLRB 655 (2001) (finding it unobjectionable that a union promised "during its campaign, to negotiate a collective-bargaining agreement that would base entitlement to work on the amount of time the employee had worked for the Employer"); *Acme Wire Prods. Corp.*, 224 NLRB 701 (1976) (finding it permissible for a union to promise that "having representation ... means having a written contract[,] which provides for elimination of merit reviews and a diversity of benefits, including job security, wage increases, a variety of health, welfare, and pension benefits, sick leave, and more holidays") (internal marks omitted).

<sup>39</sup> *Compare Plant City Welding*, 119 NLRB at 131 (finding that unions visiting the homes of employees does not interfere with employee free choice) with *F.N. Calderwood, Inc.*, 124 NLRB 1211 (1959) (noting that "regardless of whether remarks made were coercive in character, the technique by an employer visiting employees at their homes ... is grounds for setting aside an election") (emphasis added).

<sup>40</sup> See *Springfield Discount*, 195 NLRB 921 (1972) (union allowed to poll voting unit employees before an election).

<sup>41</sup> See, e.g., *Strengthening America's Middle Class*, *supra* note 9 (statements of Rep. Robert Andrews [D-NJ], Chairman, House Subcomm. on Health, Employment, Labor and Pensions; Nancy Schiffer, Assoc. General Counsel, AFL-CIO; and Ivo Camilo, Teresa Joyce and Keith Ludlum).

<sup>42</sup> See, e.g., *Strengthening America's Middle Class*, *supra* note 9, at 1 (statement of Harley Shaiken, Professor, University of California, Berkeley).

<sup>43</sup> In *Dana Corp.*, 351 NLRB No. 28 (2007), the Board recognized a 45-day window for employees to investigate and challenge a union's claim of majority status based on an employer's voluntary recognition of the union via card check. Under *Dana Corp.*, when an employer recognizes a union based upon a card check majority, the employer or union must notify the Board, and the employer must post a notice (provided by the Board) which informs employees of the employer-union recognition and of their right to file a decertification petition or support a rival union's election petition during the next 45 days. It is possible that the Board would extend the logic and application of its *Dana Corp.* decision to the EFCA's card check recognition process. However, given organized labor's strong resistance to *Dana Corp.* and the fact that President-elect Obama will soon be able to appoint a majority of Board members, we believe there is a good chance that the Obama Board will look to overrule or limit *Dana Corp.* rather than expand it.

comes to collective bargaining and its benefits and disadvantages. The EFCA would allow only unions to address employees in many cases, leaving them with only one side of the story. For a country that puts such a high value on free speech, it is surprising that Congress would silence employers and leave employees without an informed, meaningful choice.<sup>44</sup>

### Voting, Objections and Certification

The election itself is conducted by the Board and is decided by secret ballot, usually at the facility where eligible voters work. The Board administers the election by bringing portable voting booths, ballots and a ballot box to the workplace.<sup>45</sup> The election occurs outside the presence of any management representatives and campaigning by either side is not allowed in the voting area.<sup>46</sup> Each party may have observers at the polling location to assist the NLRB agent and observe the election process.<sup>47</sup> The observers or Board agent may also challenge the eligibility of any particular voter for good cause (e.g., if the individual is a supervisor or outside the voting unit).<sup>48</sup> Eligibility challenges must be made before the employee's vote is cast, and if so, the Board agent will impound the challenged votes until any underlying eligibility issues are decided by the Board. The election ballot will contain a single question regarding each union in the election: "Do you wish to be represented by [Union] for purposes of collective bargaining?"

To win, the union must receive a majority of eligible votes cast, not a majority of total eligible votes.<sup>49</sup> A tie goes to the employer.<sup>50</sup> Within five working days of the service of the tally of ballots by the Board,<sup>51</sup> either party may file election objections with the Board. The objections must involve either the conduct of the election or conduct by one of the parties allegedly affecting the election outcome.<sup>52</sup> The objections must be substantiated by objective proof—typically, sworn affidavits from interested parties.<sup>53</sup> The Board may dismiss or sustain the objections or, more likely, hold a hearing on the topic.<sup>54</sup> Any unfair labor practices filed by either party in connection with the election or organizing drive are often consolidated for hearing at this time as well.<sup>55</sup> The EFCA does not discuss whether or how the

parties might raise objections following the card check process. As a practical matter, even if the Board provides the employer with a limited period of time after counting the cards to object, the employer likely would not have access to necessary information if the union conducted the card collection in secrecy.

Although EFCA supporters criticize the protections afforded employees in the election process, in fact the Board vigorously investigates and remedies any employer misconduct. In addition, as outlined immediately above, various procedural safeguards are already in place to ensure that employees receive a wide berth at the polling place and that neither party may stuff the ballot box. The underlying data also does not support the claim that any problems are common or pervasive enough to justify a legislative bypass of the election process. In fiscal year 2006, of all the representation elections conducted by the Board, objections were filed in only 9.6% of cases.<sup>56</sup> That statistic *includes* objections filed by employers against unions for their campaign misconduct.<sup>57</sup> Moreover, the EFCA also imposes heightened penalties for employer (but not union) unfair labor practices during the campaign. While we do not agree with the underlying premise or the proposed solution, at least that approach appears more reasonably calibrated to address any perceived problems in this area than essentially eliminating the secret ballot election.

After any objections, challenged ballots or unfair labor practice charges are addressed, the Board will certify whether the union won or lost the election. If the union wins, then the employer must bargain with the union concerning the employees' wages, hours and other terms and conditions of employment.<sup>58</sup> If the employer wins the election, the union must wait 12 months before it can petition the Board again for an election in the same unit. However, the Board may set aside election results that it finds were tainted by employer misconduct and order a new election.<sup>59</sup> Moreover, if the Board determines that the employer committed unfair labor practices so severe that it would be impossible to hold a fair rerun election, it may

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<sup>44</sup> Noting this fact while testifying before the House on behalf of the Chamber of Commerce, Charles Cohen suggested that "[the EFCA] more accurately should be described as the Employee No Choice Act." *Strengthening America's Middle Class*, *supra* note 9, at 9 (statement of Charles I. Cohen, former NLRB Member).

<sup>45</sup> CASEHANDLING MANUAL II, *supra* note 29, at § 11304.3.

<sup>46</sup> *Id.* at § 11326.

<sup>47</sup> *Id.* at § 11310.

<sup>48</sup> *Id.* at § 11338.2(a).

<sup>49</sup> *Id.* at § 11340.4(a).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at § 11392.2.

<sup>52</sup> *Id.* at § 11392.1.

<sup>53</sup> *Id.* at §§ 11392.6, 11394.3.

<sup>54</sup> *Id.* at § 11395.

<sup>55</sup> *Id.* at § 11407.

<sup>56</sup> 71 N.L.R.B. ANN. REP. 148-49 (2006), available at [http://www.nlr.gov/nlr/shared\\_files/brochures/Annual%20Reports/Entire2006Annual.pdf](http://www.nlr.gov/nlr/shared_files/brochures/Annual%20Reports/Entire2006Annual.pdf).

<sup>57</sup> *Id.* at 149.

<sup>58</sup> While the employer cannot directly appeal union certification, it may test the validity of the certification by refusing to bargain with the union. The union will then file a refusal to bargain unfair labor practice, and the employer will have an opportunity to argue to the Board (and eventually a federal appellate court) that the certification is somehow flawed. NLRB, CASEHANDLING MANUAL, PART ONE, UNFAIR LABOR PRACTICE PROCEEDINGS §§ 10025, 10282 (2007), available at [http://www.nlr.gov/Publications/Manuals/ulp\\_casehandling\\_manual\\_\(I\).aspx](http://www.nlr.gov/Publications/Manuals/ulp_casehandling_manual_(I).aspx).

order the employer to bargain with the union even though the union lost. This exceptional measure, known as a *Gissel* bargaining order, will only be implemented if the union had demonstrated majority status at some point in the organizing drive.<sup>60</sup> The fact that the Board already has at its disposal a powerful tool to remedy serious infractions that also takes into account majority rule undercuts much of the proffered logic behind the EFCA's card check provision.

## Effect on Contract Negotiations

Perhaps the central genius of the NLRA is that it requires the parties to define the contours of their working relationship on a case-by-case basis. It does not require that the parties reach agreement nor does it set the terms of any such agreement.<sup>61</sup> Rather, the NLRA requires that the parties negotiate in good faith and provides each side with various economic weapons if needed to spur a resolution.<sup>62</sup> As a result, when the parties do reach an accord, it is the result of negotiated compromises based on their respective priorities and bargaining leverage. When Congress passed the NLRA, it was careful not to compel the parties to reach an agreement. As the Supreme Court recognized, "allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the NLRA is based – private bargaining under governmental supervision of the procedures alone, without any official compulsion over the actual terms of the contract."<sup>63</sup> However, the EFCA represents a sea change in the law in this area, drawing an unnatural distinction between initial contract negotiations and bargaining for successive contracts. Since initial contract negotiations tend to set the tone of the future relationship between employer and union,<sup>64</sup> this change is particularly troubling.

Under the EFCA, once a union is certified by the Board and sends a letter to the employer demanding negotiations, the employer would have ten days to respond and begin bargaining for an initial contract.<sup>65</sup> If the parties cannot reach agreement within 90 days, either side may refer the issue to the Federal Mediation and Conciliation Service

("FMCS") and request mediation.<sup>66</sup> If the parties still cannot come to an agreement after 30 days of mediation, the dispute will be referred to an arbitration board appointed by the FMCS.<sup>67</sup> The arbitration board will then determine the terms of the contract, which will be binding on the parties for two years unless the parties agree otherwise in writing. This process, known as interest arbitration, is currently utilized by only a small minority of employers in private industry.<sup>69</sup>

We see several serious problems with the EFCA's interest arbitration provision. First, it discourages unions from bargaining in good faith. Given the choice of arm's-length bargaining with an employer concerned about running its business or having initial contract terms set by a third party, we have no doubt that many unions will opt for the latter. Moreover, if an arbitration panel were tempted to find a middle ground (particularly on economic terms), the EFCA may reward unions for setting outrageous demands. Conversely, to avoid arbitration, employers may hastily agree to terms that prove harmful to their businesses. In any of these scenarios, unions could end up with more favorable terms from the arbitration than are warranted based on business conditions and bargaining leverage.

Second, the EFCA critically fails to set out how arbitration would be accomplished. As a former director of the FMCS (and one-time Board Chairman) recently acknowledged, the bill does not provide the FMCS any guidance on how to set up the arbitration board.<sup>70</sup> The bill provides only that the FMCS "shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the [FMCS]."<sup>71</sup> "Thus, it leaves the FMCS to guess at whether it should establish the procedural aspects only or the substantive rules for setting contract terms as well. Another unaddressed issue is how the arbitration board would reach decisions – by aiming to find a middle ground, employing a "final offer" approach or via some other method?<sup>72</sup> In addition, the EFCA is silent on what factors the board should weigh in its decision. Would it consider the employer's financial condition, compensation provided by competitors, local cost of living, or some other data? Non-economic contract terms raise a whole additional set of concerns.

<sup>59</sup> CASEHANDLING MANUAL II, *supra* note 29, at § 11436.

<sup>60</sup> *Gissel Packing*, 395 U.S. at 602.

<sup>61</sup> 29 U.S.C. § 158(d).

<sup>62</sup> For the employer, those weapons include the right to impose its last, best contract offer if negotiations reach impasse and the right to lock out employees. Conversely, the union (via the employees it represents) has the right to call a strike or other work stoppage, as well as to picket and handbill. See, e.g., 29 U.S.C. § 163; *N.L.R.B. v. Truck Drivers Union, Local No. 449*, 353 U.S. 87, 92-93 (1957).

<sup>63</sup> *H.K. Porter Co. v. N.L.R.B.*, 397 U.S. 99, 108 (1970).

<sup>64</sup> See CHARLES LOUGHRAN, *NEGOTIATING A LABOR CONTRACT: A MANAGEMENT HANDBOOK* 458-59 (2nd ed. 1992).

<sup>65</sup> EFCA § 3.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> ROBERT'S DICTIONARY OF INDUS. RELATIONS 50 (4th ed. 1994).

<sup>70</sup> Peter J. Hurtgen, Remarks at "Labor Law Under the New Administration" Panel Discussion at New York University School of Law (Nov. 21, 2008).

<sup>71</sup> EFCA § 3.

<sup>72</sup> Final offer arbitration (also known as "baseball" arbitration) is a process by which each party submits a proposed monetary award to the arbitrator. The arbitrator is required to choose one award without modification. This approach imposes limits on the arbitrator's discretion and gives each party an incentive to offer a reasonable proposal, in the hope that it will be accepted by the decision-maker. A related concept, known as "night baseball" arbitration, requires the arbitrator to make a decision without the benefit of the parties' proposals and then to make the award to the party whose proposal is closest to that of the arbitrator. ODR/ADR Dictionary, "Final Offer Arbitration," <http://iboinstitute.org/mod/glossary/view.php?id=64&mode=date> (last visited Dec. 31, 2008).

While having an external party set collective bargaining contract terms is undesirable, it is feasible that the FMCS could formulate some standards to ensure that arbitration boards arrive at reasonable economic terms. But the boards would be operating in the dark each time with respect to non-economic terms. These crucial terms, which include but are by no means limited to scheduling, seniority, layoff and recall, subcontracting, dispute resolution and discipline and discharge, largely define the parties' unique working relationship. Only the parties can meaningfully strike the delicate balance between economic and non-economic terms reflected in the ultimate agreement.

Third, the EFCA does not provide any method for appeal of the arbitration panel's decision. Instead of allowing management and labor to work out their differences and reach a compromise, the EFCA puts all the power to set final wages and terms of employment in the hands of unaccountable government officials. Not only is that approach likely harmful to business interests, but it directly contradicts the intent and decades of experience under the NLRA.

A constitutional argument may offer some hope for employers on this aspect of the EFCA. Because the U.S. Constitution vests Congress with all legislative powers,<sup>73</sup> the Supreme Court has developed the non-delegation doctrine, which prohibits the legislative delegation of rule making authority to any other entity.<sup>74</sup> The Court has recognized that there are some instances where complexity or congressional lack of expertise necessitates the delegation to other agencies better equipped to promulgate subordinate rules.<sup>75</sup> However, "when Congress confers [such] decision-making authority upon agencies, Congress must lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform."<sup>76</sup> In other words, Congress must provide the agency with standards beyond just basic policy goals. "An unconstitutional delegation of legislative power occurs when the Legislature confers upon an administrative agency unrestricted authority to make fundamental policy decisions... The doctrine prohibiting delegations of legislative power does not invalidate reasonable grants of power to an administrative agency, when suitable safeguards are established to guide the power's use and to protect against misuse."<sup>77</sup>

Courts across the country have found that mandatory interest arbitration provisions are not in themselves unconstitutional.<sup>78</sup> However, in order to pass muster under the non-delegation doctrine, the implementing legislation must set out standards by which the arbitrator is to make decisions. The EFCA fails to provide such guidance or set forth an intelligible principle. It directs the FMCS to compose an arbitration board but does not expressly provide whether the FMCS should merely develop the procedural aspects of convening a board or whether it should develop substantive rules on the board's decision-making power. Furthermore, it fails to constrain the FMCS' rule-making authority. For all of these reasons, it is possible that the interest arbitration provision in the current version of the EFCA would not survive constitutional scrutiny.

## Stiffer Penalties for Employers

As discussed above, the NLRA currently forbids a broad range of employer conduct and speech during an organizing drive and election campaign. Although EFCA proponents portray current remedies available to the Board as toothless,<sup>79</sup> in fact the Board has a number of tools at its disposal, including "make whole" remedies for aggrieved employees (reinstatement and back pay),<sup>80</sup> posting requirements,<sup>81</sup> the authority to order a new election<sup>82</sup> and even *Gissel* bargaining orders in extreme cases.<sup>83</sup> Nevertheless, the EFCA proposes to significantly broaden the Board's enforcement power against employees. The bill allows the Board to seek a mandatory injunction for any unlawful employment practices that take place during the organizing process and during first contract negotiations.<sup>84</sup> It also provides treble back pay damages for an employee discriminated against or discharged in retaliation for union activity and allows for civil penalties of \$20,000 per violation against employers found to have willfully or repeatedly violated employee rights during an organizing campaign or initial contract negotiations.<sup>85</sup> At the same time, the EFCA does not provide for any increased penalties or remedies against a union that commits unfair labor practices against the employees or the employer. While proponents claim that the EFCA is meant to protect employees from intimidation or harassment in their representation choice, it fails to provide a deterrent against union authorization card abuses despite the heightened significance placed on cards.

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<sup>73</sup> U.S. CONST. art. I, § 1.

<sup>74</sup> *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935).

<sup>75</sup> *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935).

<sup>76</sup> *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 473 (2001).

<sup>77</sup> *Hess Collection Winery v. Agricultural Labor Relations Bd.*, 140 Cal. App. 4th 1584, 1604 (Cal. Ct. App. 2006).

<sup>78</sup> See generally *id.*; *Superintending Sch. Comm. of Bangor v. Bangor Ed. Assoc.*, 433 A.2d 383 (Me. 1981); *City of Spokane v. Spokane Police Guild*, 553 P.2d 1316 (Wash. 1976).

<sup>79</sup> See, e.g., *Specter & Nguyen*, *supra* note 2, at 311, 317.

<sup>80</sup> 29 U.S.C. § 160(c).

<sup>81</sup> *Fieldcrest Cannon, Inc.*, 318 NLRB 470 (1995).

<sup>82</sup> CASEHANDLING MANUAL II, *supra* note 29, at § 11436.

<sup>83</sup> See *Gissel Packing*, 395 U.S. at 610-13.

<sup>84</sup> EFCA § 4.

<sup>85</sup> *Id.*

## The Legislative Road Ahead

Although we believe that the EFCA is likely to pass in some form in the near future, the concerns we raised above leave us hopeful that Congress will revisit some or all of those issues before putting the EFCA up for a vote again. As united as organized labor has been in support of the EFCA, the extreme nature of the legislation has similarly galvanized employers and business advocates.<sup>86</sup> In addition, the Democrats came close in the 2008 elections but did not obtain the 60 seats needed in the U.S. Senate to prevent a Republican filibuster. We believe that development also increases the likelihood of compromise on the final bill. However, even if these efforts are successful in taking the sting out of the most radical changes in the EFCA, we still expect that the bill that eventually reaches the President's desk will represent the most significant changes to American labor law in decades.

We are also monitoring the potential effect that the push to enact the EFCA would have on individual states' labor laws covering their public employees. Currently, at least ten states have legislated card check provisions for union certification for public employees.<sup>87</sup> Other states have recently brought forth such legislation or have implemented it within specific industries.<sup>88</sup> If the EFCA were to pass as currently drafted, it would likely embolden efforts to replicate it on the state level, at least in the short term. Conversely, if attempts to amend or defeat the EFCA were successful, employers and their allies may have more ammunition in the state-level battles. At the very least, the attendant debate should highlight for the states the inherent risks and flaws in the current bill.

## Practical Tips

The open questions surrounding the EFCA – including whether or not it will pass as written or with amendments – put attentive employers in a difficult position. While we encourage employers to seek legal advice tailored to their specific situations, we also offer the following suggestions to consider:

- Although the precise factors that lead any particular workforce to seek union representation vary, concerns regarding compensation and treatment by management are frequently important drivers. Prudent employers should review their wages and fringe benefits to ensure they are market competitive. Employers should also make sure they understand and address any issues with rogue supervisors (e.g., lack of communication or respect, perceived favoritism, etc.) and provide employees with an open channel to human resources or other appropriate avenues to express concerns.
- Employers should review personnel policies concerning solicitation and distribution to ensure that the policies apply recent Board precedent to maximum effect. For instance, in December 2007, the Board clarified that employees may generally be prohibited from using their employer's e-mail system for union solicitations.<sup>89</sup> Considering the extent to which the EFCA threatens to further tilt the playing field in unions' favor, employers should not make organizing any easier.
- As we noted above, the EFCA would reward unions that conduct clandestine card collection efforts. In order to maximize their chances of effectively responding to organizing drives, employers should consider management training (initial or refresher) on how to spot common signs of an organizing drive and where to internally report such information promptly.

<sup>86</sup> Steven Greenhouse, *Unions Look for New Life in World of Obama*, N.Y. TIMES, Dec. 29, 2008, available at <http://www.nytimes.com/2008/12/29/business/economy/29labor.html?ref=business>; Michael Mishak, *Businesses Scurry to Build Defenses for Possible Unionizing Onslaught*, LAS VEGAS SUN, May 5, 2008, available at <http://www.lasvegassun.com/news/2008/may/05/businesses-scurry-build-defenses-possible-unionizi/>; Thomas J. Donohue, *Employee Free Choice Act Crushes Worker's Right to Cast Secret Votes*, U.S. CHAMBER OF COMMERCE, Aug. 31, 2008, [http://www.uschamber.com/press/oped/080831\\_cardcheck.htm](http://www.uschamber.com/press/oped/080831_cardcheck.htm); American Rights at Work, *Wal-Mart Mobilizing against the Employee Free Choice Act*, <http://www.americanrightsatwork.org/employee-free-choice-act/latest-updates/wal-mart-mobilizing-against-the-employee-free-choice-act-20080801-605-83-83.html> (last visited Dec. 31, 2008); Jonathan Tasini, *Boycott McDonald's: Every Big Mac Eaten Attacks Workers*, THE HUFFINGTON POST, Dec. 10, 2008, available at [http://www.workinglife.org/blogs/view\\_post.php?content\\_id=10781](http://www.workinglife.org/blogs/view_post.php?content_id=10781).

<sup>87</sup> The states with card check provisions for public employees are New York, Illinois, New Jersey, New Hampshire, Oregon, Massachusetts, California, New Mexico, Utah, and Minnesota. *Card Check Recognition in the Public Sector*, <http://www.kentlaw.edu/faculty/mmalin/classes/PublicSectorSp08/CourseDocs/CARD%20CHECK%20RECOGNITION%20IN%20THE%20PUBLIC%20SECTOR.pdf> (last visited Dec. 23, 2008); Iowa Federation of Labor, *Massachusetts Public Workers Get Card Check Bill Signed*, POLITICAL ACTION UPDATE, Oct. 30, 2007, [http://www.iowaafclio.org/vol\\_07-24.htm](http://www.iowaafclio.org/vol_07-24.htm); California Labor Federation, *Our Issues – Organizing Majority Sign-up, or “Card Check”*, <http://www.calaborfed.org/issues/organizing/msu.html> (last visited Dec. 23, 2008) (noting that “[i]n California, public sector employees already have the right to majority sign-up”); United Steel Workers, *Common Questions and Answers on Card Check*, <http://legacy.usw.org/usw/program/content/3122.php> (last visited Dec. 23, 2008) (noting that many “states, such as California, Illinois and New Mexico, have card check for their public sector workers”); Henry H. Drummonds, *The Union Authorization Debate*, LABOR LAW J., Dec. 1, 2007, available at <http://www.allbusiness.com/government/government-bodies-offices-regional/local/8891307-1.html> (noting that, among other states, Utah, Massachusetts, and Minnesota permit majority authorization procedures, as they allow for “any suitable method” to ascertain whether union representation is appropriate).

<sup>88</sup> Bureau of Nat'l Affairs, *Hawaii Governor Vetoes Card-Check Bill*, DAILY LABOR REPORT, No. 74, April 17, 2008, p. A9, available at <http://manoa.hawaii.edu/irc/May%202008%203.pdf> (noting that the Hawaiian bill “would have allowed agricultural workers and some small business employees to use a card-check procedure instead of using secret ballot election procedures to choose union representation”); Nathan Newman, *Extend Union Rights to Additional Employees: “Mediated Elections,”* PROGRESSIVE STATES NETWORK, Sept. 12, 2008, <http://www.progressivestates.org/node/21963> (noting that “[i]n New York and California already have the ability to join unions through card check and employer neutrality agreements, ... Illinois airport workers have the right to card check elections,” and in California, AB 2386 “proposes a new process that allows farm workers to quickly vote by mail with two choices on the ballot to directly vote for the union on the ballot or to vote for a more traditional union election later”); AFL-CIO, *Expanding Workers' Collective Bargaining Rights*, <http://www.afclio.org/issues/legislativealert/stateissues/upload/expanding.pdf> (last visited Jan. 1, 2008) (noting that Washington, Maryland, and Oklahoma have implemented majority authorization procedures in particular industries).

<sup>89</sup> See Guard Publ'g Co., 351 NLRB 70 (2007).

- Given the likelihood of increased organizing activity under the EFCA, employers should also consider management training on labor law basics, including “do’s” and “don’ts” for front-line supervisors potentially confronted with employee questions and requests. Businesses familiar with other employment laws but new to the NLRA often find some aspects of compliance counterintuitive, such as the limitations on employer speech and conduct during an organizing drive.
- We have already assisted several clients with respect to inquiries from the press, employees or investors regarding the EFCA. Employers concerned about presenting a lawful, consistent response to such queries should consider discussing the issue with legal counsel and their public relations representatives.

Check the K&L Gates website for updates on the EFCA and other employment initiatives as the Obama administration and the 111<sup>th</sup> Congress get underway.



**Author:**

Mark S. Filipini  
mark.filipini@klgates.com  
+1.206.370.8111

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Rosemary Alito  
rosemary.alito@klgates.com  
+1.973.848.4022

Patrick M. Madden  
patrick.madden@klgates.com  
+1.206.370.6795

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