

**Federal Issues  
West Virginia Chamber and SHRM  
2009 HR Summit**



**Marc Freedman  
Executive Director, Labor Law Policy  
U.S. Chamber of Commerce**



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# Composition of the 111th Congress

## Senate

- 110th Congress: 51-49
- 111th Congress: With Al Franken's seating, and Arlen Specter's party switch Democrats now control by a margin of 60- 40.
- Magic number is 60—cut off debate and move forward (cloture).
- Byrd not well

## House

- Democrats have increased their majority by 19 seats and now lead the Chamber by a margin of 257-178.

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## Key Employment Bills in the 110<sup>th</sup> Congress That We Were Concerned About

- The Employee Free Choice Act
- Repeal of Right to Work Laws
- The “RESPECT” Act (make supervisors eligible for union organizing)
- The Lilly Ledbetter Fair Pay Act of 2007/ The Fair Pay Restoration Act
- The Healthy Families Act (mandate paid sick leave)
- The Civil Rights Act of 2008
- The Paycheck Fairness Act (comparable worth)
- The Protecting America’s Worker Act (increase OSHA penalties)
- The Nurse and Patient Safety & Protection Act of 2007 (new ergo)
- The Popcorn Workers Lung Disease Prevention Act (OSHA diacetyl reg)
- The S-Mine Improvement and New Emergency Response Act
- The Combustible Dust and Fire Prevention Act of 2008
- The Private Whistleblower Streamlining Act of 2007
- The Working Families Flexibility Act

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## Key Employment Bills in the 110<sup>th</sup> Congress That Have Moved in the 111<sup>th</sup>

- The Employee Free Choice Act
- Repeal of Right to Work Laws
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# Current Union Environment

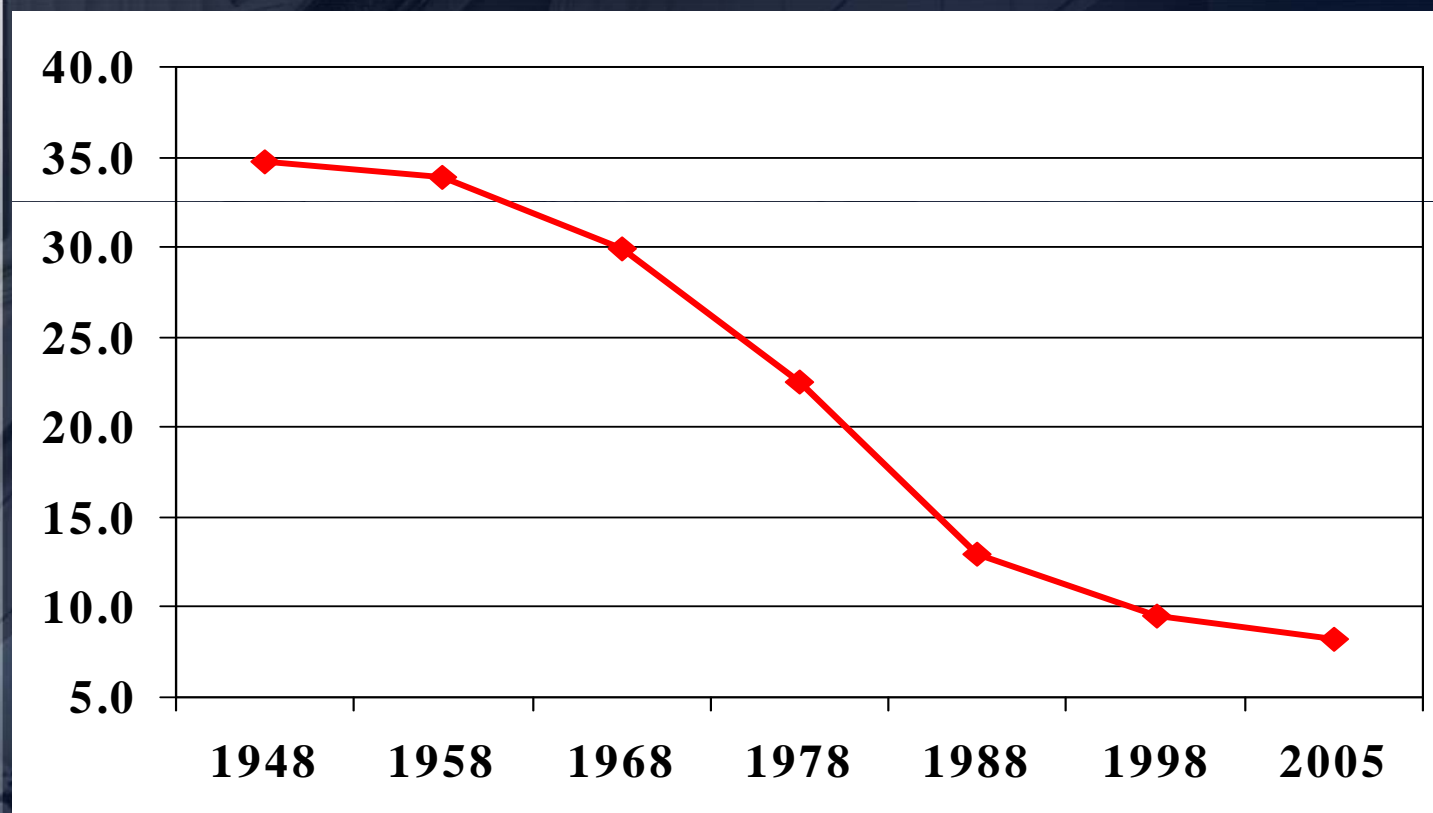
- Union members currently make up just 7.6 percent of private-sector employees.
- Same organizing system as when they had their highwater mark in the 50s—they win about 56% of elections.
- Recent data shows they won 66% of elections in 2008
- EFCA isn't about unions winning more elections, it's about them never losing.

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## Union Membership 1948 - 2006 As A Percentage of the Private Sector



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## Threat Represented by EFCA

- *Andy Stern, President, SEIU: “If we pass the Employee Free Choice Act, these unions will grow by 1.5 million more members a year, not just for five years but for 10 to 15 straight years.”*
- With increased membership as a result of enacting EFCA would come much more ability to move workplace legislation like:
  - Expanding the Family and Medical Leave Act including paid leave
  - Mandating paid sick leave
  - Increasing OSHA penalties
  - Eliminating damages caps and statutes of limitation under civil rights law
  - Eliminating Right to Work Laws



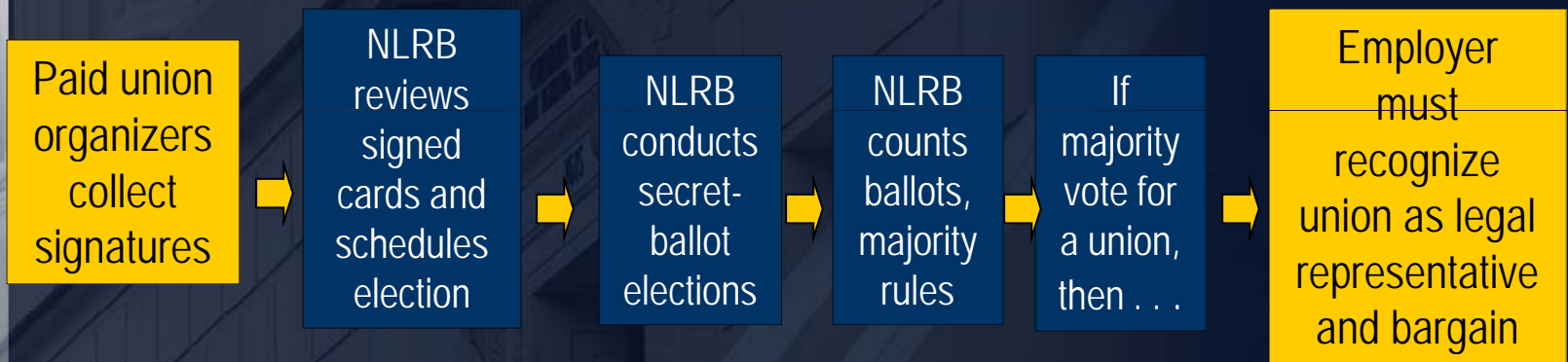
# EFCA Would Yield Unbalanced Labor Law

## H.R. 1409/S. 560

- Require unions to be recognized if a majority of employees in a bargaining unit sign authorization cards, thus eliminating the right of the employer to call for a secret ballot election.
- Force contract negotiations into binding interest arbitration if the employer fails to agree on a contract with a newly formed union within 120 days after negotiations begin. Contract imposed on company for two years—no appeal, no employee ratification.
- Impose stiffer penalties on employers, but not on unions, for violations.
- Status: Introduced on March 10, 2009; 40 sponsors in Senate vs. 47 in 2007; 223 in House vs. 230 in 2007—less than last time with much higher majorities in both bodies



# Union Organizing: Current Law



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# Union Organizing Under “Employee Free Choice Act”





## EFCA Effectively Eliminates Use of the Secret Ballot

- Two reasons why we say EFCA “effectively” eliminates use of secret ballots:
  - Unions will not stop at getting only 30% of employees to call for an election when 50% plus one assures them of recognition.
  - EFCA says that once cards with a majority of employees are presented and certified, the NLRB is NOT ALLOWED to conduct an election.
- Actually lowers the amount of workers need from 65-75% to 51%

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## EFCA and Small Businesses

- Serious threat to small businesses—only half plus one of employees— you could come into work on Monday and be forced to recognize a union you had no idea was targeting your business. You can lose control of your business before you even know the threat exists.
- EFCA shuts employers out of the discussion—you thought you were doing right by your employees and had a cooperative relationship and yet the union organizers can come in and convince your employees otherwise.
- Small businesses will go from being under the radar to being in the crosshairs for organizing.

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## EFCA and Binding Interest Arbitration

- Binding interest arbitration by panel of government arbitrators if agreement on first contract not reached in 120 days.
- Unreasonably short time for first contract—especially small businesses with no history of labor negotiations
  - Mediation after 90 days
  - Arbitration after 30 days mediation—mediator refers
- Current law imposes duty to bargain, but no obligation to agree to detrimental terms

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## EFCA and Binding Interest Arbitration--II

- Government sets contract terms for two year first contract
  - All conditions for workplace will be covered, not just wages and benefits
  - Employer and union need not agree
  - Workers need not agree (no contract vote)
  - Union has no skin in game—only employer
- Easy for union negotiators to slow walk into arbitration
  - Finding middle will always favor union
  - Not a matter of if you will lose, but how badly

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## Current Law: Collective Bargaining

- Bargaining in good faith required
- Each party free to determine whether proposals are acceptable—duty is to bargain in good faith, not to agree to contract that would be against interest
- Broad NLRB authority to remedy bad-faith (“surface”) bargaining
- Union leverage includes strikes if first contract not agreed to
- Workers typically can vote on the contract



## Binding Interest Arbitration NOT the same as Dispute Arbitration

- Unions arguing that EFCA opponents are hypocrites because we support the use of arbitration to settle narrow disputes but oppose binding interest arbitration
- Two very different types of arbitration:
  - Dispute Arbitration is used to resolve narrow issues after a contract has already been entered into, like whether employee appropriately dismissed
  - Binding Interest Arbitration trying to be used to write a new full contract
- Apples and Oranges—unions desperately trying to confuse issue

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## EFCA Increases Damages on Employers, but not on Unions

### Treble Damages for Back Pay

Back pay shall be awarded and fees for two times the back pay amount shall be awarded as liquidated damages when an employer has discriminated against an employee in violation of § 8(a)(3) (hiring/firing because of union activity) when employees were seeking representation or during the period after a labor organization was recognized until the final contract.



# EFCA Increases Damages on Employers, but not on Unions—II

## Civil Penalties

An employer who willfully and repeatedly commits any unfair labor practice within the meaning of § 8(a)(1) (interfering with organizing) or (3) (hiring or firing) while employees are seeking representation by a labor organization or during the period after recognition until the final contract is subject to a civil penalty not to exceed \$20,000 for each violation.



## EFCA Increases Damages on Employers, but not on Unions—III

### Injunctive Relief

Where it is charged that an employer discharged an employee in violation of §8(a)(3) (hiring or firing for union activity) or threatened to discharge an employee or otherwise threatened an employee in violation of §8(a)(1) (interfering with organizing) or engaged in any other unfair labor practice within the meaning of §8(a)(1) while employees were seeking representation by a labor organization or during the period after recognition until the final contract, the NLRB must seek an injunction.

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## Senator Specter (as a Republican)

March 24, 2009 floor statement: Won't support cloture for EFCA:

“The problem of the recession makes this a particularly bad time to enact employees choice legislation. Employers understandably complain that adding a burden [would] result in further job losses. If efforts are unsuccessful to give labor sufficient bargaining power through amendments to the NLRA then I would be willing to reconsider the employees choice legislation when the economy returns to normalcy.”

- Note support for unions and their quest for more strength, and hinging of position on bad economy.

Offered Appendix of suggestions including “quickie elections” and union access

## Senator Specter—II

- April 28, 2009 Switches parties, becomes a Democrat—wouldn't survive Republican primary
- Stated that he would maintain his position on cloture vote for EFCA
- Aggressively seeking some other package—working with Sens. Harkin, Pryor, Schumer, Brown
- Has little to do as junior senator, needs to show unions he is on their side to fend off Democratic primary challenge

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## Senator Specter—III

- September 15, 2009: Tells AFL-CIO Convention in Pittsburgh: "We have pounded out an employees' choice bill which will meet labor's objectives."
- Despite Specter's assurances, no indication that 60 votes exist for this "deal":
  - Byrd health = 59
  - Key Ds saying no change: Lincoln (AR), Nelson (NE)
  - Even Specter's office, and Sen. Reid disavow any "deal" in place
- All about pandering to unions for support in primary
- Story barely lasted one news cycle



## EFCA Alternative Concepts Being Discussed

- “Quickie elections”—secret ballot elections but with very short time frame
  - Possibly 5-10 days—would compromise employer ability to communicate to employees
  - Employees forced to make decision without full info
  - Part of Specter’s “deal”
- Union Access—union organizers would come into workplace to same extent as employer communicated
  - Intrusive and unnecessary—currently unions can get in front of employees at home, etc.
  - Union sympathetic employees can approach others
  - Employers would pay for time spent by lose productivity
  - Part of Specter’s “deal”

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## EFCA Alternative Concepts Being Discussed–II

- Mail in ballots— “postcard check” would not prevent union pressure tactics
- “Baseball” or Last Offer arbitration—arbitrators would have to choose between complete packages offered by both sides
  - MLB only uses for narrow issues—how much to pay one player for one year
  - Would still result in contracts written by arbitrators without ability of employers or employees to shape
- Part of Specter’s “deal”

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## Prospects for New EFCA Bill—Where We Are

- Unions desperately want (payoff for election)—still touting EFCA even though clearly no 60 votes
  - At least Sens. Lincoln, Webb, Feinstein have indicated they will vote no on cloture to proceed, and ALL Republicans
  - Senator Byrd health means they only have 59
  - Not clear whether unions actually support swapping card check for quickie elections/union access—Trumka comment after Specter announcement
- Only if they can get a bill with 60 people showing up will they introduce and bring up quickly-- not at all clear that this will happen
- If no new bill, likely that they will bring up original for vote even though it will fail, just to flesh out votes—several Dem senators will not be happy—heading into election year
  - Senator Reid in tight spot

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## Current Message: NO Compromise

- Goals of EFCA (unfettered union organizing, guaranteed first contract) are inappropriate—this is not ADA, Civil Rights, or great noble calling
- Demise of support for EFCA does not mean this is time for employers to fill the void—don't be lured into “so what DO you support?” Bottom line: employers will give up much more than they could ever get
- Process makes any compromise very risky—will wind up with EFCA or similar bill



# Healthy Families Act

## H.R. 2460/S. 1152

- Applies to public or private employers with fifteen (15) or more employees
- Requires an employer to:
  - Provide up to 56 hours (7 days) of paid sick leave for all employees—full time and part time
  - Leave accumulated at rate of one hour per 30 hours worked (new)
  - Accumulation begins on day one, available for use after 60 days
- Leave may be used on an hour-by-hour basis or in smallest increment used by employer's payroll system (as with FMLA)

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# Healthy Families Act–II

## H.R. 2460/S. 1152

- Leave may be used for:
  - Physical or mental illness of the employee;
  - Doctor’s visit for the employee;
  - Caring for a child/parent/spouse or someone in a family-like relationship;
  - Needs related to domestic violence or stalking
- Safe harbor: if provide this amount of leave for these purposes no new leave required—questions remain about scope (new)
- Seen as Kennedy “legacy” bill

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## The “Paycheck Fairness Act” (H.R. 12/ S. 182)

- Permit unlimited punitive and compensatory damages to be awarded, and make it easier to bring class action suits with regard to pay disparities.
- Significantly limit defenses to Equal Pay Act claims.
- Make it a violation of the Fair Labor Standards Act to prohibit employees from sharing salary information.
- Re-impose the discredited Office of Federal Contract Compliance Programs (OFCCP) Equal Opportunity survey and force the OFCCP to use dubious statistical methods in investigating systemic compensation discrimination.
- Status: On January 9, 2009, the House passed the bill by a vote of 256-163; sent to Senate with Ledbetter.

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# Protecting America's Workers Act (OSHA Reform)

## H.R. 2067/S. 1580

- Broad restructuring of OSHA civil and criminal penalties
- Makes death in the workplace with willful violation a felony
- Removes death in workplace requirement for criminal penalties
- Would allow employee or representative of employee to challenge settlement agreements or citation modifications



# Protecting America's Workers Act—II (OSHA Reform) H.R. 2067/S. 1580

- Requires employers to abate violations for serious hazards during the time employer contests to a citation are being reviewed and resolved
- Prohibits employer policies or practices that discourage the reporting of work-related injuries or illnesses i.e., safety incentive programs
- Would subject employers currently regulated by industry specific agencies to OSHA—airlines, trucking, maritime
- Expands protection for whistleblowers