
Issue Brief: The Employee Free Choice Act (EFCA)

It has been widely reported by the mainstream media that legislation proposed in Congress could fundamentally change the culture of the American workplace by replacing existing labor organizing rules with ones that would enhance a union's ability to win support and ultimately increase unionization nationwide. Across industry sectors, small and large employers alike are concerned about how the proposed legislation could impact their business practices. This issue brief provides background information on the issue and examines key aspects of the proposal and their potential relevance to the apartment industry.

Over the past several years, a considerable policy debate among the business community, labor advocates, and members of Congress has occurred surrounding proposed legislation that would, according to those on both sides of the issue, facilitate the formation of unions in the private sector and enhance bargaining power for unionized workers. It is of particular concern to industries that are historical union targets, including manufacturing, health care, and transportation. The proposed changes would presumably impact the service and retail sectors as well. As nationwide union membership has slipped to single digits, unions are seeking changes to the current organizing rules that will speed up the organizing process and allow greater fines against employers that do not bargain with them in good faith. Unfortunately, the changes that have been proposed would change the balance of bargaining power to such a degree that employers could be significantly disadvantaged.

Defeating the proposed changes is a priority for the U.S. Chamber of Commerce and other cross-industry groups. The legislation has not seen action in Congress since June 2007 when it failed to garner the 60 votes needed to overcome a Senate filibuster after being approved by the House of Representatives but it is, however, expected to be considered again next year with an early vote in the House followed by delay and extended debate in the Senate.

The Employee Free Choice Act (EFCA) (S.1041/H.R.800), popularly known as the "card check" bill by the business community, was introduced in the House on February 5, 2007 by Rep. George Miller (D-CA). The bill, supported by 233 co-sponsors, passed the House on March 1, 2007 in a 241-185 vote. The EFCA was introduced in the Senate on March 29, 2007 by Sen. Edward Kennedy (D-MA), but the measure died on June 19, 2007 when it was filibustered. The Senate bill has 46 co-sponsors.

The EFCA would amend the National Labor Relations Act (NLRA) in several meaningful ways. The NLRA, enacted in 1935, was intended to guarantee to workers the right to organize without coercive employer interference. Since the law was passed, through a series of subsequent legislative and judicial actions, the labor landscape has become volatile and costly for both employers and unions as national and global economies have changed.

Union organizing efforts have historically focused on only a handful of industries, but a re-write of existing labor law could vastly enhance a union's ability to organize additional industries that have not been traditional targets. It seems unlikely that the apartment industry would become a specific union target because of its decentralized business model and extremely high employee turnover, especially among workers in on-site

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property operations jobs. But that assessment does not deny that a small number of multifamily firms already cope with managing unionized workplaces and that increased unionization efforts could occur within the apartment industry if the EFCA is approved.

We oppose the EFCA because, in its current form, the proposed legislation could interfere with an employer's ability to make strategic business decisions so profoundly that overall employment and employer-sponsored benefits for American workers could be compromised. The EFCA could fundamentally change the employer-employee relationship by altering the balance between a company's goals of productivity and profitability and a union's ambitions to gain employee support and put in place a collective bargaining agreement.

The most well-known provision of the EFCA is a proposed amendment to the NLRA that would require an employer to recognize a union when a majority of employees simply sign union authorization cards as opposed to the current regulation stipulating a private-ballot election. In other words, if a majority of employees sign cards of union support, the National Labor Relations Board (NLRB) would certify the union as the bargaining representative for a particular unit of employees. The results of card check votes would be known to employers, employees, and union organizers, rendering the process inherently vulnerable to pressure and coercion by union representatives and pro-union workers.

This is not to say that, under the EFCA, private-ballot elections would be eliminated. But presumably they would become less common since they are disfavored by unions as an obstacle to organizing. Importantly, the election process can go on for a lengthy period of time owing to a variety of disputes. For example, there may be disagreement about which employees would be covered in the bargaining unit and thus permitted to vote. Unions would likely push for card check campaigns to avoid the challenge and expense associated with private-ballot elections. Under current law, card checks typically occur when an employer agrees that a majority of workers support unionization. There are times when an employer actually chooses to recognize a union by card check such as when it is apparent that a traditional election process would be disruptive and expensive, or to gain favor with the union in another context.

The most troublesome provisions in the legislation relate to timing and process. In addition to doing away with an employee's expectation of a private-ballot election, the EFCA would amend Section 8 of the NLRA to require collective bargaining negotiations within just ten days of union certification. A right to mediation would be triggered if an agreement on the first labor contract is not reached within a 90-day negotiation period, and if mediation fails within 30 days of commencing, the mediating body will decide unresolved issues between an employer and a union. The resulting binding arbitration would be in effect for two years. Such forced interference in the private sector would be a disruptive affront to the very essence of the employee-employer relationship.

First contract negotiations can be especially contentious—and lengthy—because employers want to retain the ability to manage their business to the greatest extent possible and unions want to satisfy the vows that they made to employees in order to gain their support. The above-described timetable would interfere with bargaining by imposing the threat of mandatory binding arbitration by an outside decision maker.

The EFCA would also impose higher fines on employers for committing certain unfair labor practices, including triple back pay to an aggrieved employee and up to \$20,000 in civil penalties per violation.

Apartment firms should be aware that the EFCA would broaden the scope of circumstances in which the NLRB could grant an injunction against an employer even when it is decided that there is only "reason to believe" that an employee has been improperly terminated, threatened, or otherwise improperly treated under the NLRA.

It is well known that unions have long been dissatisfied with the legal framework established by the NLRA. Proponents of the card check legislation particularly argue that current union election procedures fail to protect organizing rights because the system inherently favors the interests of employers. From the perspective of unions, card checks allow an advantage by reducing the campaign period that traditionally occurs following a union's recognition request and an election, thereby significantly reducing the period of time for employers to communicate with their employees about the considerable drawbacks of unionization. Unions also favor card check procedures' abbreviated timeframe because they are less financially costly to unions: The fewer resources that a union expends on a particular campaign the greater resources it has to dedicate to other organizing efforts.

Employees already enjoy statutorily-guaranteed rights and protections to organize under Section 7 of the NLRA. The NLRB, the federal agency charged by Congress to protect those rights, has established procedures to ensure fair elections and accessible means for employees and unions to challenge unlawful employer actions. Current law protects employee rights by prohibiting employers from threatening retaliatory acts or otherwise interfering with a union election. As proposed, the EFCA is an ill-conceived legislative proposal because it would tip the balance decidedly in favor of unions and enhance their political strength at considerable cost to business and employees.

If Democrats increase their majority in Congress, particularly in the Senate, and win the presidency, this issue will likely move to center stage. The business community has developed a targeted campaign strategy to inform voters about this issue in key Senate races that, if won by Democrats, could significantly increase the likelihood of Congressional approval of the measure. The legislation that passed the House in 2007 is not expected to be approved and signed into law in its current form. Led by the U.S. Chamber of Commerce and a cross-industry coalition of large corporations including Wal-Mart, opponents of the bill will attempt to kill it entirely. If the proposed legislation is seriously debated in the Senate next year, there will be a process of negotiating that will likely result in a series of compromises and amendments that would take out many of the most egregious provisions. Throughout this process, NAA/NMHC will participate in various coalitions and work diligently to ensure that, if enacted, the legislation will be reasonable and workable for the apartment industry.

Card check legislation is not a threat to the apartment industry in 2008 because both Senate cloture rules and a sure presidential veto by President Bush are too formidable for its proponents to overcome. However this does not mean that NAA and NMHC members should become complacent about the prospects for card check legislation going forward. With the possibilities of a Democrat in the White House and a stronger Democratic majority in the House, proactive attention is focused on the Senate. There are 11 key Senate races in November that will determine the balance of power on this

issue. The Republicans' overarching goal is to preserve their ability to invoke cloture rules in debates like card check. Their objective will be to hold Democratic gains during the November elections to keep the Democrats' Senate total below 60. The U.S. Chamber of Commerce is supporting pro-business Senate candidates. In order to reach the magic number of 60, the Democrats will need to win nine additional Senate seats. Even reaching 60 may not be enough since there are a handful of Democrat senators who are unwilling to vote for all of the specific provisions in S. 1041/H.R. 800. If EFCA legislation becomes actual law in 2009/2010, it will undergo significant modification in the process.

Last updated: August 5, 2008.

110th CONGRESS
1st Session
S. 1041

To amend the National Labor Relations Act to establish an efficient system to enable employees to form, join, or assist labor organizations, to provide for mandatory injunctions for unfair labor practices during organizing efforts, and for other purposes.

IN THE SENATE OF THE UNITED STATES

March 29, 2007

Mr. KENNEDY (for himself, Mr. DODD, Mr. HARKIN, Ms. MIKULSKI, Mr. BINGAMAN, Mrs. MURRAY, Mr. REED, Mrs. CLINTON, Mr. OBAMA, Mr. SANDERS, Mr. BROWN, Mr. BYRD, Mr. INOUE, Mr. BIDEN, Mr. LEAHY, Mr. BAUCUS, Mr. LEVIN, Mr. KERRY, Mr. ROCKEFELLER, Mr. REID, Mr. CONRAD, Mr. KOHL, Mr. LIEBERMAN, Mr. AKAKA, Mrs. FEINSTEIN, Mr. DORGAN, Mrs. BOXER, Mr. FEINGOLD, Mr. WYDEN, Mr. DURBIN, Mr. JOHNSON, Ms. LANDRIEU, Mr. SCHUMER, Mr. BAYH, Mr. CARPER, Ms. STABENOW, Ms. CANTWELL, Mr. NELSON of Florida, Mr. LAUTENBERG, Mr. MENENDEZ, Mr. CARDIN, Mr. WEBB, Mr. CASEY, Mrs. MCCASKILL, Ms. KLOBUCHAR, Mr. WHITEHOUSE, and Mr. TESTER) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To amend the National Labor Relations Act to establish an efficient system to enable employees to form, join, or assist labor organizations, to provide for mandatory injunctions for unfair labor practices during organizing efforts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Employee Free Choice Act of 2007'.

SEC. 2. STREAMLINING UNION CERTIFICATION.

(a) In General- Section 9(c) of the National Labor Relations Act (29 U.S.C. 159(c)) is amended by adding at the end the following:

` (6) Notwithstanding any other provision of this section, whenever a petition shall have been filed by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wish to be represented by an individual or labor organization for such purposes, the Board shall investigate the petition. If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the Board shall not direct an election but shall certify the individual or labor organization as the representative described in subsection (a).

` (7) The Board shall develop guidelines and procedures for the designation by employees of a bargaining representative in the manner described in paragraph (6). Such guidelines and procedures shall include--

` (A) model collective bargaining authorization language that may be used for purposes of making the designations described in paragraph (6); and

` (B) procedures to be used by the Board to establish the validity of signed authorizations designating bargaining representatives.'.

(b) Conforming Amendments-

(1) NATIONAL LABOR RELATIONS BOARD- Section 3(b) of the National Labor Relations Act (29 U.S.C. 153(b)) is amended, in the second sentence--

(A) by striking ` and to' and inserting ` to'; and

(B) by striking ` and certify the results thereof,' and inserting ` , and to issue certifications as provided for in that section,'.

(2) UNFAIR LABOR PRACTICES- Section 8(b) of the National Labor Relations Act (29 U.S.C. 158(b)) is amended--

(A) in paragraph (7)(B) by striking ` , or' and inserting ` or a petition has been filed under section 9(c)(6), or'; and

(B) in paragraph (7)(C) by striking `when such a petition has been filed' and inserting `when such a petition other than a petition under section 9(c)(6) has been filed'.

SEC. 3. FACILITATING INITIAL COLLECTIVE BARGAINING AGREEMENTS.

Section 8 of the National Labor Relations Act (29 U.S.C. 158) is amended by adding at the end the following:

`(h) Whenever collective bargaining is for the purpose of establishing an initial agreement following certification or recognition, the provisions of subsection (d) shall be modified as follows:

`(1) Not later than 10 days after receiving a written request for collective bargaining from an individual or labor organization that has been newly organized or certified as a representative as defined in section 9(a), or within such further period as the parties agree upon, the parties shall meet and commence to bargain collectively and shall make every reasonable effort to conclude and sign a collective bargaining agreement.

`(2) If after the expiration of the 90-day period beginning on the date on which bargaining is commenced, or such additional period as the parties may agree upon, the parties have failed to reach an agreement, either party may notify the Federal Mediation and Conciliation Service of the existence of a dispute and request mediation. Whenever such a request is received, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

`(3) If after the expiration of the 30-day period beginning on the date on which the request for mediation is made under paragraph (2), or such additional period as the parties may agree upon, the Service is not able to bring the parties to agreement by conciliation, the Service shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service. The arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties.'.

SEC. 4. STRENGTHENING ENFORCEMENT.

(a) Injunctions Against Unfair Labor Practices During Organizing Drives-

(1) IN GENERAL- Section 10(l) of the National Labor Relations Act (29 U.S.C. 160(l)) is amended--

(A) in the second sentence, by striking ` If, after such' and inserting the following:

` (2) If, after such'; and

(B) by striking the first sentence and inserting the following:

` (1) Whenever it is charged--

` (A) that any employer--

` (i) discharged or otherwise discriminated against an employee in violation of subsection (a)(3) of section 8;

` (ii) threatened to discharge or to otherwise discriminate against an employee in violation of subsection (a)(1) of section 8; or

` (iii) engaged in any other unfair labor practice within the meaning of subsection (a)(1) that significantly interferes with, restrains, or coerces employees in the exercise of the rights guaranteed in section 7;

while employees of that employer were seeking representation by a labor organization or during the period after a labor organization was recognized as a representative defined in section 9(a) until the first collective bargaining contract is entered into between the employer and the representative; or

` (B) that any person has engaged in an unfair labor practice within the meaning of subparagraph (A), (B) or (C) of section 8(b)(4), section 8(e), or section 8(b)(7);

the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred.'.

(2) CONFORMING AMENDMENT- Section 10(m) of the National Labor Relations Act (29 U.S.C. 160(m)) is amended by inserting ` under circumstances not subject to section 10(l)' after ` section 8'.

(b) Remedies for Violations-

(1) BACKPAY- Section 10(c) of the National Labor Relations Act (29 U.S.C. 160(c)) is amended by striking

And provided further, and inserting *Provided further,*
That if the Board finds that an employer has discriminated against an employee in violation of subsection (a)(3) of section 8 while employees of the employer were seeking representation by a labor organization, or during the period after a labor organization was recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract was entered into between the employer and the representative, the Board in such order shall award the employee back pay and, in addition, 2 times that amount as liquidated damages:
Provided further,'.

(2) CIVIL PENALTIES- Section 12 of the National Labor Relations Act (29 U.S.C. 162) is amended--

(A) by striking *Any* and inserting *(a) Any*'; and

(B) by adding at the end the following:

(b) Any employer who willfully or repeatedly commits any unfair labor practice within the meaning of subsections (a)(1) or (a)(3) of section 8 while employees of the employer are seeking representation by a labor organization or during the period after a labor organization has been recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract is entered into between the employer and the representative shall, in addition to any make-whole remedy ordered, be subject to a civil penalty of not to exceed \$20,000 for each violation. In determining the amount of any penalty under this section, the Board shall consider the gravity of the unfair labor practice and the impact of the unfair labor practice on the charging party, on other persons seeking to exercise rights guaranteed by this Act, or on the public interest.'