



## **The So-Called Employee Free Choice Act: What It Is, Why It Matters, and What You Should Do**

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The Employee Free Choice Act (EFCA) – often called the “card-check bill” – is the most significant and controversial labor legislation to garner attention in decades. The bill proposes major changes in the way union organizing and first-contract settlements take place. Although organizing in the construction industry differs somewhat from that in other industries, the legislation would apply to construction along with other industries and could have substantial ramifications. This article provides answers to construction employers’ key questions about the contents, outlook, and potential impact of the bill.

### **What Is EFCA and How Would it Change the Law?**

EFCA, as passed by the U.S. House of Representatives (and defeated in the Senate) in 2007 and as it exists at the time this article’s writing, contains three major provisions:

#### **1. Card-Check Recognition**

EFCA requires the National Labor Relations Board (NLRB) to certify a union as the exclusive collective bargaining agent of a unit of employees if the union has established “majority support” by showing that a majority of employees in the unit have signed valid union authorization cards.

Under current law, an employer presented with such a showing of majority support may voluntarily recognize the union as the bargaining agent of its employees, or it may refuse to do so and force the union to petition the NLRB to conduct a secret-ballot election among the employees.

Employers in most industries are presently prohibited from recognizing a union as the bargaining agent of the employer’s employees if the union has not demonstrated that it has majority support. However, an exception exists for employers in the construction industry, allowing such employers to enter into a collective bargaining agreement (CBA) with a union absent any showing of employee support. Such CBAs are typically called “8(f) agreements” (based on the section of the National Labor Relations Act in which the exception is codified) or “pre-hire agreements” (because they are often executed before the employer has even hired any employees to work under the contract), while regular CBAs are called “9(a) agreements” (based on the section of the NLRA authorizing them). EFCA does not alter this exception.

Also unchanged by EFCA is the right to an NLRB-supervised election when the union cannot establish majority support but can establish only 30-percent support.

## 2. Mandatory Mediation and Arbitration

EFCA imposes mandatory mediation and arbitration in first-contract negotiations between the employer and the union if settlement is not reached within a short time frame. More specifically, EFCA requires the parties to meet and begin collective bargaining within 10 days, or later if both parties agree, of a request by a newly organized or certified union. If no settlement is reached within 90 days of the beginning of bargaining, either party may demand mediation by the Federal Mediation and Conciliation Service (FMCS). If the parties are still unable to reach agreement within 30 days of the request for mediation, then either party may demand arbitration by a panel of arbitrators established under regulations to be issued by the FMCS. The arbitrators' decision will be binding for two years unless the parties agree otherwise.

Current law does not require private-sector employers, including those in the construction industry, to use mediation and arbitration to settle collective bargaining disputes and does not mandate a specific timeline by which parties must settle a contract. In fact, it does require that a contract be executed at all.

## 3. Enhanced Remedies and Employer Sanctions

EFCA requires the NLRB to give priority to investigations of allegations that an employer has unlawfully interfered with an organizing campaign or has unlawfully discharged or discriminated against an employee during an organizing campaign or first-contract negotiations. The bill also requires the NLRB to seek an injunction in federal court to order such the accused employer to cease the alleged unlawful activity and reinstate any wrongfully discharged employee prior to a final determination that an unlawful act actually occurred. Under current law, the NLRB may, but is not required to, seek an injunction.

EFCA also imposes new penalties for employer misconduct. An employer found to have wrongfully discharged or discriminated against an employee during an organizing drive or first-contract negotiations would be subject to paying triple backpay and a fine of up to \$20,000 per violation.

The bill does not impose any new penalties for unlawful conduct committed by a union during an organizing drive or first-contract negotiations.

### **How Could EFCA Impact My Firm?**

For open-shop contractors, EFCA's dangers are evident: EFCA would make union organizing easier, which is something they obviously don't want or they wouldn't be open-shop contractors. More specifically, EFCA effectively enables employees to "vote" in public rather than in private. Individuals are more likely to express support for the

union regardless of their personal views when someone -- especially someone they know or someone they fear -- asks them to sign a union card right in front of them than they would if given the freedom to vote in a secret-ballot election. Some might be intimidated, others agreeable, and others still -- especially those with poor English skills -- may not understand what they are doing. This means less reliable but more prevalent demonstrations of majority support.

Furthermore, since a card-signing campaign can be quick and stealthy, the employer may not be aware of it until the union has already attained signed cards by a majority of the employees. The employer loses the opportunity it now has between the time a petition for election is filed and the election date to share its views with its employees, and employees lose the opportunity to make a fully informed decision as well as the chance to change their minds before expressing a final selection.

The mandatory mediation and arbitration provisions are equally dangerous. The bill imposes unrealistic deadlines for labor and management to meet and negotiate a first contract before mandating interference by government-appointed mediators and arbitrators. Arbitrators would have the authority to dictate wages, hours, and terms and conditions of employment, potentially imposing burdensome contracts. In addition, the arbitration mandate itself means that unions would be guaranteed a CBA without having to strike, leaving them little incentive to bargain in good faith. Why compromise when the arbitrators might give them exactly what they wanted? What's more, EFCA requires all parties to accept the arbitrators' decision without allowing employees any opportunity to ratify or reject the contract.

For union contractors, EFCA might seem like a godsend in these times of declining market share. Increased organizing of open-shop contractors arguably means a more level playing field for union contractors subject to greater employment costs, not to mention more active participants to shore up struggling multiemployer pension funds. In reality, though, EFCA threatens to cause more trouble for union contractors than it promises to bring advantages.

First is the question of whether the building trades would actually do the legwork necessary to organize open-shop contractors through a card-check process. Unlike unions in other industries, construction unions are less familiar with such "bottom-up organizing" (persuading employees to go union) as the bulk of their organizing experience over the decades has been in "top-down organizing" (persuading employers to go union). Even if they were inclined to do the legwork, it would likely take them some time to develop the staff and knowledge to execute such organizing on a large, national scale.

Plus, experience has shown that construction unions often direct attacks on their "friends" more than their "enemies." This means that, rather than seeking to create new bargaining relationships with open-shop contractors, some trades might instead seek to solidify their existing bargaining relationships by using card-check to convert 8(f) relationships into 9(a) relationships. Such relationships offer the union greater security,

because, while contractors with 8(f) relationships may terminate their relationships with the signatory union upon expiration of their CBA, contractors with 9(a) relationships have an ongoing duty to bargain with the union beyond contract expiration, unless and until the union is shown to have lost majority support. Also, an 8(f) agreement does not bar a petition for representation by a rival union, while a 9(a) agreement does. Accordingly, a union could use the card-check process to convert 8(f) relationships to 9(a) relationships where it is concerned that a contractor may go open shop or that a rival union is trying to take over its jurisdiction. Likewise, a union that wants to take over the jurisdiction from a rival union might attempt to invoke the card-check process on a union contractor. These conversions would limit the contractor's freedom to transfer jurisdiction to a different union or to go open shop, and could exacerbate jurisdictional disputes.

Moreover, it is unclear whether EFCA's mandatory mediation and arbitration provisions apply where the parties had an 8(f) relationship that is converted to a 9(a) relationship through card check. If so, then the dangers of mandatory mediation and arbitration described above would equally apply to the union contractor.

Even if the trades were to use card-check to organize open-shop contractors, union contractors may experience a downside. Unions might attempt to expand their jurisdiction also when organizing open-shop contractors, not only expanding beyond traditional lines of craft jurisdiction but even creating multicraft construction units. Again, this could lead to jurisdictional disputes – as well as unusual pension plan contribution obligations – potentially creating further havoc for union contractors.

Furthermore, mandatory arbitration under EFCA could yield CBAs that are markedly different from current area-wide agreements. They might have vastly different expiration, benefits, hiring hall, no-strike, subcontracting, and work rule provisions – differences that could give newly organized contractors significant cost advantages over current union contractors and upset the current system of multiemployer bargaining.

## **What Is the Status of EFCA?**

The battle over EFCA has been fierce over the past year. With the election of an EFCA-friendly president and the expansion of Democrat control of Congress, EFCA's passage seemed to many a sure thing at the start of 2009. However, strong grassroots efforts by opponents coupled with the nation's economic crisis stalled efforts to pass EFCA in the spring. EFCA was firmly put on the back burner this summer, when attentions were diverted to health care reform. But, the legislation is far from dead.

EFCA has sufficient support in the House to pass the current bill at any time. The battle remains in the Senate, where EFCA proponents have struggled to reach the magic number of 60 supporters needed for cloture – i.e., to defeat a filibuster and pass the bill. Meanwhile, a small group of EFCA-supporting senators are trying to develop an alternative version of the bill – a so-called “compromise” – that will allow for the process to move forward. The contents of such an alternative remain to be seen. Changes

rumored to be part of the discussion include dropping the card-check provisions and instead adopting provisions for postcard-based elections, expedited secret-ballot elections that would take place five-to-ten days from the date of petition, equal access to the workplace by union organizers, and banning employers from holding mandatory employee meetings.

Opponents of the bill, including AGC of America and most of the business community, maintain that compromise is not an option and hold deep concern is that even a well-intentioned compromise proposal could become a “Trojan horse” used by EFCA supporters to sneak EFCA past cloture. AGC believes that the present system best supports the overarching objectives of the Act: the promotion and protection of employee free choice and labor relations stability.

### **What Should I Do About EFCA?**

AGC encourages you to write to or visit your members of Congress and urge them to oppose EFCA or any derivative bill that eliminates secret-ballot elections or imposes mandatory arbitration. An easy way to do this is to use AGC’s online Legislative Action Center at [www.agc.org/lac](http://www.agc.org/lac).

Regardless of what happens on Capitol Hill, all employers are well-advised to examine employee relations and promptly correct problems. For open-shop contractors, this includes reviewing wages and benefits to ensure that they are competitive. While union contractors are prohibited from changing wages, hours, and terms of conditions of employment without first bargaining with the union, they can still examine and identify problems to address in bargaining. They should also take a look at relationships with and among the various trades in the area, and take heed of any discord. All employers should also keep an eye out for organizing activity and train supervisors about what they lawfully may and may not do in the face of union organizing. For more information on supervisor “do’s and don’ts,” AGC members can visit the Labor & HR Topical Resources page of AGC’s Web site at [www.agc.org/hr/topicalresources](http://www.agc.org/hr/topicalresources), and select the main category “Unions/NLRA” and the subcategory “Union Organizing Campaigns & Representation Elections.”

***For more information about EFCA, visit [www.agc.org/efca](http://www.agc.org/efca) or contact the author, Denise Gold at [goldd@agc.org](mailto:goldd@agc.org) or (703) 837-5326.***