

THE EMPLOYEE FREE CHOICE ACT
Card Check Legislation White Paper
August 2009 Update

Overview

The 111th Congress is in session, and the Employee Free Choice Act (EFCA) - commonly referred to as "card-check" legislation - has been reintroduced. This legislation (H.R. 1409/S. 560) would have a profoundly negative impact on the produce industry. The United Fresh Produce Association (United Fresh) is strongly opposed to the goals and objectives of the EFCA and is spearheading a coordinated response against this legislation among its 1400 member companies, its allied industry partners, and the thousands of employees they represent. Since the beginning of this year, several important developments have been made that are reflective in this updated policy white paper.

Major Provisions of the Employee Free Choice Act

Elimination of Secret Ballot Elections

The Employee Free Choice Act (EFCA) would modify the National Labor Relations Act, signed by President Franklin Roosevelt in 1935 by eliminating federally-overseen secret ballot elections for establishing a union as collective bargaining representative.

As the alternative, petitions (sometimes referred to as a "card check") would be sought from employees without federal oversight. If a majority of petitions from covered workers were received in support of a union, it would be certified.

Interestingly, while the legislation has a specific section entitled "streamlining union certification," there is no concurrent streamlining of the process for decertifying a union.

Binding Arbitration

Once a union is certified, the process of negotiating an initial contract would be significantly changed. If the employer and union cannot come to agreement after an unusually abbreviated timeframe of 120 days, the matter would be referred to binding arbitration with a mandatory contract ultimately emerging. That contract would be in force for a minimum of two years.

What would enactment of the Employee Free Choice Act mean for employers?

Greater likelihood of successful union organizing

Historically, secret ballot elections under the NLRA have resulted in victories by the unions approximately 50% of the time. However, for those organizing efforts that have utilized a card-check system instead of secret ballot elections, the union success rate jumps to 80%. This estimate appears reasonable, as the unions would not be pushing for a modification to the process without significant potential for gains in union organizing.

Therefore, the available information indicates the card-check appears to lower the bar for union organizing. As a result of that effort, employers who have been the targets of union

organizing activity in the past, but whose employees did not approve a union via majority vote, would appear to be most vulnerable to the provisions of the EFCA.

Mandatory Imposition of an Initial Collective Bargaining Agreement

Additionally, those same employers face an additional hurdle with the EFCA. If the less-stringent card check provisions of EFCA are instituted, the employer no longer will be able to resist the unreasonable demands of unions during negotiations on the initial collective bargaining agreement. Once negotiations come to an impasse, the EFCA imposes an abbreviated time-frame for resolution that culminates with the binding ruling of an arbitrator. This contract, by law, must remain in effect for a minimum of two years.

Clearly, this binding arbitration provision is a potentially costly modification. Its inclusion in the process appears to incentivize unions not to negotiate directly with the employer, since they would no longer be the final decision-maker.

Legislative Action on the Employee Free Choice Act

In March of 2007, the original House bill (HR. 800) passed by a vote of 241-185. In June of that same year, the Senate's version (S. 1041) failed a cloture motion by a vote of 51-48-1. Had the Congress been successful in passing the EFCA in 2007, President Bush stood as a final check against this legislation by virtue of a veto.

In March of this year, the House and Senate versions of card-check legislation were introduced. The House version (H.R. 1409) has 226 co-sponsors, while its Senate counterpart (S. 560) has 40 co-sponsors.

Since its introduction, Card check legislation has taken many twists and turns. What many pundits predicted would be a congressional slam dunk for the unions has been met by a fierce backlash from the business community and opinion leaders about the policy precedent this type of legislation would place on labor-management relations. This led to several key senators announcing their opposition to the original bill and blocked the path to passage

Over the summer significant momentum was gained behind a so-called compromise that would remove the elimination of a secret ballot and exchange this provision for a so-called "post card check." The proponents of the bill believe that calling the new version a "compromise" may entice wavering senators to support the measure. Also, they believe that the filibuster-proof majority the Democrats now have in the Senate will provide greater strength to move this bill forward. All of this has refueled the discussion of when card check could come back to the legislative forefront before the House and Senate.

What would a "compromise" legislation entail?

Post Card Check – Given the tremendous public opposition to EFCA's elimination of secret ballot elections, it is likely that a compromise will involve a modification of that provision.

There have been discussions about converting to "post card check" wherein federally-overseen elections would still be stricken, but the cards would be mailed in rather than allowing union officials to handle them.

How would this be different from the original provision? Basically it does not change much. Union officials would still be able to look over the shoulders of employees as they sign the cards, and keep a count of who is supporting or opposing the union. There is no chain of

custody, as in a federally-overseen election, so the fundamental principle of having a secret ballot is still compromised.

Reducing the Time Period for an Election – Another provision they are considering would involve reducing the time between an election being announced and its ultimate conclusion. Currently the National Labor Relations Board states that the average time for an election is 38 days, with 94% being completed within 54 days. Some proposals are suggesting shortening the process to as little as 7 days. Employers have countered that the only reason to reduce this interval is simply to prevent employees from hearing both sides of the arguments before the deadline.

Mandatory Access for Union Organizers on Employers' Property – In order to address union claims that they are unfairly denied contact with workers during the organizing process, congressional leaders are also considering a provision that would force employers to accept organizers onto their property. It is unclear what the terms of that access would involve, but at some point employers would have to allow individuals on their property whose activities they likely strongly disagree with and run counter to the owner's interests.

What is United Fresh's position, and actions, on this issue?

- United Fresh is opposed to the EFCA's modifications of the current system. The following is the United Fresh Government Relations Policy Statement on the Employee Free Choice Act which was approved by the Board of Directors in January of 2009:

The elimination of union employees' right to federally-overseen, secret ballot elections for the purposes of union certification is a significant issue for the produce industry. The elimination of this right would erode employees' workplace security and upset the important balance between union leadership interests and employers. United Fresh will serve as the leading voice for the produce industry in opposing legislative or regulatory actions that seek to undermine this fundamental right.

- Currently, United Fresh serves on the steering committee of the Coalition for a Democratic Workplace (CDW), the national coalition representing America's workers, businesses and associations in opposition to The Employee Free Choice Act. This coalition has regularly met with key Members of Congress and staff to discuss the strategy to defeat card check. They have also pursued an aggressive multimedia campaign to spread the word about the detrimental effects of that legislation. United Fresh has joined with CDW in pursuing targeted media outreach to provide the other side of the story during labor rallies intended to promote EFCA.
- United Fresh is also a member of Agriculture for a Democratic Workplace (ADW). This coalition of agriculture interests is a sector-specific coalition opposing EFCA and was formed by key allied association members of United Fresh including Western Growers and the California Grape & Tree Fruit League. This coalition is working jointly with the broad business community coalition in providing briefing information to Congressional staff and media about the potential impact of EFCA upon the agriculture supply chain.
- Finally, in March, United Fresh organized a grassroots network of industry members to amplify the produce industry's voice in eight key states for defeating card check; Arkansas, Colorado, Louisiana, Nebraska, North Carolina, Ohio, Pennsylvania,

What can United Fresh members do themselves on this issue?

1. Join the United Fresh grassroots network
2. Contact your members of Congress directly

Talking Points for United Fresh members when talking with members of Congress and their staff:

- ✓ Federally-overseen secret ballot elections are essential to maintain the balance between employer and union leadership interests. Card check or “post card check” both violate that principle.
- ✓ Secret ballot elections are utilized to select a variety of public officials at the state, local and federal level, including the President and all Members of Congress. Therefore, why wouldn’t they be appropriate in the workplace?
- ✓ The 73 year-old National Labor Relations Act established the current process and has lasted through many economic downturns. The current crisis should not be used as an excuse to throw out a stable, time-tested and fair process.