



# The EFCA, Organized Labor's Legislative Agenda and Its Impact on Your Business

Insights

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Organized labor's membership in the private sector has plummeted below 8 % – an all time low. To address this problem, unions have turned to an aggressive legislative agenda designed to tilt the scales in their favor. Among the items on their priority list are the Employee Free Choice Act (EFCA) and the Re-Employment of Skilled and Professional Employees and Construction Tradeworkers Act (RESPECT Act).

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## **The EFCA**

At the top of labor's wish list is EFCA, a bill that would radically alter 75 years of labor law governing the representation rights of employees. Specifically, EFCA would fundamentally change three critical aspects of the National Labor Relations Act (NLRA) by:

- providing for the elimination of NLRB-supervised secret ballot elections in favor of "card check," thereby enabling unions to organize employees merely by convincing or coercing a majority of them to sign authorization cards;
  - changing the rules of bargaining by imposing mandatory interest arbitration on those parties who fail to reach an agreement on their own within 130 days; and
  - subjecting employers to substantially increased penalties and remedial relief.
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## **The RESPECT Act**

The RESPECT Act is an effort to narrow the scope of individuals who would be considered "supervisors" under the NLRA. If passed, it would substantially reduce the number of employees considered supervisory, thereby increasing the number of employees eligible for union representation. From a practical standpoint, the RESPECT Act would also decrease the number of employees permitted to campaign on behalf of the employer in response to a union organizing effort.

In the wake of President-elect Obama's victory, the business community has been flooded with recommendations on how best to respond to these proposed pieces of legislation. Some suggestions

may appear to be severe and even cost-prohibitive. At this stage, however, it remains to be seen whether these provisions will become law as proposed or whether compromise bills will be crafted and signed into law. We recommend a balanced approach, taking into account lingering uncertainty in the legal landscape and the unique challenges presented by the current economic climate.

Regardless of whether some or all of these bills become law, one thing remains clear: employers can anticipate a surge in organizing activity in the first months of an Obama Presidency. Should the card check provisions of EFCA become law, those employers who are ill-prepared could wake up to find their employees unionized by a reinvigorated labor movement.

Consequently, all employers are best served by acting now to prepare for the onset of stealthy, but aggressive, card-signing efforts. Those who choose to wait until the legislation is actually passed may find that they are too late to adequately protect their organizations. Employers should pursue a proactive strategy designed to inoculate and educate employees long before the initial signs of union activity. Fortunately, time remains for concerned employers to prepare adequately by rolling out their plans through a structured approach, as outlined in this document.

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## **Practical Effects of EFCA**

Until now, an employer "blind-sided" by an underground organizing campaign could respond during the ensuing six-week "campaign" period, during which time it remained free to educate employees on the risks of union representation prior to a secret-ballot election. But in the wake of EFCA ill-prepared employers could suddenly find themselves unionized without so much as a single ballot cast. A drastically streamlined representation process would substantially compromise employers' ability to counter organizing through an informational communications campaign.

1. **Limited Time to Respond:** If EFCA passes, unions will step up their efforts to utilize secretive card-signing campaigns. This tactic, if left unchecked, would short circuit employer efforts to furnish information explaining the benefits of remaining union free. The employees would be making their decision with only the union's side of the story.
2. **Union Pressure:** Card-check will enable unions to utilize peer pressure and other forms of coercion to intimidate employees into signing cards, even though they may not actually desire third party representation.
3. **Loss of Bargaining Rights and Interest Arbitration:** If a union successfully organizes your business, a third party arbitrator could decide the terms and conditions of any resulting collective bargaining agreement. If employers don't like those terms, or worse, cannot make them economically viable, they would have little if any recourse, short of legal challenges on Constitutional grounds.

4. **Guaranteed First Contracts:** Another practical effect of EFCA is that employers will either have to agree to first contracts or risk having one imposed by an arbitrator. Regardless of *how* employers get saddled with first contracts, EFCA will require such contracts to stay in place for a minimum of two years.
  5. **Enhanced Penalties:** Mandatory penalties of up to \$20,000 per violation, applicable only to employers, could provide labor with a decisive advantage from the standpoint of regulatory enforcement. Compulsory injunctive relief would provide additional leverage. Taken together, these penalties threaten to drive up the cost of litigation during difficult economic times and would certainly encourage unions to file more frivolous unfair labor practice charges as a pressure tactic.
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### **Practical Effects of the RESPECT Act**

1. **Loss of Supervisors as Employer Advocates:** Many employees traditionally considered supervisory would no longer be classified as such and therefore could not be utilized to counter union organizing efforts.
  2. **Supervisors as Union Advocates:** Those same supervisors would now be legally authorized to sign authorization cards and to solicit and encourage others to do the same.
  3. **Imposing Discipline:** Once organized, employers would be negotiating for a collective bargaining agreement that encompasses the terms of supervisory and subordinate employees alike, thereby compromising the ability of supervisors to enforce those terms against their co-workers.
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### **Status of the Current Legislation**

The EFCA was initially introduced as H.R. 800 in early 2007, with 235 congressional co-sponsors. Just one month later, it was passed by the House of Representatives on a vote of 241 to 185. By late March of that year, it was presented to the Senate as S. 1041, with 46 co-sponsors. The Senate Republicans announced a filibuster and the EFCA ultimately fell nine votes short of the 60 required for a cloture vote to end the filibuster.

On March 10, 2009, the bill was reintroduced in both houses of Congress, with 40 cosponsors in the Senate, and 223 in the House. Organized labor claims to possess substantial majority support in both houses of Congress, and Democrats are hoping for a vote later this spring.

Others, however, insist that a large number of "blue dog" Democrats are waffling under pressure from their constituents, and it remains to be seen whether the bill has sufficient support to survive another filibuster. A stagnating economy in unionized sectors and elsewhere, along with widespread

another industry. A stagnating economy in unionized sectors and elsewhere, along with widespread reports that the American public has concerns over the card-check provisions, are said to be giving many politicians second thoughts.

The EFCA could ultimately become law in a compromised form. The process is volatile, and no one knows exactly when it will be resolved. Some believe that it could play out over the summer and into next fall. Others claim that its passage is more imminent. But one fact remains clear – the bill is now one step closer to becoming a reality, and the window is closing on opportunities to get out in front of it while there is still time.

The RESPECT Act was introduced in both the House and the Senate this past March. As it now stands, the bill has 157 co-sponsors in the House, and another 27 in the Senate. It was approved by the House Education and Labor Committee on September 19, by a vote of 26 to 20. Organized labor sees this bill as a crucial companion piece to the EFCA and there would appear to be little standing in the way of its passage in 2009.

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### **Will Labor's Agenda Become Law?**

EFCA, or some related legislation, is anticipated to be one of the first pieces of legislation advanced by an Obama administration. Action on the bill is expected within the first hundred days of his presidency. A number of potential compromises have made their way through the rumor mill, including the idea of a drastically reduced organizing campaign period with union access to employer premises to campaign. At this point, it is too early to tell what version will ultimately pass, but it is clear that substantial changes are on the horizon.

For all these reasons, employers must prepare now if they hope to retain their union-free status in the face of these potentially sweeping changes in the landscape. As stated above, employers will have precious little time to respond. Companies must prepare now to identify potential vulnerabilities and address union activity at the earliest possible stage.

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### **Addressing the Threat While Conserving Internal Resources**

Given the current economic downturn, employers are under increased pressure to avoid wasting time and money. There may be a reluctance to commit resources to combat a legislative agenda that has yet to take effect. If employers wait until the legislation passes, however, it may already be too late. An opportunistic union will have signed cards ready to go, preparing to spring them on an unwary employer within days of the bill's passage.

Therefore, our advice is to implement a plan that will benefit your organization in the event the proposed legislation passes or even if a watered-down version ultimately becomes law. The key is to tailor a game plan now that benefits your organization regardless of the ultimate outcome.

To accomplish this, we recommend a phased action plan, to coordinate preparation while avoiding excessive goal costs. Although the content of each phase may need to be adjusted as circumstances change, this approach should limit unnecessary expenditures of time and money.

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## **Phase 1 (To Be Done Immediately)**

### **1. Oppose the Employee Free Choice Act**

Contact elected representatives to express your opinion and solicit support outside of your company to fight passage of EFCA. This effort should include coordination with trade and industry associations, Human Resources Associations, and Chambers of Commerce, and through contributions to politicians or PACs.

### **2. Educate Senior-Level Decision Makers**

Executive leadership and all Board Members must understand the potential business repercussions if EFCA and RESPECT pass and recognize the importance of allocating resources to protect the organization right now. Decision makers need to understand that failure to adequately prepare could result in an arbitrator dictating wage rates and benefit levels for employees – something that could dramatically affect their companies' bottom lines.

### **3. Build a Pro-Employee "Track Record"**

Everyone agrees that actions speak louder than words. *When* the union supporters come soliciting employees to sign union cards, employers will have little, if any, time to use words to convince employees not to sign the cards. Therefore, you need to act immediately to demonstrate that employees do not need an outside organization to take over their job rights. Employers without a proven track record of positive employee relations will certainly be more vulnerable to unionization of their employees.

### **4. Policy Review**

Written policies form the infrastructure of a good employee relations program. At a minimum, employers should review, update and distribute a lawful but effective union-free policy statement, along with other policies to bolster that statement. Among others, employers should update their policies on: Problem Solving or Grievances; Equal Employment Opportunity; No Harassment; No Access; No Solicitation; No Distribution; Bulletin Boards; and Electronic Communications.

### **5. Reduce Your Vulnerability to Organizing**

Take steps now to address and correct employee issues that unions typically exploit in the context of an organizing campaign. Any approach to address employee issues should take temporary employees into account, as an Obama NLRB may return to the Clinton Board's ruling in *M.B. Sturgis* which allowed for the inclusion of temporary and regular employees within the

in *M.D. Sturgis*, which allowed for the inclusion of temporary and regular employees within the same bargaining unit.

1. **Initiate an Issue Identification Program:** We recommend a thorough evaluation of all potential employee issues. Fisher Phillips can prepare a plan to assist clients in identifying these issues through proactive interviews, audits, effective employee surveys, and other lawful investigative measures.
  2. **Provide Effective Problem-Solving Procedures:** Once this evaluation is complete, establish a legal plan for correcting these issues, using a systematic approach to issue resolution.
  3. **Promote Open Communications With Employees:** It is never too early to begin shoring up lines of communication flowing both upward and downward, considering all communications vehicles available.
  4. **Establish an Environment that Fosters Fair Employment Decisions:** Unions will continue to exploit perceptions of unfairness and favoritism, which rise above economic issues as the chief source of employee discontent in most organizations.
  5. **Evaluate Potential Safety and Health Concerns:** Employees are rarely more vulnerable to organizing activity than when they sense a lack of attention to health and safety issues.
  6. **Review Pay and Benefits to Ensure They Remain Competitive:** As market conditions remain volatile, periodic area and industry surveys are the only safeguard against slipping away from the competitive pack.
  7. **Improve Organizational Image Within the Facility and the Surrounding Community:** Employees are far more likely to stray outside the organization for group identification when they lack a credible source within. A strong community image increases support from employee families, friends and associates. A positive community image can also help fend off a negative corporate campaign.
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6. **Supervisory Training**

Design a systemic training and communications program to educate managers about EFCA, company and employee rights, early warning signs and how best to legally but effectively respond to a card-signing drive.
  7. **Address the RESPECT Act**

1. Evaluate job descriptions for supervisors and managers to determine supervisory status if and when the law is changed.
2. Determine the desired unit composition in the event of an organizing effort.
3. Review job duties and responsibilities to provide for the best voting unit possible, in light of the changes that may flow from the RESPECT Act.
4. Train supervisors about the risks to employees of unionization so that if they are thrust into roles as bargaining unit employees they understand why signing a union card is not in an employee's best interest and are motivated to oppose card-signing by other employees within the bargaining unit.

#### **8. Conduct a Security Audit**

Employers should have a professional security firm audit their premises, computer and other digital or electronic systems, and other assets to make sure they are not vulnerable to sabotage or unwanted access that may be associated with employee job actions or union organizing activities.

These recommendations will benefit you regardless of the outcome of the proposed legislation. Employers that develop a plan to address these issues will improve employee relations, position themselves to avoid card-signing in any environment, and eliminate the disruptive employee issues that lead to costly litigation, morale problems, and poor productivity. Those who take these steps now will be positioned to address business challenges down the road.

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### **Phase 2 (To Be Done As Soon As Practical)**

#### **1. Conduct Supplemental Training for Managers and Supervisors**

Update the status of the proposed statutes, the likelihood of their becoming law, the dangers of card signing, and the early warning signs.

#### **2. Prepare Lawful and Effective Presentations and Follow-up Programs for Current Employees to Educate Them on Card-Signing and its Effects**

These programs should include thorough discussions regarding the basis for the organization's position on remaining union-free. These messages can be communicated in employee meetings using visual and graphic presentations, letters and other available communication channels.

#### **3. Prepare and Implement a New Orientation Program**

Educate new hires on EFCA to help inoculate them from card-signing pitches. Education could



range from a simple anti-card-signing speech to a professionally edited video.

#### **4. Carefully Review Job Duties**

Address potential RESPECT Act issues affecting bargaining unit composition.

#### **5. Establish and Train an Internal Corporate Campaign Team**

If the RESPECT Act passes and the number of statutory supervisors decreases, support may be needed from managers with limited on-site visibility. These individuals will need advanced training on how to lawfully communicate and understand the strategic issues. They will also need to interact with employees at their assigned locations to increase their credibility if activity ensues.

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### **Phase 3 (To Be Done Once the Legislation Becomes Law)**

#### **1. Train Managers on the Final Status of the Law and What is Expected of Them**

Remind them of what to look for so as to spot any signs of card signing activity, along with any issues that could generate union support.

#### **2. Prepare Initial Communications About EFCA and Card Signing for Distribution to Employees**

It is critical for employees to understand that signing a card is now tantamount to voting for the union.

#### **3. Develop a Communications Plan for the First Few Weeks of Any Ensuing Campaign**

Be prepared to communicate effectively with employees within minutes of learning of the union activity. Keep in mind that any card-signing activity calls for a swift and substantial (as opposed to measured) response.

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### **Conclusion**

EFCA and the RESPECT Act present unprecedented challenges to employers. Fisher Phillips has successfully assisted employers in defeating union organizing efforts over the years. We have learned from our experiences that the keys to success are to be proactive, put systems in place to recognize organizing efforts, identify issues that could be exploited by unions, and effectively address those issues so as to render third-party representation unnecessary. Employers that fail to take the pre-emptive actions necessary to deal with these new threats could well find themselves unionized and thereafter presenting information to an arbitrator who will unilaterally shape their work rules, wages, and benefits.