

Employee Free Choice Act Introduced

The Employee Free Choice Act (EFCA) has been introduced in both houses of Congress. Better known as the “card check” bill, it could have major ramifications for retailers. Bill numbers are S 560 and HR 1409. Here are a few questions and answers that may clarify the legislation and its potential impact on retailers.

What would the Employee Free Choice Act do?

EFCA would require the National Labor Relations Board (NLRB) to certify and an employer to recognize union representation if organizers get more than half of the workers in a bargaining unit to sign authorization cards or a petition asking for union representation. If the employer and the union cannot negotiate a first contract within 90 days, the bill would allow federal mediators to impose binding arbitration for a two-year contract. It would levy penalties, including fines, against employers who discriminate or retaliate against employees for their union activity.

How is this different from current law?

Under the National Labor Relations Act (NLRA) of 1935 unions must file a petition with the NLRB documenting receipt of signatures from 30 percent of potential union members requesting an organizing election. The NLRB must conduct a secret ballot election, supervised by an NLRB agent, to give employees the opportunity to vote on whether they want to join a union. It takes a majority of votes cast to approve union representation, which can then be certified by NLRB. The EFCA would eliminate the secret ballot election.

What are the implications for retailers?

Almost all employers are covered by the NLRA; there are a few exceptions based on dollar volume, but the dollar level is low. For retailers, it is \$500,000 annually. There are no exceptions based on number of employees. Without the requirement for an NLRB-supervised secret ballot election, it is possible that union organizers could get enough signatures before the employer realizes the effort is underway. Included in NLRB definitions of bargaining units are department units, office clerical units and single units of a multiple unit operation, meaning, for example, that signatures of more than half the employees in a single department would qualify for union certification.

What can retailers do to deter organizing efforts?

Employers must be very careful in their efforts to convince employees not to join a union. Current law prohibits employers from threatening employees with reprisal, such as loss of their jobs, or offering them benefits, such as pay raises or promotions.

Employers can talk about adverse economic consequences of union representation as long as they can demonstrate that the consequences to the company and the employees are probable and based solely on economic considerations. There can be no hint of anti-union sentiment in the comments and no hint of reprisal against the employees.

The NLRB has established standards as to what employers may say and do in the secret ballot election process. Any employer facing a union organizing effort would be well advised to consult an attorney specializing in federal labor law.

What is the possibility of the EFCA becoming law?

At this time, it is hard to tell whether the bill will pass in its current form or if it will pass at all. The legislation was introduced in the last Congress, was passed by the House of Representatives but foundered in the Senate. There seems to be less support for the legislation now than there was last year, which could lead to modifications to make the bill more palatable to wavering lawmakers.

In the House, there were 224 co-sponsors, which are enough votes for a simple majority. In the Senate, however, there were 39 co-sponsors, which is a long way from the 60 votes needed to overcome an expected filibuster and allow the bill to come up for a vote. The current strategy is for the Senate to consider the bill first; if it passes there, it would go to the House. President Obama supports the bill in its original form, but has not said if he would support modifications.