



Essential Conversations to Have With Your Employees About the Employee Free Choice Act

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On March 10th, an important and controversial piece of legislation, The Employee Free Choice Act (EFCA), was introduced in both the House and the Senate. EFCA in its present form makes it much easier for unions to organize by allowing employees to form a union through a "card check," which means a union could be certified as a bargaining agent for employees without an election by providing evidence that a majority of employees in an appropriate bargaining unit have "signed valid authorization cards."

In addition, EFCA provides for mediation and mandatory interest arbitration in first contract negotiations. The law today requires the parties to bargain in good faith but does not require either party to make a concession or reach an agreement. EFCA would alter bargaining power in favor of a union, and the terms and conditions of an initial contract could be set through interest arbitration if the parties failed to reach their own negotiated agreement.

EFCA also increases penalties for employers violating the law, providing for triple back pay to employees who are unlawfully discharged or discriminated against while involved in union activities or in a period leading up to a first contract. And civil penalties also would be available. Under EFCA, employers would need to be careful in making employment decisions and in disciplining employees to avoid legal costs and enhanced penalties.

Alternatives to EFCA have started to emerge as legislators attempt to reach a compromise between labor and management interests. Some speculate that a compromise bill, drafted to remove the most controversial aspects of EFCA, might have an easier chance for passage. But EFCA, if passed in its current form, would make organizing much easier for unions and much more difficult to oppose by employers.

With the potential changes in labor law, employers who prefer a direct relationship with employees, free of third-party influence, must develop communication and action plans to proactively insulate themselves from vulnerability to third-party influence. These activities should take place long before employers hear a union "knocking at the door."

In addition to a program that continually identifies and appropriately resolves employees' issues and concerns, employee education and communication about unions and collective bargaining play a significant role in establishing and maintaining a positive, third-party-free workplace. Communication includes providing an education for employees who may be unfamiliar with the pending legislation or the legal intricacies and process involved with union organizing and collective bargaining.

What to Discuss

Here are some topics employers need to consider when communicating with their employees regarding these challenging subjects:

1. Employers must open communication channels with employees regarding EFCA. Of the major elements of the bill, the "card check" provision is most important. Employees need to understand the legal significance signing a union authorization card could have, particularly in a post-EFCA world. They also must be aware that signing a card because of pressure, for a friend, "to get on the union's mailing list," because "everyone has signed one," or "to shake up management," could lead to union certification without additional consideration, and the potential loss of the right to vote by secret ballot.

2. Employees also need to understand the legal significance of signing a union card. This action authorizes the union to act as the signer's bargaining agent in collective bargaining over wages, hours, and other terms and conditions of employment. That is true now, and would be true if the EFCA amendments were passed.

3. Employers must make sure employees are aware of the organization's position on the unionization of its employees. Employees should know their employer respects employees' rights under labor law, but has a preference to remain in a direct relationship with their employees, without a third-party between them.

4. An employer may wish to address the principles of collective bargaining. There are no guarantees (regardless of "promises" made during organizing and prior to collective bargaining), and there are inherent risks to collective bargaining such as the potential for disputes and strikes under the current law. Under EFCA, the failure of the parties to reach a first agreement could result in the terms of their employment set by an outside arbitration board, not by the employer and union.

5. Employees also need to know union representation and union membership may carry financial obligations and a requirement to follow union rules, often contained in a union's constitution and bylaws.

6. Employers may wish to remind employees about its track record, and the efforts it has made to create an excellent workplace with competitive wages, fair policies, and opportunities for employee input. Employers may wish to exercise their "bragging rights" regarding positive changes made over time, and highlight that the changes were made by the employer and employees working together, without the need of a third-party.

Communication with employees regarding the challenging topics of unionization and labor law always should be carried out in a non-threatening, respectful manner. Employees should feel comfortable enough to ask questions and engage in a two-way communication with their employer.

The timing of communication efforts also must be considered by an employer who plans to raise the topic of EFCA and related issues. Incremental communications over a reasonable time period may serve to build the framework of information that employees need to make an informed choice in the face of union organizing.

The fact that EFCA still is "a work in progress," yet to be passed, compels the progressive employer to begin planning communication now with employees. Whether EFCA or a compromise bill becomes law, or whether the law remains unchanged, employers and organizations benefit by planning essential discussions with their employees. The potential changes to current labor law provide several topics to start the conversation.

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