

DyKEMA

AND

MICHIGAN MANUFACTURERS ASSOCIATION



EMPLOYEE FREE CHOICE ACT

By: Ronald J. Santo
rsanto@dykema.com
April 17, 2009

California | Illinois | Michigan | Texas | Washington, D.C.

www.dykema.com

CURRENT NLRB PROVISIONS IMPACTED BY EFCA

- ❖ **Employer has option to afford employees a secret ballot election, or voluntarily recognize a union based on a card check.**
- ❖ **Employer and Union not required to reach a first contract.**
- ❖ **Penalties for unfair labor practices are:**
 - **reinstatement**
 - **back pay**
 - **in egregious situations order of recognition and bargaining**

EMPLOYEE FREE CHOICE ACT SENATE AND HOUSE BILLS

1. **Automatic NLRB certification based on authorization cards signed by majority of employees in an appropriate unit.**
2. **First Contract: Mediation and Arbitration**
 - **10 day period for bargaining to begin**
 - **90 day bargaining period**
 - **30 day mediation period**
 - **Mandatory arbitration of two year agreement**

EMPLOYEE FREE CHOICE ACT SENATE AND HOUSE BILLS

3. Increased Penalties for Commission of Unfair Labor Practices

- Fines up to \$20,000 per violation for “willful or repeated” unfair labor practices
- Treble damages to employee unlawfully discharged or discriminated against during organizing or first contract negotiations
- Injunctive relief must be sought for employee discharge, discrimination, or threat

ORGANIZED LABOR'S ARGUMENTS FOR EFCA

- ❖ **Elections are time consuming and one-sided.**
- ❖ **Newly-elected unions encounter difficulties reaching first contract.**
- ❖ **Current penalties are inadequate deterrents.**
- ❖ **Current economic recession necessitates unionization to enhance wages and job security needed to sustain economic growth.**

LEGISLATIVE STATUS OF EFCA

1) Senate Bill 560

- Senate taking lead since identical House bill can be easily passed.
- Senate Bill pending before Health, Education, Labor and Pension Committee
- Hearings not scheduled
- Stalled because insufficient votes (less than 60) for cloture of debate
 - Impact of Minnesota election
 - Impact of Democrats in key states

2) House Bill 1409

- House Bill pending before Education and Labor Committee
- Awaiting Senate action

PRESIDENT OBAMA'S POSITION

- ❖ Quoted from January 15, 2009 Interview in the *Washington Post*:

Q: (Summary) What is your position on EFCA?

A: Here's my basic principle that wages and incomes have flatlined over the last decade. Part of it has to do with workers have very little leverage and that larger and larger shares of our productivity go to the top and not to the middle or the bottom. I think unions serve an important role in that. I think that the way the Bush Administration managed the Department of Labor, the NLRB, and a host of other aspects of labor management relations put the thumb too heavily against unions. I want to lift that thumb. THERE ARE GOING TO BE STEPS THAT WE CAN TAKE OTHER THAN THE EMPLOYEE FREE CHOICE ACT THAT WILL MAKE A DIFFERENCE HERE.

- ❖ I think the basic principle of making it easier and fairer for workers who want to join a union is important. But I will certainly listen to all parties involved including from labor and the business community which I know considers this to be the devil incarnate.
- ❖ **YOU KNOW, NOW IF THE BUSINESS COMMUNITY'S ARGUMENT AGAINST THE EMPLOYEE FREE CHOICE ACT IS SIMPLY THAT IT WILL MAKE IT EASIER FOR PEOPLE TO JOIN UNIONS AND WE THINK THAT IS DAMAGING TO THE ECONOMY THEN THEY PROBABLY WON'T GET TOO FAR WITH ME.** If their arguments are we think there are more elegant ways of doing this or here are some modifications or tweaks to the general concept that we would like to see. Then I think that's a conversation that not only myself but folks in labor would be willing to have. So my focus first is on those key economic priority items that I just mentioned.

THE DRIVE FOR PUBLIC SUPPORT REGARDING EFCA INTENSIFIES

Quoted from *Wall Street Journal*, April 13, 2009

- ❖ The fight over a stalled bill that would make it easier for unions to organize workers is entering a new round, with the nation's largest business association and big labor unions gearing up competing efforts to sway a small group of senators. The New Chamber ads will hit the airwaves in Nebraska, Virginia, Louisiana, North Dakota, and Colorado – states whose senators could be swing votes on the issue.

* * *

- ❖ **The Employee Free Choice Act currently lacks the 60 votes needed to clear the Senate. Opposition to the proposal until now has focused on a provision that would make it easier for unions to organize without secret-ballot elections.**

* * *

- ❖ **Congressional Democratic leaders, some business executives and unions are discussing possible compromises that would open a path to achieve at least some of labor's goals this year. The CEOs of Costco Wholesale Corp., Starbucks Corp. and Whole Foods Market, Inc. have floated a proposal that sidesteps some of the thornier issues, but would set a fixed time period in which to hold union elections.**

STARBUCKS / COSTCO / WHOLE FOODS APPROACH

- ❖ **Oppose NLRB certification based on card check**
- ❖ **Oppose binding arbitration of first labor agreement**
- ❖ **Support fixed period for free election**
- ❖ **Support toughening penalties for employers violating the statute**
- ❖ **Support toughening penalties for unions violating the statute**
- ❖ **Support easing rules relating to union decertification elections**

LEGISLATIVE STATUS OF LEGISLATION TO PROTECT THE SECRET BALLOT ELECTION

- ❖ **Senate Bill 478:**
 - Although introduced, Senate Bill 478 has not been referred to the Health, Education, Labor and Pension Committee

- ❖ **House Bill 1176:**
 - Referred to the Education and Labor Committees
 - Awaiting Senate action

CANADIAN EXPERIENCE

Based On Article By Michael D. Grodinsky –
Lessons To Be Learned From The
Canadian Experience

- ❖ **Canadian labor statues differ between provincial jurisdictions.**
 - **Currently 4 Canadian provinces have card majority certification (includes Quebec)**
 - **Currently 6 Canadian provinces do not have card majority certification (includes Ontario since 1995 and British Columbia since 2002)**
 - **Canadian federal jurisdiction has card majority certification**

* * *

CANADIAN EXPERIENCE, CONT'D

- ❖ **“There has been a shift away from card count...to mandatory votes. Prior to the free trade era, only one province required votes. Since 1988, the number has increased to [six]...covering about two thirds of the labor force.” (Professor Eric Tucker, Professor of Law at Osgoode Hall Law School, York University)**
 - **Time frame for secret ballot election very short**
 - **Assumption for short time frame is that representation is an employee decision so “neither necessary nor appropriate for employers to play the same role as the union does in a representation campaign.” (Professor James J. Brodney, Ohio State University, Moritz College of Law)**

* * *

CANADIAN EXPERIENCE CONT'D

- ❖ **Canadian unionization as of beginning of 2008 was 31.5%, compared to United States of 13.3%**
- ❖ **Canadian experience:**
 - **“The average employee without strong convictions one way or the other wants to be left in peace, and will sign cards either to avoid the annoyance or peer pressure, or, alternately, out of a fear of consequence of not signing.”**
- ❖ **Canadian experience: lost working days due to labor dispute – seven times higher than the average in the United States**
 - **“Card majority provinces = 66% of days not worked due to labor dispute. BUT = only 33% of the work force”**

CANADIAN EXPERIENCE, CONT'D

- ❖ **Canadian Experience: Card check dilutes employer faith in the certification and impedes the bargaining process**
- ❖ **Canadian Experience: Implementation of first contracts by arbitration has resulted in an “arbitrary settlement that does not necessarily achieve labor peace or a desirable agreement”**
- ❖ **Elimination of card check in Saskatchewan led to province “being competitive in the international economy, finding increased opportunities for the province’s work force, and encouraging the flow of capital into the province”**

EMPLOYER RESPONSE TO PENDING EFCA

- ❖ Principles of Union avoidance implemented NOW
 - Education

DENSO - No Dues Required Page 1 of 1

Thursday, March 12, 2009 9:29 AM

DENSO NO DUES REQUIRED

[HOME](#) [DMMI](#) [UAW](#) [EFCA](#) [RESOURCES](#)

“ It is important that proper communication - which is not one-directional - occurs on a daily basis, so that everyone understands one another. ”

DENSO Spirit

■ HOME

DMMI Associates,
Welcome to DMMI's associate website: "No Dues Required."

We chose this name because at DMMI, there are No Dues Required to work in a great company that strives for open communication, competitive pay and benefits and a safe and secure work environment.

DMMI and other DENSO companies in North America will continue to be a target for unions. Why? Declining membership numbers and the lure of your monthly membership dues.

We are proud to be union-free and we think it's a benefit - not just to DMMI, but to you. We've created this website to provide you with resources, so you can fully understand the facts about DMMI - your company, your benefits and the mission that we share. It will also provide you with facts about unions like the UAW, backed by documents and literature you can access freely and confidentially.


Click around to learn more.

◆ IN THE NEWS ...

The UAW Fights Its Image as the Villain of Detroit

◆ WHAT'S NEW?

Associate Testimonials
Hear and see your fellow DMMI co-workers comment on a variety of topics. [Click here to watch.](#)



Why Union Free?
Find out the top 10 reasons why DMMI should remain union free. [Click here to see The Top Ten](#)



EMPLOYER RESPONSE TO PENDING EFCA CONT'D

- Employee Engagement
- Communications
- Vulnerability Assessment
- ❖ Grievance Procedure
 - Peer Review
 - Binding Arbitration
- ❖ Change Manager / Supervisor
 - Inability To Build A Congenial Employee Group
 - Employee Sentiment Critical
- ❖ Review and revise solicitation, distribution, e-mail, computer usage, and access policies. Review policies regarding “off duty” employee access to site of employment

* * *

EMPLOYER RESPONSE TO PENDING EFCA CONT'D

- ❖ **Develop response mechanisms to hand billing, informational picketing, photographing license plates, and union “street theatre” - inflatable rats, funeral marches**
- ❖ **Develop protocols and procedures for enforcing private property rights, including protocols with local law enforcement**
- ❖ **Review availability and access to employee names, addresses, e-mail addresses**
- ❖ **Review and revise as necessary electronic communication policies re: access to internet, especially blogging and “personal space”**
- ❖ **ABOVE ALL – MAINTAIN A POSITIVE EMPLOYMENT ENVIRONMENT**

❖ **QUESTIONS AND ANSWERS**