



# Update on EFCA

And  
Recommendations for Senior Management on  
Maintaining Non Union Status

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# Overview: Questions We Will Consider Today



- § Is the Employee Free Choice Act dead?
- § Should you still be afraid?
- § Why? What does experience show?
- § Politics today: an extremely pro labor NLRB is being appointed as we speak
- § EFCA, or some compromise of EFCA, is still very much in play
- § Back up and go Forward: How have we gotten here and what you should do now?

# What Would EFCA Do?

- § Certification Of Unions Based On Signing Of Authorization Cards
- § AFL-CIO Calls This “Real Choice”



# What Would EFCA Do?

- § **Mandatory Arbitrations Of 1<sup>st</sup> Contracts After 130 Days**
- § **AFL-CIO Says Necessary To Stop “Endless Delays”**



## What Would EFCA Do?

- § Stronger Penalties Against Employers For ULP's
- § Treble Damages For Unlawful Discharges
- § \$20,000 For Each Other Violation
- § 10 (L) Injunctions



## Where EFCA Stands

§ S. 560/H.R. 1409

- 40 Senate Cosponsors

  - **Compare:** 47 in 110<sup>th</sup> Congress

- 223 House Cosponsors

  - **Compare:** 234 in 110<sup>th</sup> Congress



# Senate Democrats Not Cosponsoring EFCA

- Baucus (MT)
- Bayh (IN)
- Bennet (CO)
- Bingaman (NM)
- Conrad (ND)
- Dorgan (ND)
- Specter (PA)
- Feinstein (CA)
- Hagan (NC)
- Kohl (WI)
- Landrieu (LA)
- Lincoln (AR)
- McCaskill (MO)
- Nelson (NE)
- Pryor (AR)
- Tester (MT)
- Udall (NM)
- Warner (VA)
- Webb (VA)

*Highlighted Senators more vocal: Said they do not like this bill*

# Options For Labor

- § Make No Changes – Push For A Senate Vote On Cloture - Smoke Out Supporters – Punish Nonsupporters
- § Wait For The 2010 Election And Hope For More Democrats In The Next Congress
- § Divide Employer Community – Costco/Whole Foods/Starbucks Coalition - No Success So Far
- § Ignore The Employer Community And Line Up 60 Votes For A “Compromise” Bill

# Options For Labor

§ In An April 21 Interview With Washington Post, SEIU Pres. Andy Stern Said:

- Changes Needed To Get 60 Votes
- Unions Can't Afford To Wait To Next Election To See If They'll Get 60 Votes In Senate
- Window Before Elections Could Be Shortened—less Time For Pressure
- Stiffen Penalties For Employer Violations

§ On May 7, The Wall Street Journal Reported That Senators Are Working On A “Compromise”

# Options For Labor

- § In Early June, Business Week Reported Internecine Warfare Among SEIU And Other Unions
  - § Senate Majority Leader Reid Met With The Unions To Ask Them To Settle Differences And Present A Unified Front To Congress
- § On August 26, Reid Told The Las Vegas Chamber That EFCA Will Not Be Considered During 2009

# Options For Labor

## So Is EFCA Dead?

- § July 17 New York Times Reported Harkin (IA), Brown (OH), Carper (DE), Pryor (AR), Schumer (NY) And Specter (PA) Were Writing A Compromise With Labor To Drop Card Check For Alternatives:
- **Fast Elections (5 To 10 Days)**
  - **Union Access To Company Property**
  - **Prohibition On Employer Mandates To Attend “Captive Meetings”**
  - **Binding Arbitration Of 1<sup>st</sup> Contracts**
  - **“Real” Penalties**
- § **An anonymous AFL-CIO official was quoted saying the compromise will still bring “dramatic changes.”**

# Options For Labor

## So Is EFCA Dead?

- § At AFL-CIO Convention on Sept. 14-15, President Obama and DOL Secretary Solis reaffirmed support to enact EFCA after Congress is through with health care
- § **Sen. Specter (PA):** Democrats and Labor Activists have successfully resolved differences over amended EFCA to include quick elections, union access to property, triple penalties, and mandatory “baseball” style arbitration
- § **Sen. Tom Harkin (IA):** Democrats would have had the votes in July had Sen. Kennedy been able to vote
- § Specter predicted amended bill will pass once new senator from Massachusetts is in place

## Other Possible Changes

- § Supermajority For Card Check (E.G., 60/70%) –  
Not Likely – Still Card Check
- § No Card Checks But “Mail Ballots”
  - Still Subject To Pressure/Intimidation
- § Arbitration
  - Time Period Beyond 130 Days
  - “Baseball”/Last Best Offer Arbitration
  - Remedy For Bad Faith Bargaining
- § Increased Remedies For Employer Violations –  
More “Gissel Bargaining Orders”

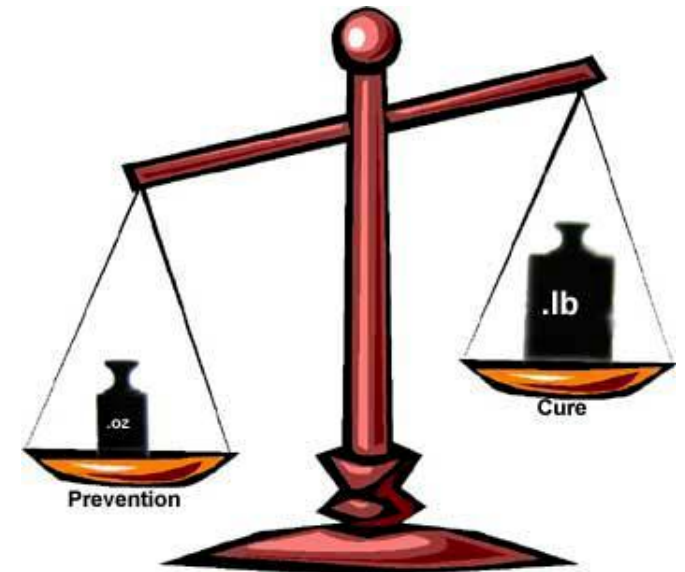


## What About The NLRB?

- § In 1993 Craig Becker, an Obama NLRB nominee today, wrote that the employer role in union elections could be virtually eliminated by NLRB rulemaking-no action needed by Congress
- § U.S. Chamber opposes Becker as “out of the mainstream”
- § Soon 2 Union attorneys (Craig Becker and Mark Pearce) likely will join Chairperson Liebman (a former Teamsters’ attorney) at NLRB
- § In 2010, a Democrat will replace Republican Ron Meisberg as General Counsel (“Chief Prosecutor”) at NLRB.

# Recommendations For Senior Management On Maintaining Non-Union Status

- § Do you want to risk that nothing will change?
- § When will the other shoe drop and what should you be doing now?
- § “An ounce of prevention is worth a pound of cure”



# Recommendations For Senior Management On Maintaining Non-Union Status

## Question:

§ What is the cornerstone of non union status?

## Answer:

§ Business success that is shared with every employee incrementally over time, and simple fairness and respect

## To Elaborate:

- § Every employee wants to know - what's in it for me and my family?
- § Employees must feel they have a stake in the company's success and understand their roles
- § Must trust their roles will be recognized and rewarded
- § Simple fairness and respect - from senior management to local supervisors - is also critical

**We offer 15 recommendations to support these objectives**

# Recommendations For Senior Management On Maintaining Non-Union Status

## § Create An Employee-Oriented Vision For Company Success:

- Communicate Consistently
  - The reasons that nonunion status is the best way for the company to become the most successful company at satisfying customers and growing profits
  - How the companies that are most successful in satisfying customers and growing profits are able, over time, to have the best jobs, wages, benefits, job security and job satisfaction, and
  - How this employer is delivering on this vision of success for the company and for each individual employee, year after year

# Recommendations For Senior Management On Maintaining Non-Union Status

## § Focus Relentlessly On The Vision By Communicating To Employees The Importance Of The Employees' Stake In Customer Service, Profitable Revenue Growth, Cost Control And Yield

- Do not underestimate the importance of employees' appreciation of their stake in a successful business and what must be done to achieve success



# Recommendations For Senior Management On Maintaining Non-Union Status

## § Hold Semiannual Senior Management Meetings With All Employees At Every Location Concerning Progress Towards This Vision And About Business Success:

- Report to employees and answer questions about the specific business progress of the company, business problems that must be addressed for success, improvements for employees – tie discussion to company vision and focus areas
- If needed, from time to time, address positives of nonunion status, the disadvantages of unionization, and the meaning of signing a union authorization card
- During one meeting a year, show detail on incremental wage and benefit improvements year after year due to success

# Recommendations For Senior Management On Maintaining Non-Union Status

## § Train Dedicated Management Communicators For Times Of Union Organizing Activity

- Travel to an imperiled facility on short notice and “live there” to communicate the reasons a union is not in the interest of the company or employees’ best interest
- Address the meaning of signing a union authorization card (if a petition for representation not yet filed), the positive progress of the company towards its employee-oriented vision and business objectives, and disadvantages of unionization
- Respond to employee questions and comments persuasively and legally

**Consult With Counsel To Train These Communicators**



# Recommendations For Senior Management On Maintaining Non-Union Status

## § Train All Supervisors Concerning Union Organizing & The Best Supervisory Practices To Prevent Employee Interest In Unions

- Company's position on unions
- How to communicate about unions
- Signs of union organizing and card signing
- Mgmt actions that are prohibited by labor laws
- TIPS and more -- no-solicitation, no-distribution, and no-trespassing rules
- Importance of fairness and completely consistent enforcement of company policies and rules
- Positive Employee Relations Practices

**Consult With Counsel Concerning This Training**

# Recommendations For Senior Management On Maintaining Non-Union Status

## § Establish A Formal Process For Performance Reviews Of Supervisors And For Retraining

- Human beings do not improve without feedback
- Formalize the process
- Harmful if not constructed carefully and treated seriously
- To support the process, mandate retraining of supervisors (one by one or in groups)



# Recommendations For Senior Management On Maintaining Non-Union Status

## § Perform Annual Location By Location Assessments Of Safety, Equipment And Facility Conditions, And Employee Treatment / Morale – Establish Follow Up Action Items In Every Assessment And Manage Action Items From The Top Until Completed

- Select and train ombudsmen among current managers (no new hires necessary) to interview all employees individually at each location at least once a year
- File written reports and create action items concerning safety, equipment, facility and employee-relation issues; communications to employees regarding those issues; training/ retraining of supervision, etc.
- COO/Senior Management must hold field management accountable on action items at a monthly one-hour senior management conference call with top field management

**Consult With Counsel Before  
Establishing An Assessment Process**



# Recommendations For Senior Management On Maintaining Non-Union Status

## § Require HR And/Or Legal Review And Advice On Every Final Warning/Suspension/Discharge Decision

- Builds employee morale and prevents interest in union organizing
- Standard list of questions for the local manager to answer each time
- When local manager does homework in advance, counseling goes smoothly and quickly
- Pays Enormous dividends

Counsel Can Help Even A Small Company To Devise A Simple Review Process



# Recommendations For Senior Management On Maintaining Non-Union Status

## § Establish Peer Review Boards For Approval Of Suspension/Discharge/Seniority Date Decisions

- Not a union grievance process – will not cause employers to start to “think union.”
- Will cause them to think company is taking every step to manage employees’ livelihoods fairly and will build trust that a union is not necessary.
- Pays enormous dividends in the fairness and trust department.

Very Simple, Effective  
Processes Can Be Designed  
For You By Counsel

# Recommendations For Senior Management On Maintaining Non-Union Status

## § Establish Open Doors To Management At All Levels For Suggestions And For Rapid Resolution Of Complaints

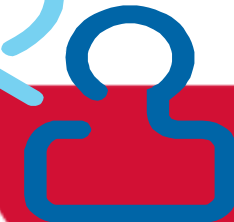
- Most non union companies claim to have an “open door” policy, but not all take all of these steps:
  - Open the doors at all levels, including your own
  - If you are too small for peer review boards, publish your open door policy and ensure it works
  - Ok to suggest discussions with immediate supervisor first, but do not mandate that this must occur in every case
  - Ok to skip levels or to bring it to the top
  - Ensure a response within a pre-established number of days
  - Make sure the process works as advertised



# Recommendations For Senior Management On Maintaining Non-Union Status

## § Formal, Written Communication Mediums

- Our previous recommendations all require good communication processes and skills
- Research on communication shows repetition of communication is helpful to the process – saying the same thing in more than one medium helps everyone to get the point and know you mean what you say
- Letters, emails, magazines, newsletters, newspapers all help management to reinforce key messages
- Use also for employee recognition and teambuilding: stories about employees, pictures of families and outings, employee milestones (birthdays, years of service, children’s graduation, photos, etc.)
- Help build “family spirit”



# Recommendations For Senior Management On Maintaining Non-Union Status

## § Annual Benchmarking Of Wages And Benefits

- Accurate information essential
- Don't violate the antitrust laws
- Find legal ways through appropriate surveys and human resource organizations



# Recommendations For Senior Management On Maintaining Non-Union Status

## § Employees Handbooks And/Or Written Policies

These Books Do Not Undermine Company “Flexibility” But Collective Bargaining Agreements Often Do

### At A Minimum, Cover The Following:

- Spell out a preference for union-free operations
- Procedures to ensure diversity in the workplace
- Fair and progressive discipline
- Management of absenteeism
- Probationary periods of employment
- Promotions/transfers
- Seniority (if desired)
- Solicitation/Distribution on company property

Consult Counsel In Preparation

# Recommendations For Senior Management On Maintaining Non-Union Status

## § Orientation Meetings For All New Employees

- For hourly employees
- For new management
- Discuss reasons a union is not in the long term interests of the company or employees
- No exceptions to orientation process



# Recommendations For Senior Management On Maintaining Non-Union Status

## § **Mandate Periodic Meetings Between Facility Managers And Their Employees To Communicate Specific Messages From Senior Management And To Take Questions And Comments To Send Back To Senior Management**

- Needed by senior management to communicate without traveling on site, using email or letters, or a formal communication medium.
- May want the facility manager to read a key message from senior management and take questions
- May want to communicate key messages in short pre work communication sessions
- Essential for facility manager to report key questions and comments to senior management - may prompt follow up communication or action.



**THANK YOU**

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