

What Should A Retailer Do To Prepare For The Employee Free Choice Act?

Phase 1 (Do Immediately)

1. Assign A Senior HR or LR Professional To “Get Smart” About EFCA.

The misleadingly labeled Employee Free Choice Act is Union-backed and Democrat-sponsored legislation that will dramatically change federal labor law to make union organizing much, much easier. The Democrat-majority in Congress has vowed to pass EFCA in 2009, and President-elect Obama has repeatedly vowed to sign it as President. Among many other things, EFCA will do away with secret ballot representation elections and will force employers to recognize and bargain with Unions based on no more than signed authorization cards. EFCA also provides that an arbitrator can force a Collective Bargaining Agreement on an employer if it does not agree to Union demands within 120 days. Every retail employer should assign a senior manager to learn all the EFCA basics so that he or she can serve as a clearinghouse for EFCA-related action items.

2. 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 NACS through its grassroots website to send faxes as well as personal phone calls or visits to your legislators.

3. Educate/Enlist Senior-Level Decision Makers.

Executive leadership and all Board Members must understand EFCA and must understand the far-reaching effects that legislation could have on fundamental business operations. The executive team must recognize and endorse 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.

4. Union Philosophy Policy Statement.

The employer should develop and post an unambiguous pro-employee, union-avoidance Policy statement.

5. Know That Unions Are Targeting Retailers And Cards Are Valid For ONE YEAR!

Numerous unions see retail as a union “legacy” industry. Unions also routinely organize small units of only a few employees to get their “foot in the door” so they can organize

larger units from the inside (much easier). Those two facts make EFCA particularly troubling for retail employers. Union organizers can approach employees at night or on weekends now and collect authorization cards that they can use next year after EFCA passes to force unionization on an unsuspecting employer. Consequently, savvy employers will invest now in the education and training necessary to (lawfully) motivate supervisors and (lawfully) inoculate employees against card signing.

- a. Identify True NLRA Supervisors:** The National Labor Relations Board has recently decided a number of seminal cases that set new standards for evaluating who is (and who is not) a supervisor under the National Labor Relations Act. The employer must determine who qualifies as a true supervisor under the NLRA (job titles, job descriptions, and exempt/non-exempt status are irrelevant) because the employer would violate federal labor law if it trained and used an individual to carry out its union-avoidance objectives based on an erroneous belief that the person was a supervisor.
- b. Supervisor 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.
- c. Prepare and Deliver Lawful and Effective Employee Education Programs:** Create presentations and follow-up programs for current employees to educate them on card-signing and its effects. Then carefully select and train an appropriate manager representative to present the education programs (selecting the right person is crucial!). The employee education programs should include thorough discussions regarding the basis for the organization's position on remaining union-free and the legal nature of signed authorization cards. These messages can be communicated in employee meetings using visual and graphic presentations, letters, and other available communication channels.

Phase 2 (Do As Soon As Possible): A Structural Commitment To Union-Avoidance

1. 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.

2. Labor Relations Resources/Staff.

Labor relations is part public relations, part media relations, part political consulting, part tactical planning, part strategic thinking, part litigation, part public speaking, part training, part MBA, and nearly full-time labor law advisor. An employer operating in a union-targeted industry must have ready access to expertise in all those areas. Employers with multiple facilities should seriously consider a "privileged" union-activity hot line.

3. Establish and Train an Internal Corporate Campaign Team.

In addition to EFCA, Unions and Democrats intend to pass the “RESPECT” Act. The RESPECT Act would substantially reduce the number of “supervisors” and increase the number of employees eligible for union representation. From a practical standpoint, the RESPECT Act would decrease the number of on-site supervisors who could campaign for the employer on union issues. Consequently, the employer should designate and very carefully train a cadre of District, Regional, or Corporate managers who could travel to and lawfully campaign at organizing “hot spots.”

4. Reduce Your Vulnerability to Organizing; Create/Update A Grievance Solicitation Policy And Create A “Past Practice” Of Soliciting And Fixing Grievances.

a. Beat the Union to the Punch: Employers can take away a major union selling point by developing and institutionalizing a multi-layered practice of soliciting and fixing grievances now, before union organizing starts. (Some call it “Coaching By Walking Around,” some call it “Rounding,” but whatever the label, the idea is to formally require supervisors *at all levels* to solicit individual employee ideas, thoughts, and concerns and fix grievances, whenever possible, on a regular basis (and document those interactions).) If an employer has a “past practice” of soliciting and fixing grievances before union organizing starts, the employer can continue that practice during union organizing.

b. Look Past Supervisor Reports To Dig Out And Fix Issues Now: We recommend a thorough evaluation of all potential employee issues (particularly employee health and safety concerns). Consider hiring outside counsel to help prepare a plan to identify these issues through proactive interviews, audits, effective employee surveys, and other lawful investigative measures.

c. Temporary Employees? Any approach to address employee issues should take temporary employees into account. An Obama-NLRB will likely return to a Clinton-era ruling, which allowed for the inclusion of temporary and regular employees within the same bargaining unit (known as the *M.B. Sturgis ruling*).

5. Employee Communications Committees.

Employee Communications Committees are a powerful tool to create employee loyalty and deny unions the “bully pulpit” of providing a “voice” or “respect.” An employer can create many different types of ECCs for different subjects and employee groups. *However, such committees must be carefully crafted to avoid violating NLRA Section 8(a)(2).* Experienced labor counsel can provide detailed information on how to create and operate lawful employee communications committees.

6. Institutionalize An Employee Communication Procedure For Announcing and Implementing Change.

The second most common reason that employees turn to unions is that employers fail to adequately communicate “negative” change before it happens. The employer should have a multi-step communications “mindset” for announcing changes that adversely affect employees (starting as far in advance as possible). The employer must strive to align employee expectations with reality *before negative change occurs* to minimize employee anger, which leads to union organizing drives.

7. Create/Update Other Union-Avoidance Policies.

Written policies form the infrastructure of a good employee relations program. At a minimum, employers should review, update and distribute a lawful and effective: Open Door Policy; Progressive Discipline Policy (with appeal rights); Trespass, Solicitation and Distribution of Literature Policy; Electronic Communications Policy; Bulletin Board Policy; Dress Code Policy; Cell Phone/Camera, Audio, and Video Recording Policy; Safe Work Place Policy; and Equal Employment Opportunity/No Harassment Policies. Recognize that federal labor law significantly restricts the scope and application of such Policies. Consult with your labor lawyer to be sure your Policies are lawful as written and applied.

8. Hiring.

Train HR and operations personnel to lawfully screen job candidates for union “salts” and know how to lawfully deal with such candidates.

9. Prepare and Implement a New Orientation Program.

Educate new hires on EFCA to help inoculate them about card-signing pitches. Education could range from a simple “Know The Facts” speech to a professional video.

10. Build a Pro-Employee “Track Record.”

Everyone agrees that actions speak louder than words. *When* the union supporters begin 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 now to demonstrate that employees do not need an outside organization to speak for them. Employers without a proven track record of positive employee relations will certainly be more vulnerable to unionization. Building a positive track record starts with the first-level supervisor.

a. Carefully Select Supervisors/Managers: The number one reason employees turn to unions is because they “hate” their first-level supervisor or immediate manager. Pick supervisors who can lead and still empathize with subordinates.

b. Give New Supervisors/Managers “People Skills” Training: Most good leaders are taught, not born. An employer should give its new supervisors and managers several days of intensive communications, labor relations, employer policy, and related training within the first two weeks.

c. Evaluate Supervisors Based on Union-Avoidance Criteria: Supervisors and managers must have some “skin” in the union-avoidance program. The employer should evaluate and pay supervisors and managers based, in part, on pre-defined union-avoidance objectives/criteria, such as: turnover rates, employee discipline rates, accidents, employee/management complaints, grievances solicited, and grievances resolved. The evaluation process should be 360-degree to get an accurate picture of each supervisor/manager.

11. Carefully Review Job Duties.

Address potential issues affecting bargaining unit composition and create increased interchange, integration, and interaction where possible to increase the size of the employer’s smallest “appropriate unit” (a legal term of art).

12. 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.

13. Improve The Organization’s Image Within the Facility and the Surrounding Community.

Employees are far more likely to look 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.

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 best positioned to address business challenges down the road.

Phase 3 (Do if EFCA and RESPECT Become 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 and Deliver Employee “Update” Communications About EFCA and Card Signing for Distribution to Employees

It is critical for employees to understand that signing a card now is actually the same as voting to join 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 about union activity. Keep in mind that *any* card-signing activity calls for a swift and substantial (as opposed to a measured) response. Also remember that the “old” campaign plan may be obsolete. For example, traditional campaign communications about the risks of strikes and collective bargaining will be irrelevant under EFCA. Every employer will need to have a new, different, and hard-hitting campaign plan designed for an initial five-day sprint, not a three-month marathon.

Conclusion

EFCA presents unprecedented challenges to employers. The key to success is proactive action. Employers must educate supervisors and employees to (lawfully) stop card signing before it starts. In addition, employers must 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.