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LABOR & EMPLOYMENT DEPARTMENT

# ALERT

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## EMPLOYEE FREE CHOICE ACT: *ARE YOU PREPARED?*

By James A. Matthews, III

The Employee Free Choice Act (EFCA) was re-introduced on March 10, 2009, in both the Senate and the House of Representatives. If passed, EFCA would represent the most drastic overhaul of private sector labor relations since 1935.

As discussed in detail in our [November 2008 Alert](#), EFCA would change federal labor law in three ways, only one of which has received extensive publicity. First, it would require the certification of a union based upon a “card-check,” rather than a secret-ballot election. Second, it would require the parties to submit to binding arbitration for an initial two-year contract if they are unable to reach agreement on a contract within 120 days. Third, it would dramatically increase the penalties for employer unfair labor practices during union organizing and first contract negotiations, without any change in the penalties for union unfair labor practices during the same period.

Last year, EFCA overwhelmingly passed the House, but failed in the Senate and faced a certain veto by then-President Bush. Its proponents are counting on the increased Democratic majorities in both the House and Senate and the legislative momentum created by the various economic stimulus initiatives of the new administration to pass the bill quickly. Given the political commitments to organized labor made both by President Obama and a substantial segment of Congress, it is likely that EFCA will ultimately pass in some form, and President Obama has promised to sign it, essentially in whatever form it passes. That political reality demands a prompt and effective response from employers, both externally and internally.

Externally, it is not too late to influence the final form of the legislation. The conventional wisdom is that Congressional support for EFCA is broad, but not deep and, while he has pledged to sign it, it is unlikely that President Obama is interested in spending any more political capital on it than necessary. In particular, to avoid a Senate filibuster, EFCA supporters will require the support of all Senate Democrats and a least a few Republicans. If those key Senators (and, perhaps, some of the more conservative Democrats in the House) can be convinced to demand some changes in the more radical provisions of the bill (for example, replacing mandatory contract arbitration with some sort of non-binding fact-finding procedure and/or requiring a “super-majority” of two-thirds or 75 percent for mandatory card check recognition), the desire of most in Congress and of the White House to get some bill passed and move on could ameliorate some of the most serious potential problems.

Internally, whatever form the final bill takes, it is clear that employers will have far less time than they do now to respond to union organizing activity once such activity becomes apparent, will have less ability to respond to a union victory with “hard bargaining” and will be subject to significantly greater financial

liability for even inadvertent unfair labor practices committed in this context. As a result, preparation, including management and supervisor training in management techniques to avoid, recognize and respond effectively and lawfully to organizing activity, is now more important than ever.

For more information about this *Alert*, contact Jim Matthews at 215.299.2762 or [jmatthews@foxrothschild.com](mailto:jmatthews@foxrothschild.com), or any member of Fox Rothschild's Labor & Employment Department. Visit us on the web at [www.foxrothschild.com](http://www.foxrothschild.com).

## EFCA Seminars

To assist our clients (in both areas), Fox Rothschild will present a series of free employer briefings on EFCA. The schedule appears below. While there is no charge to attend, reservations are necessary. To make a reservation, e-mail [rsvp@foxrothschild.com](mailto:rsvp@foxrothschild.com) or call toll-free 877.778.7369 by April 10, 2009.

If you have questions or concerns in the interim, please contact Marvin Weinberg at 215.299.2836 or [mweinberg@foxrothschild.com](mailto:mweinberg@foxrothschild.com), or Brian Caufield at 973.994.7537 or [bcaufield@foxrothschild.com](mailto:bcaufield@foxrothschild.com).

Seminars are scheduled to begin at 8:00 a.m. on the following dates at the following office locations:

Date	Location
April 21	Philadelphia, Pennsylvania
April 22	Blue Bell, Pennsylvania (Montgomery County)
April 22	Princeton, New Jersey
April 23	New York, New York
April 27	Roseland, New Jersey
April 28	Warrington, Pennsylvania (Bucks County)
April 28	Pittsburgh, Pennsylvania
April 29	Exton, Pennsylvania (Chester County)



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