

Employee Free Choice Act and its Effect on Colorado Employers and Employees

I. Overview of EFCA

A. *Current State of Labor Law*

America's labor laws are grounded in the principle that workers should have the freedom to decide whether to bargain collectively with their employers. Under current law, union organizers can request a representation election once 30 percent of a company's workers show interest in having an election to decide if they want a union to represent them. These elections usually take place within 39 days after the NLRB receives and certifies authorization cards requesting such an election.

Once a majority of employees vote for union representation and the NLRB certifies the union as the employees' exclusive representative, the employer and the union begin negotiating a collective bargaining agreement. Through a process of mutual give and take, the two sides reach an agreement over wages and working conditions.

A company may voluntarily agree to recognize a union if union organizers can present authorization cards signed by a majority (50% plus 1) of the company's workers. Unions find it much easier to sign up workers through the use of authorization cards, especially when workers are requested to make that choice in public. However, as the Supreme Court affirmed in *NLRB v. Gissel Packing Co.* (1969), publicly signed cards are "inherently unreliable," and a company may always request a private vote to confirm that its employees actually want to unionize. Companies usually insist on giving their workers the privacy of the voting booth and refuse to recognize unions without a NLRB supervised election.

B. *Three Pertinent Provisions of the Employee Free Choice Act (EFCA)*

The Employee Free Choice Act would amend the federal labor law, the National Labor Relation Act, in three significant ways:

1. "Card Check:" The EFCA would require the National Labor Relations Board to certify a union after a majority of a firm's workers has signed authorization cards, virtually putting an end to secret ballot representation elections. The proposed Act states: "If the [National Labor Relations] Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations...the Board *shall not direct an election* but shall certify the individual or labor organization."

2. **“Mandatory Interest Arbitration:”** The EFCA would require companies and newly certified unions to enter binding arbitration if they cannot reach agreement on an initial contract after 90 days of negotiations and 30 days of mediation. Neither companies nor employees have the right to appeal the arbitrator's ruling, and the contract would last for two years.

3. **“Employer Penalties:”** The EFCA would dramatically increase the penalties for unfair labor practices committed by employers, but not unions, during an organizing drive.

II. Points of Concern for Colorado Employers and Employees

A. “Card Check”

As stated above, this provision allows for certification of a union as the bargaining representative if the National Labor Relations Board finds that a majority of employees in an appropriate unit has signed authorizations designating the union as its bargaining representative. The bill requires the Board to develop model language for the authorization cards and procedures for establishing the validity of signed authorizations. This is the provision from which the nickname for the bill, “card check” originates.

Points of Concern

- *Abolishing elections deprives workers of a fundamental democratic right. Elections guarantee that all workers can express their views on whether they wish to be represented by a union. Under card check, however, workers who have not participated in a card check, perhaps because they were simply not contacted by union organizers, have no say in whether their workplace organizes.*
- *If organizers collect cards from a majority of workers, 100% of the workers in that unit would be represented by the union without a vote.*
- *Equally important, a democratic election with private ballots ensures that all workers can express their desires without fear of social stigma or retribution.*
- *With a card check system, such as that proposed in the EFCA, employees would be deprived of the benefit of information that is now provided by an employer following the filing of a petition for a secret ballot election.*
- *If employees wish to decertify the union, they must follow the traditional secret ballot election process; card check is not made available for decertification.*

- *The rationale for the EFCA, including lengthy election proceedings and employer misconduct, is not borne out by the facts: The median time from the filing of a petition to an election in 2007 was 39 days; Unions file very few objections to employer conduct in cases where employers win the election; a remedy already exists for employer misconduct that prevents a free and fair election; and finally, the success rate of unions in NLRB elections was 59.2% in 2007, indicating that the secret ballot election process has actually served both the unions and employees well.*
- *It has been established through court cases, precedent under the NLRA, and testimony of former union organizers that the card check process of obtaining signatures is routinely characterized by harassment, intimidation, and coercion, including employees being threatened in their homes and other locations away from the workplace.*

B. "Mediation and Interest Arbitration"

This provision of the EFCA provides that if an employer and a union are engaged in bargaining for their first contract and are unable to reach agreement within 90 days, either party may refer the dispute to the Federal Mediation and Conciliation Service (FMCS) for mediation. If the FMCS is unable to bring the parties to agreement after 30 days of mediation the dispute will be referred to arbitration and the results of the arbitration are binding on the parties for two years. Time limits may be extended by mutual agreement of the parties.

This provision would result in contracts being written by federal arbitrators instead of through the process of collective bargaining and negotiating.

Points of Concern

- *The Employee Free Choice Act would shift the balance of power in negotiations by removing the negotiation to a government appointed arbitrator after 90 days of bargaining and 30 days of mediation efforts.*
- *The EFCA puts control of wages and working conditions in the hands of a government appointed arbitrator without the benefit of guidance or the criteria that should be considered in determining appropriate contract terms.*
- *Arbitrators do not have to live with the consequences of their decisions and once they have made their ruling there is virtually no accountability for those decisions through appeal processes.*
- *An ill-conceived arbitrator's award can have severe consequences for both communities and employees.*

- *Competition in the free market means that if an arbitrator miscalculates and raises wages too high, a company cannot raise its prices to compensate for the decision without the risk of losing customers and going out of business.*
- *Under the EFCA employees cannot terminate the arbitration process; cannot vote down a contract; cannot vote to strike if they wish to reject the arbitrator's ruling; and cannot decertify during the two year contract term that an arbitrator may impose.*
- *Unlike binding arbitration, with collective bargaining, both sides have a stake in making the final agreement work.*

While the card check provision has received most of the attention in the media, this provision is regarded as equally troublesome to business.

C. "Employer Penalties"

EFCA provides for stronger penalties for violations while employees are attempting to organize or obtain a first contract. The following new provisions apply to violations of the National Labor Relations Act committed by employers against employees during any period while employees are attempting to organize a union or negotiate a first contract with the employer:

- Mandatory Applications for Injunctions:** Provides that just as the NLRB may seek a federal court injunction against a union whenever there is reasonable cause to believe that the union has violated the secondary boycott prohibitions in the Act, the NLRB may seek a federal court injunction against an employer whenever there is reasonable cause to believe that the employer has discharged or discriminated against employees, threatened to discharge or discriminate against employees, or engaged in conduct that significantly interferes with employee rights during an organizing or first contract drive. Authorizes the courts to grant temporary restraining orders or other appropriate injunctive relief.
- Treble Back pay:** Increases the amount an employer is required to pay when an employee is discharged or discriminated against during an organizing campaign or first contract drive to three times back pay.
- Civil Penalties:** Provides for civil fines of up to \$20,000 per violation against employers found to have willfully or repeatedly violated employees' rights during an organizing campaign or first contract drive.

This component of the Employee Free Choice Act has received the least attention. Section 4 dramatically increases the penalties against employers for unfair labor practices conducted during an organizing drive and requires the NLRB to prioritize investigation of those cases. Currently, when an employer illegally discriminates against a worker for supporting a union during an organizing campaign, the law requires the employer to provide that worker full back pay.

Points of Concern

- *The EFCA would require the employer to provide triple back pay and would add a civil penalty of up to \$20,000 for most unfair labor practices committed by employers during organizing drives.*
- *It would also require the NLRB to give preliminary investigation of those unfair labor practices "priority over all other cases."*
- *The EFCA would not, however, increase penalties for unfair labor practices committed by unions against either workers or businesses.*
- *By increasing penalties against only employers, the EFCA sends the message that there are disparate standards of conduct for threats and coercion and that union threats are less of an injustice than employer threats. Prioritizing cases of employer discrimination forces workers who face union intimidation to wait longer for justice.*
- *If Congress believes stiffer labor law penalties are needed to counter the prospect of threats and coercion, those higher penalties should apply equally to employers and to unions. Cases of union violence and employer intimidation should have equal priority.*

III. Effect of EFCA on Colorado Labor Peace Act

A. Colorado Labor Peace Act (CLPA)

Union/ Employer relations are generally governed by federal law. The one area which the NLRA gives to the States to regulate is the subject of "union security agreements." Union security agreements are very important to unions because they require all employees in the bargaining unit to join the union or pay agency fees in order to work for the employer. With a union security agreement in place, a union does not have to convince employees to voluntarily pay dues because it has been made a condition of their employment. In the absence of a union security agreement, an employee cannot be forced to pay union dues or fees in order to keep their job. In other words, the employee has the "right to work", regardless of whether he or she is a member of the union or a financial fee payor to the union. Currently, twenty-two states have "right to work" laws, prohibiting the inclusion of union security agreements in union contracts in those states.

Colorado has a "modified" right to work law, passed in 1943. The main impact of the Colorado Labor Peace Act is that it provides a specific process—a secret ballot vote- that must be complied with before allowing a union security agreement (called an "all-union agreement") in a contract between the employer and union which would force an employee to pay union dues or agency fees to the union. In order for a union to negotiate a union security clause, it must satisfy the requirements of the Colorado Labor Peace Act. The requirements of the Labor Peace Act are

an affirmative vote of seventy-five percent of those voting or a majority of the eligible employees in the bargaining unit. If the union does not petition for this election or they do not get the necessary votes, then there can be no union security clause in the contract.

B. Implications of EFCA on CLPA

The EFCA, if passed into law as proposed, does not affect a state's power to enact "right to work" laws and will not eliminate the requirements of the CLPA. While the union would be able to organize employees using the majority card check method under the EFCA, e.g., without a secret ballot election, employees will still have their right to a secret ballot election under the Colorado Labor Peace Act. Again, in Colorado, if the union is intent on getting a union security agreement into the contract, it must petition for a state Labor Peace Act election. If it does not petition for the election and win 75% of the votes from employees, there will be no union security clause in the contract.

Under current law, even if the union wins the Labor Peace Act election, (i.e., 75% of employees who vote or a majority of the employees eligible to vote, approve a union security agreement) the employer is still not obligated to agree to union security. An employer may decide that it does not want to bind current and future employees to compulsory dues and that it would be detrimental to its recruitment and retention of employees. However, under the EFCA, if the parties do not reach an agreement on all issues after bargaining for 90 days, either party will have the right to request mediation leading to interest arbitration. In that interest arbitration, union security is one of the terms the arbitrator may unilaterally impose on the employer and employees, *provided the union was successful in the Labor Peace Act election.** Just as interest arbitration gives arbitrators the ultimate power to control wages and working conditions that end up in the contract, so will they have the authority to impose a union shop on all employees and make financial support for the union a term and condition of employment.

*If the union was not successful in the Labor Peace Act election or did not petition for an election, an arbitrator called in for interest arbitration under the EFCA would have no authority, under the state Labor Peace Act, to impose union security as a term of the parties' contract.

IV. Public Opinion and Perception of EFCA

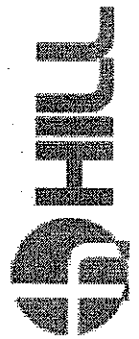
Surveys from across the country show that American voters overwhelmingly support a workers right to a secret ballot election. Opposition to the Employee Free Choice Act is widespread among voters across the country regardless of party affiliation and actually increases among union members themselves.

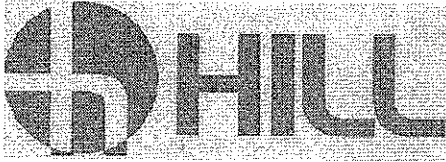
- *87 percent of Americans support a federally supervised secret ballot election to decide unionization.*
– *McLaughlin & Associates, 2007*
- *75 percent of the public supports secret ballot elections over EFCA rules.*
– *Opinion Research Corporation, 2006*

- *77 percent of voters in Maine, 72 percent of voters in Colorado, and 72 percent of voters in Minnesota support secret ballot elections over EFCA rules.*
– *McLaughlin & Associates, 2008*
- *The majority of voters in Louisiana (63%), two-thirds of New Hampshire voters (68%), and seven in ten New Mexico voters (72%) oppose Congress' "Employee Free Choice Act".*
– *Coalition for a Democratic Workplace, 2008*
- *Among union households, opposition to the legislation increases to 68% in Louisiana and to 76% in New Mexico. Union household opposition to the EFCA in New Hampshire remains consistently high at 69%.*
– *Coalition for a Democratic Workplace, 2008*

Background

- Methodology
 - Statewide sample of 734 registered voters
 - Interviews conducted December 8th-11th, 2008
 - Typical interview took approximately 21 minutes
 - Margin of error of $\pm 3.6\%$ for 734 cases
- Contributors
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SEVENTH DRAFT; CODM1281; n=500 likely voters+ 234 RTD; Field 12/6-8/08

Colorado statewide voter opinion poll

23. If changes were made in Colorado's laws regulating labor unions, should state laws be: [READ & ROTATE ORDER]

- MORE ENCOURAGING TO UNION FORMATION? 1... 1
- LESS ENCOURAGING TO UNION FORMATION? 2... 2
- [DO NOT READ]
- NEITHER/LEAVE UNCHANGED..... 7... 7
- UNSURE 8... 8
- REFUSED 9... 9

24. If an employee election were to be held to decide whether workers should organize a union, which one of the following types of elections do you think would be better? [READ & ROTATE ORDER]

Having a process where a union is organized if a majority of workers sign a card and the workers' signatures are made public to the employer, co-workers and union organizers
OR

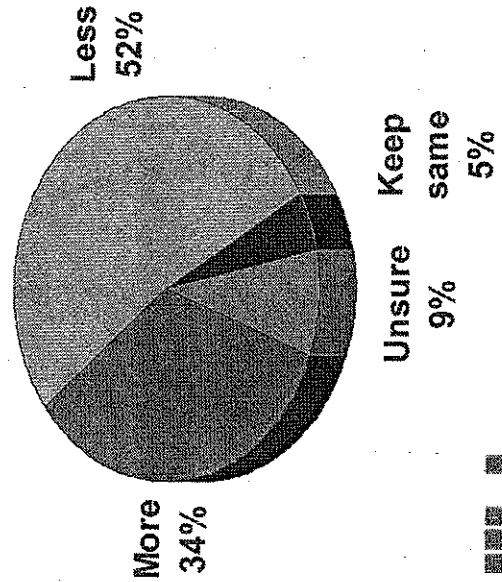
Having a federally-supervised secret ballot election where workers privately vote yes or no on whether to organize a union.

- SIGN CARD/SIGNATURES PUBLIC TO ALL..... 1... 1
- FEDERALLY SUPERVISED SECRET ELECTION/PRIVATE 2... 2
- [DO NOT READ]
- NEITHER..... 7... 7
- UNSURE 8... 8
- REFUSED 9... 9

Labor relations

- Colorado public clearly leans against greater workforce unionization and towards maintaining a private, secret labor organizing ballot

Changes to state labor laws should be...
MORE encouraging to union formation; or
LESS encouraging to union formation?



Best type of union organizing election
majority of workers sign CARD, signatures made PUBLIC to employer, co-workers and labor organizers; or
federally-supervised SECRET ballot where workers PRIVATELY vote whether to organize union?

