



***Labor Relations Institute, Inc.***

## **HALF-PLUS-ONE & YOU'RE DONE:**

Five Things You Should Do Today to Prepare Your Company for the Employee Free Choice Act



## **Half-Plus-One and You're Done:**

### **Five Things You Should Do Today to Prepare Your Company For the Employee Free Choice Act**

*By Phillip Wilson, President and General Counsel, LRI*

The Employee "Free Choice" Act - what I call the Card Check bill - is the number one legislative priority for unions. They are spending over \$300 million in this election cycle to ensure it gets passed. As a non-union employer, what should you do to get ready?

Here are Five Things you (and your company) should do TODAY to prepare for the Card Check bill.

#### **STEP 1**

**Explain to your company leaders and community stakeholders exactly what the Card Check bill changes from today - and how that will impact your company, your community and the national economy.**

The Employee "Free Choice" Act represents the biggest and most fundamental change in American labor law since the original National Labor Relations Act was passed in 1935. Briefly this law changes the way unions currently get into companies in the following ways:

- **It allows unions to circumvent NLRB elections (half-plus-one and you're done).** Under the current law if an employer questions a union's majority status it can ask for a secret ballot election, monitored by the NLRB. Under the Card Check bill unions decide whether or not to seek an election - and once they have cards from a majority of employees they can force the employer to recognize them WITHOUT A VOTE. In other words, once an employee signs a union card (no matter what they are told it represents or how much pressure they are put under to sign) they give the union the right to impose recognition without a vote. Unions never request a vote once they have achieved a card-check agreement from an employer, so this provision effectively eliminates the secret ballot.
- **It imposes "fast-track" contract negotiations with government-imposed contracts.** Under current law, once a union achieves majority status the union and the company are given a minimum of one year to negotiate a first agreement. Negotiations can, and sometimes do, last even longer than a year. There is no requirement that the union and company reach an agreement. All that is required is that they both bargain in good faith in an attempt to reach an agreement. Under the Card Check bill this process is turned upside down. Now unions and companies would have only 90 days to reach an agreement. If no agreement is reached, there is a 30-day period where a mediator attempts to resolve the contract. If that doesn't work (and the union will have very little incentive to cooperate) then a federal arbitration panel is called in to settle the contract. Whatever contract the panel imposes (no matter how big a burden on the company) becomes the bargaining agreement for that unit for 2 years.
- **It imposes punitive penalties on employers for violations of the NLRA.** The current law is remedial - in other words the purpose of the Act's penalties is to restore the parties to the way things were before the violation occurred. Under the Card Check bill employers can be fined up to \$20,000 per violation and be forced to pay treble damages for back pay awards (these provisions don't apply to



unions). This creates incentives for unions to file nuisance charges against employers and puts employer unfair labor practices on a different level than those committed by unions.

These changes are massive. Since unions are pretty much a non-factor in the private sector economy today (they represent less than one in ten private sector workers), most company leaders have very little experience with what dealing with a union is like. This probably explains why there is so little discussion currently of the "Free Choice" Act by the employer community today.

But make no mistake. Should this law pass nearly every private sector company in America will be vulnerable to a stealth organizing campaign. Overnight, companies that today have little reason to worry about unions will find themselves targets. This is especially true for small businesses. Under current law, it isn't cost effective for unions to attempt to organize them. **Under the EFCA, every business with 2 or more employees is now a target.** Most companies today prefer to work directly with their employees and will attempt to educate employees about the disadvantages of third-party representation during a union election campaign.

Under the "Free Choice" Act a stealth card signing campaign is very likely to succeed. Unions will start running billboard ads in local industrial parks, asking workers who don't like their job to call an 800 number or visit a website. Those who call will be handed authorization cards and asked to get co-workers to sign - even though they will know almost nothing about unions (and unions will have little incentive to educate them). In a small shop just a handful of workers is all that will be required to bring in a union and most will have no idea what they are getting into. Thousands of companies will be organized like this with almost no investment on the part of unions.

Bigger targets will be a different story. Unions will continue to use some of the tried and true tactics of today. They will pressure employees at their homes, in local bars and coffee shops and even at churches. Unions will ally with politicians and other groups in the community where they want to organize workers by providing donations and other assistance in exchange for the access and credibility they get by being seen as "partners" with these organizations. They will bribe employees to come to meetings with free food, alcohol and other enticements (and yes, sometimes they literally bribe employees). When bribes don't work they can rely on intimidation and threats (sometimes veiled, sometimes not).

**After the Card Check bill becomes a reality, there is no check on these abusive tactics.**

Nobody will be there to educate employees on the full story about unions. There will be no government-supervised secret ballot election free from the threats and intimidation of home visits by an "organizing committee." Unions will run roughshod over workers, knowing that there is no penalty for doing so and that even in the worst case they are guaranteed a dues revenue stream for a minimum of 2 years before employees will have any opportunity to correct their mistake.

Finally, consider the impact on the American economy. While unions like to claim that they bring great wage and benefit gains to workers, it is a good idea to look carefully at the statistics. When you control for things like region of the country and industry classifications these wage effects begin to level out - in some cases the non-union workers wages and benefits are superior. More important, look at what happens to the companies in these heavily unionized industries. In today's global economy, unionized companies (who make adjustments slowly due in part to the fact that they are required to collectively bargain over most major changes) simply get out-hustled by non-union competitors.



The auto industry is a perfect example. American auto manufacturers are nearly bankrupt after years of getting out-competed by foreign companies. These companies are not using cheap overseas labor to build their cars - Toyota employees make as much and sometimes more than comparable Ford and GM employees. The main difference is in the flexibility and speed with which Toyota can react to market conditions. American manufacturers who are unionized lose a lot of that flexibility. When competing on a world market, that lack of speed means you lose.

I want to be clear about something - I do not believe that unions are fundamentally bad. Where a majority of workers decide, based on a clear understanding of all the facts, that they would prefer to work with their employer through collective bargaining that preference should be both honored and protected. Employer (and union) abuses of the system should be prosecuted and quickly remedied.

The problem with the proposed "Free Choice" Act is that it **all but eliminates the chance that employees will make the decision with a clear head and a chance to get all the facts.** Instead they will almost always be making a decision based on only one side of the story and likely in an environment where they will be under a lot of pressure (peer and otherwise) to "go with the flow" and sign away their right to deal directly with their employer.

The so-called Employee "Free Choice" Act will be devastating to employers, the American economy and to the true free choice of American workers. If company leaders and community stakeholders don't educate themselves - and their employees<sup>1</sup> - about it now, it will be too late once the law passes. Communication of such complex issues is best handled by means of video, as the message is completely controllable, with no room available for factual misrepresentations or inappropriate embellishments.

## **STEP 2**

### **Orient every new hire at your company about union card signing and the Card Check bill starting TODAY.**

Most new employees know nothing about unions. You do not want the first person who talks to them about a union card to be a union organizer. Your first line of defense against card signing is your employees. After all, they are the ones who will be approached to sign a union card. The only way you are likely to find out about an active card signing effort is if one of your employees tells you or another leader at your company. In order for this first line of defense to work, however, you must have two things in place:

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<sup>1</sup> Some may worry about what they can say to employees about legislation. The [Wall Street Journal recently ran a front page article about Wal-Mart educating its managers about the EFCA](#). In that article unions complained that Wal-Mart may be violating federal election laws by communicating to its employees (it was alleged that they told employees to vote against Barack Obama, who is a staunch supporter of the legislation). While you should certainly discuss this subject with your own attorney, understand that you enjoy a free speech right to discuss your position as an employer on issues. While you should not tell people how to vote, you certainly have a right to educate them about the "Free Choice" Act and how you feel about the legislation. Your goal should be for your employees to let the candidate of their choice know how they feel about a particular piece of legislation. Candidates aren't stupid – they look at polling data for a reason. If they realize that they are on the wrong side of an issue – even if that issue is something the unions want them to pass - they will side with the numbers.



- **Awareness:** Your employees must be aware of what a union card is, its legal significance and the relative advantages of a direct relationship versus third-party representation.
- **Open Communication:** Employees must feel comfortable approaching you or their supervisor about the issue of unions or the existence of union cards.

Let's look at each of these in order.

## **Awareness**

Remember that in most cases employees are unlikely to have any knowledge or experience with unions. Union organizers are not going to explain the legal ramifications of a union card to a potential recruit. Instead they will just say, "You want better pay and a voice at work, right? Then just sign the card." They will blow off any questions that get too close to the downside of unions. And who can blame them? Organizers are paid to sell the union. And if the organizer is just a coworker told to get cards signed, they probably have no idea what the cards mean themselves.

Just as important as understanding the legal ramifications of a union card - and the lengths to which unions will go to get one signed – employees also need to know why a direct relationship is superior to third-party representation. Let's face it - many employees just want to "do their eight and skate" and do not want to get in the middle of a union fight. Taking a stand against the union will automatically make you unpopular with the people who support it. **To get employees to take a stand you need to let them know how a union might impact them personally.**

You need to make sure that each new employee understands that there is a huge difference between a direct relationship and collective bargaining. If they decide that they prefer a direct relationship they will be more likely to let someone know if that relationship is being threatened by a union card signing effort. But creating this level of awareness is only half the battle.

## **Open Communication**

It may be hard to believe, but in many cases employees are reluctant to approach their employer with news or rumors about union organizing because they themselves aren't really sure of the company's position. These people are smart enough to know that it is an important issue, but they are also politically savvy and know that they don't want to be on the wrong side. So instead of letting the company know about card signing they try to get a handle on the politics of the situation, waiting for the right time. The problem is that life often takes over and the right time never comes - or when it does come it is too late to do anything about it. That is especially true with the "Free Choice" Act.

So make sure that employees understand that the lines of direct communication are always open. Encourage them to talk to leaders about issues and concerns at work. Help resolve those issues quickly and favorably. In the end this is the best way to stop a union card signing effort in its tracks - if employees see no benefit to a union in the first place they won't sign a card no matter how good the sales pitch. This is what I call winning the "relevance" game.



### **STEP 3**

#### **Train your managers and supervisors to recognize the "early warning signs" of union card signing.**

Once the Card Check bill becomes law, you need to become aware of union activity as soon as possible. This is even more urgent than under today's rules where even if you are "sneak attacked" by a union you still get the chance to educate employees about your side of the story.

Under the Card Check law you must have alert and well-trained first line supervisors able to recognize the early signs of union activity and to know exactly how to respond whenever this activity is identified. You must teach each manager and supervisor to be able to recognize the early warning signs of union activity and, in general, how to respond to these signs.

Unfortunately most early warning signs are not clear signals that union organizing is present - and once the "Free Choice" Act is in place the vast majority of card campaigns will be "stealth" campaigns. Obviously, if a supervisor sees people distributing authorization cards that is a clear sign (although probably too late to do anything about). But most early warning signs are more subtle.

For example, getting the cold shoulder from an employee who is normally open and talkative could be a sign. The reason this behavior is a sign is that **employees are often threatened by organizers that if they let on that there is card signing going on before the union gets in they will be fired and that their status is "unprotected"** (which is complete nonsense - all employees are protected by the NLR Act whether there is a union in place or not). Many employees clam up under that kind of pressure.

But one employee behaving this way is not a sign of a campaign. Most of the time it takes information from more than one supervisor to establish a pattern that will identify union organizing before overt activity begins.

There are 14 key early warning signs that every supervisor and manager should know and have sensitivity to in their work areas. **If your managers don't know these 14 signals they are flying blind** to union organizing activity and your company is completely vulnerable under the "Free Choice" Act.

In addition to learning these early warning signs your managers also need to know how to respond to them. It is obviously important that they be sensitive to the signs and let your "command center" know when they notice them (this is discussed further below). But they also need to know how to legally and effectively open up lines of communication that often shut down (on purpose) during an organizing effort.

We have developed 13 icebreakers that help lawfully break down barriers erected during card signing campaigns and re-open lines of direct communication with employees. These simple tools give supervisors and managers the confidence to dig a little deeper to uncover issues in the workplace and potentially discover union card signing activity early enough to begin educating employees about union cards before they sign (and under the "Free Choice" Act it is then too late). This should be another key part of your manager training program. A properly developed program includes video-based training, exercises and activities that your staff conduct with managers and supervisors, and proper testing mechanisms to insure applicable learning has occurred.



#### **STEP 4**

#### **Create and train a Quick Response Task Force to rapidly and effectively respond to card signing activity.**

Under the so-called "Free Choice" Act, every organization must be fully prepared to respond quickly and decisively to the very first signs of union activity. When an employer sees an authorization card, it is never the first card to make its way onto the premises. Realistically, if the union has been successful in keeping the campaign under the radar, they are probably at least at the 25% level before management becomes aware. Therefore you have a very small margin for error in preventing additional card signing. It is critical to have "boots on the ground" as soon as possible to manage the campaign and direct the activities for the balance of the campaign.

After your supervisors and managers have been trained to identify the early warning signs of union activity you must establish and install the proper protocol for notifying the appropriate person in your organization of suspected union activity. Many early warning signs viewed individually do not necessarily mean union activity exists. However, in almost every organizing effort, one supervisor will observe one sign while a second supervisor will observe another. This is almost like a puzzle. Each supervisor may have one piece, but until someone collects the pieces and puts them together, no one can recognize the picture. Also like a puzzle, you don't have to have 100% of the pieces to tell what is going on. In some cases, just a few of the key pieces will give you a good idea about what is happening.

Every organization should have one central "command center" where suspected union activity is reported. This should consist of at least two people so that during time off for one person another trained person is available. Although the "command center" will be open 24-7, reports will normally be very infrequent so being available by cell phone will not be an inconvenience for anyone. When suspected activity is reported it should be logged in and evaluated. Many reports will not require immediate action but when it is determined that union activity either exists or is likely to exist, the "command center" will notify the appropriate management representative.

**You must establish a method to respond immediately and decisively to union activity.** It is critical to have your first week of response planned in advance, so that all you have to do is "pull the trigger." You will also need a team of individuals who are trained to be part of a "Quick Response Task Force". This task force should consist of at least three individuals. One of these individuals should come from within the organization. One should be a professional campaign manager (either from within or outside the organization). You also want legal assistance to be part of your team.

The task force would be called into the organizing attempt the moment the campaign begins. The task force would be available to travel to the targeted location immediately and would be responsible to manage and direct the campaign.

The task force has the role of defining the campaign issues and communication strategy after the initial "blitz" week of the campaign. As the local management team runs through the first week of the campaign, the task force team begins mapping out communication strategies for the remainder of the campaign period (which could be as little as a week or last months, depending on the scope of the unit being targeted).



## **STEP 5**

### **Develop a card signing campaign "in a box" that is ready to launch the moment you notice union activity at a location.**

Your card signing campaign “in a box” should include everything you will need to run the first week of a campaign to prevent additional card signing. The moment card signing activity appears, management must respond aggressively in order to temporarily stop or significantly slow this activity until a detailed organization and union specific anti-card signing campaign can be formulated. This is an “In Case of Fire – Break Glass and Pull Handle” format that can be started by any member of management or supervision at any time of the day or night.

This is what your campaign-in-a-box should contain:

- A video that is suitable for showing to employees in small group meetings the minute you realize that active card signing activity is happening at your company.
- Flyers that supplement the information in the video, highlighting the fact that union membership is on a rapid decline, that unions create conflict in the workplace, and not to fall for the pressure of union organizer promises.
- Handouts that further reinforce the message in the video, encouraging employees to get the facts before they sign a card and explaining some of those facts in detail.
- A letter to employees that reinforces the themes of the week and again asks employees to think carefully and get all the facts before falling for union promises.
- An “Interview with a Union Organizer” video that presents the false promises unions often make from the unique perspective of a former union organizer. This powerful presentation gives employees who are "on the fence" a lot of ammunition to use when being pressured by union organizers.
- Data about the union, including the union's financial reports and election records. This information again reinforces the idea that employees should not make such an important decision based on emotion, but instead need to rely on facts.

You need to **set up a complete campaign calendar with specific responsibilities for the organization**. Once the campaign gets rolling, there should be no question about what happens when. There should be no additional approvals needed that might slow things down. The idea is to have the campaign's first week set.

If your organization has multiple locations you should have a copy of the campaign materials available at each site (Murphy's law tells us that your campaign activity will start in the middle of the night at the one location where there is no kit). Be prepared for activity to happen everywhere that you do business – remember that even very small units are vulnerable to organizing (**the NLRA covers units as small as 2 employees, and the median unit size in NLRB elections under current law is 25 employees**).



The importance of this one-week campaign cannot be overstated. In an Employee "Free Choice" Act world, you will not have the luxury of time. By the time you learn of card activity you should assume that you are already too late. In most cases today it takes a company at least a week to launch a counter attack to union card signing - local managers need approval from corporate managers and outside legal counsel before they can act. In the world under the EFCA, that will be one week too late. You will already be organized and within 4 months you will have a brand new labor contract that you will have to live with for at least 2 years.

A final word about designing your positive employee relations program described here. LRI believes firmly in the value and power of video as a key communication medium for the complex issues involved. Video assures that the message is crafted correctly, approved by legal counsel, and is then delivered in the right form and in the same way every time. Emotions run high during a union campaign, and being able to know and prove exactly what was communicated at every point in the process is critical, particularly in light of the penalties against management for unfair labor practice charges, which are stiffened significantly under the EFCA (refer to page 1).

### **About the Author:**

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He received his J.D. from the University of Michigan Law School and his B.A. (*magna cum laude*, Phi Beta Kappa), from Augustana College.

Mr. Wilson began his career practicing law in Chicago, where he represented companies nationwide in all areas of labor and employment law. He later served as the Director of Human Resources for a multi-million dollar gaming corporation employing over 1,200 people.

Mr. Wilson is a much sought after lecturer and the author of numerous books and articles on labor relations topics including *The Next 52 Weeks*, *Managing the Union Shop*, and *Model Contract Clauses*. He has been invited to testify in Congress on numerous occasions on the subject of union financial reporting requirements.

### **About LRI:**

**Labor Relations Institute, Inc. (LRI)** is a consulting firm dedicated to protecting the direct relationship between employees and their employers. LRI provides the widest possible range of employee communications products, sophisticated databases and deep intelligence services. LRI clients can secure everything required to monitor their risk of unionization, build positive employee relations, train supervisors, and if necessary, run a winning campaign. LRI's acclaimed products and services have been used in more than 10,000 union elections with a win rate of over 90%.

LRI's **EFCA Tool Kit** is the only **EFCA-specific total communications solution** designed for employers which:

- **Educates company leaders** about the EFCA and its implications.



- **Trains your supervisors** to recognize and respond – quickly and effectively - to the earliest warnings of union card signing activity.
- **Informs your employees and new hires** of the dangers of signing a union card, and explains the advantages of a direct relationship.
- **Provides an instant response** presentation and a management action plan – a counter card signing campaign “in a box” - if union activity is detected.

The Tool Kit is current under the law in effect today.<sup>2</sup> When the Employee Free Choice Act passes, all DVD's and other materials will be replaced to reflect the final provisions of the new legislation. ALL REPLACEMENT MATERIALS WILL BE PROVIDED AT NO ADDITIONAL CHARGE. To learn more about the Employee Free Choice Act and making your company a “hardened target” to unions<sup>3</sup> with the EFCA Tool Kit, visit us at <http://www.lrionline.com/efca>

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<sup>2</sup> IMPORTANT NOTE: The materials in this Toolkit are designed to be fully customizable and useable in a variety of situations and company settings. However, each situation is unique and complex and we cannot assure you that these materials will be appropriate for your specific factual situation. We strongly urge you to review these materials – whether you customize them or not – with your legal counsel to ensure that they are appropriate and lawful for use in your particular setting. We are not a law firm and do not provide legal advice – nothing in this product should be construed as legal advice.

<sup>3</sup> Regardless of whether or not the EFCA passes, the tool kit provides everything you need to fortify you company against union organizing campaigns. By already having the materials scrutinized by your legal counsel and customized for your business, having trained your managers, having implemented the orientation programs, and having your Quick Response processes in place, you are miles ahead of the unions, and it is likely they will move on to a more unprepared victim. Your savings of both time and money will go directly to the bottom line.