

WISCONSIN MANUFACTURERS & COMMERCE

Employee Free Choice Act Briefing

MICHAEL BEST
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WHAT IS EFCA?

**The most sweeping proposal
for labor law reform in nearly 75
years**

MORE THAN AN OXYMORON

- Organized labor's top legislative priority
- A strategy for growth and relevancy after decades of declining membership
- A condition of campaign endorsements, financial support (\$400m), and ground troops in the 2008 elections

WHAT WOULD EFCA DO?

EFCA would make organizing easier by stacking the deck against employees and employers

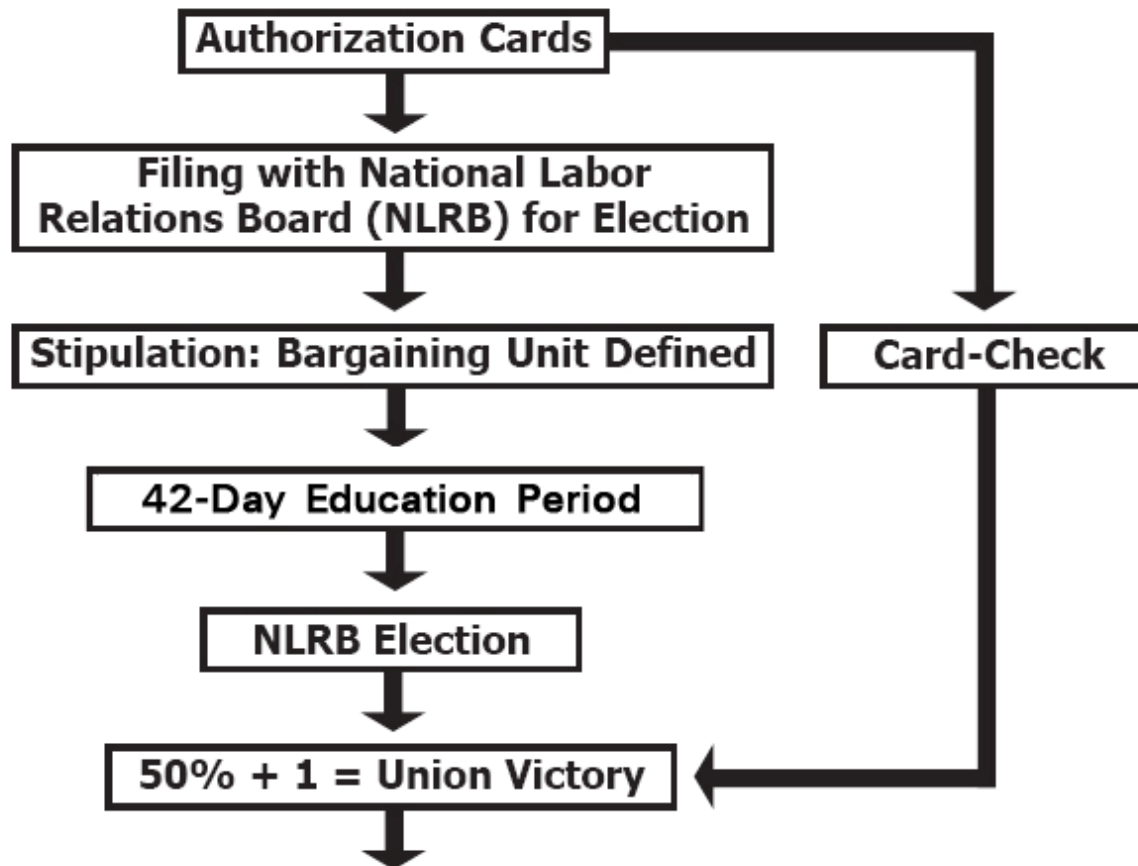
3 KEY CHANGES

- **Card-Check Recognition.** EFCA would require certification of a union based on union authorization cards instead of a government-supervised secret-ballot election
- **Compulsory Arbitration.** EFCA would require interest arbitration of a first contract if the parties cannot agree on a contract
- **Expanded Remedies.** EFCA would require injunctive relief and imposition of new penalties for unfair labor practices committed by ***employers*** during union organizing campaigns and first contract negotiations

COMPARE AND PREPARE



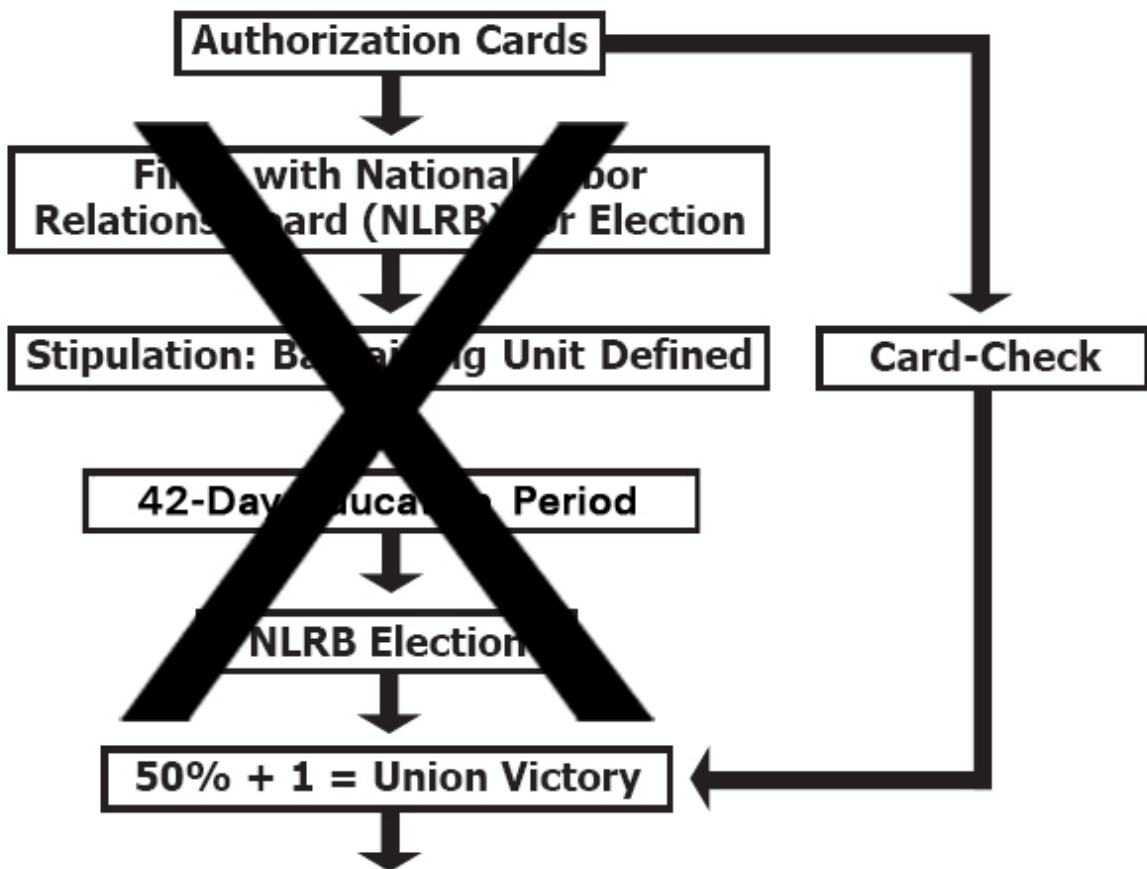
CURRENT NLRB PROCESS



SECRET BALLOT PROTECTION (Current law)

- 30% “showing of interest” allows union to file election petition
- 50% plus 1 “showing of interest” allows union to request recognition without an election
- 42-day period allows both sides to make their case
- Secret ballot election provides safe-haven for employees to decide

PROPOSED EFCA PROCESS



NLRA BARGAINING PROCESS (Current law)

- Government's only role is to ensure company and union bargain in "good faith"
- No artificial time-tables, mandatory mediation, or interest arbitration
- Employer can impose terms at impasse including wage and benefit cuts

THE EFCA PROCESS (Proposed)

- Parties must “make every reasonable effort to conclude and sign” an agreement
- Mandatory mediation after 90-days
- Compulsory arbitration after 120-days
- 2 year contract is imposed

PENALTY BOX (EFCA)

- **Injunctive Relief.** If there is “reasonable cause” to believe a violation of 8(a)(1) or (3) has occurred
- **Liquidated Damages.** Three times backpay that amount would be the remedy for certain violations of 8(a)(3)
- **Civil Penalties.** An employer who “willfully or repeatedly” violates Sections 8(a)(1) or (3) is subject to a civil penalty of up to \$20,000 for each violation

WHAT'S THE BOTTOM LINE?

EFCA increases opportunities for abuse by removing the safe-haven employees currently have to hear both sides and change their mind in an atmosphere free of coercion

TIPPING THE SCALES

- Encourages use of deception, peer pressure, coercion, language barriers etc. to obtain cards
- Allows organizing in the shadows with little or no opportunity for many employees to hear/express competing views
- “First contract” guarantee creates false picture of bargaining risks
- Chills employer speech with one-sided penalties

WHY EFCA . . . WHY NOW?

UNION MYTHS

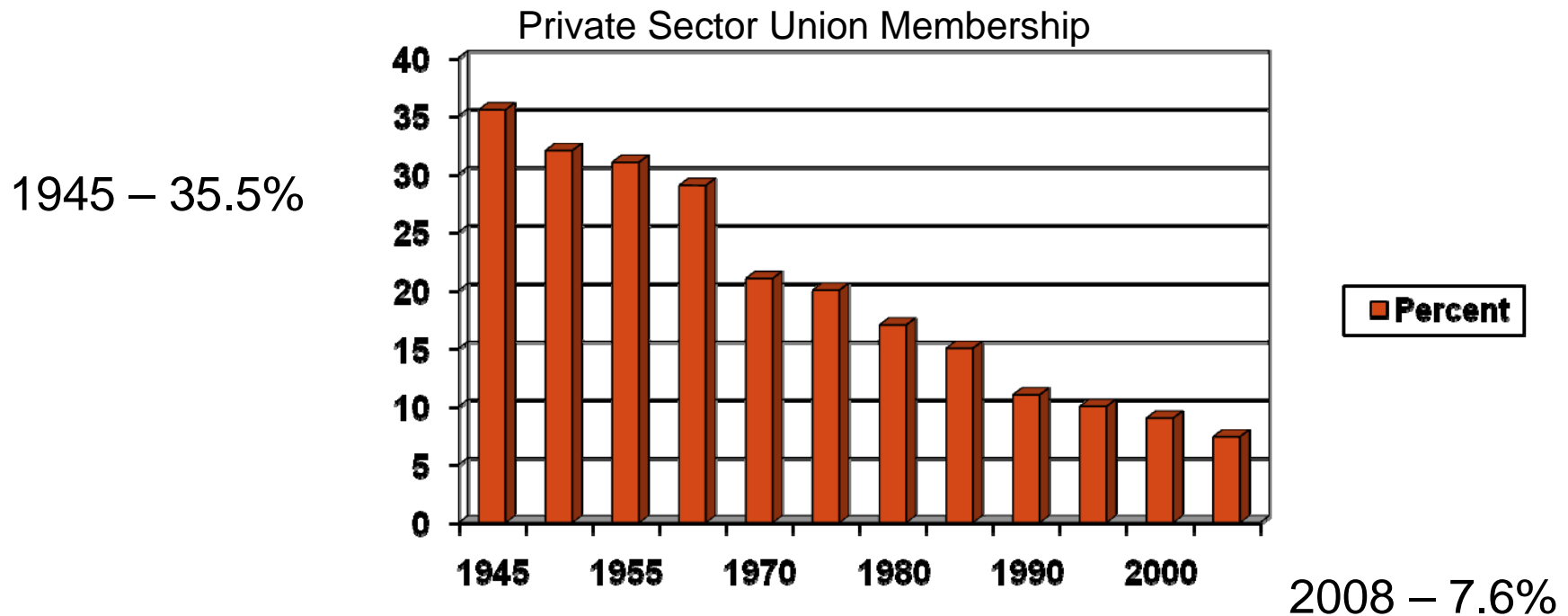
- **Myth.** EFCA is needed because the secret ballot election process is broken
- **Myth.** Union authorization cards are just as reliable as the secret ballot election
- **Myth.** EFCA simply puts the decision about how they would like to form a union in the workers' hands
- **Myth.** An increase in union density is key to our economic recovery

WHAT'S REALLY GOING ON?

**Big Labor is looking for a government bailout
to reverse decades of decline**

DECLINING MEMBERSHIP . . .

Private sector union representation has declined almost continuously since 1945



MANUFACTURING INDUSTRY

- NLRB elections down 50% since 1996
- Union win rate down to 46% in 2007
- Union density has fallen to 11.6%
- Labor leaders believe this “government bailout” will allow unions to add 1.5 million members annually for the next 10-15 years

DECLINING INTEREST IN UNIONS

- Employees honestly question the relevance of unions in today's workplace
- Employment laws now provide most protections unions once provided
- Employers have adopted better policies and practices to compete for workers
- Employees no longer see unions as guarantors of better pay, job security, and fair treatment

HERE TO STAY OR D.O.A?

The timing is right for organized labor to collect on its \$400m investment in the 2008 elections

HOUSE AND SENATE CONTROL

- The House passed EFCA in 2007, but it died in the Senate
- Democrats have picked-up 8 more seats in Senate (assuming Franken win sticks)
- Democrats now just 1 vote short of a filibuster-proof (60-seat) majority in the Senate

NEW SHERIFF IN TOWN



- “I’ve fought to pass the Employee Free Choice Act in the Senate. And I will make it the law of the land when I’m President of the United States of America.”

OBAMA'S FIRST 21-DAYS

- House quickly passes Ledbetter Fair Pay Act and Paycheck Fairness Act (Ledbetter signed into law)
- Proposed stimulus package requires federal contractors to adhere to Davis-Bacon prevailing (i.e., union) wage and other requirements
- 4 pro-union Executive Orders effecting federal contractors

EXPECTATIONS ARE HIGH

- President of AFSCME recently told Washington Times that unions expect their efforts “to be rewarded with action.”
- “The payback would be **Employee Free Choice Act** - that would be a vehicle to strengthen and build the American labor movement and the middle class”

TIMING

- EFCA was re-introduced in the House and Senate on March 10, 2009
- EFCA has majority support in both chambers, but several centrist Democrats who previously supported it are expressing reservations
- Sponsors of the bill and labor leaders are already saying there is room for compromise

EFCA WON'T PASS IN ITS CURRENT FORM

- The law in its current form leaves too many unanswered questions
- The law in its current form is subject to constitutional challenge
- The votes for cloture in Senate are not there
- Some watered-down version of EFCA will pass

TRIAL BALLOON

- Costco, Starbucks, and Whole Foods are supporting a compromise bill and shopping it through former special counsel to President Clinton, Lanny Davis
- Spokeswoman for Republican Senator Olympia Snowe of Maine says the compromise “will be unveiled early next week”

“COSTCO” PROPOSAL

- No card check, no compulsory arbitration
- Fast track elections to prevent delays in the process
- Equal access to the workplace for unions to organize
- Tougher penalties for employers and unions

POSSIBLE COMPROMISES

- Supermajority card-check recognition
- Fast-track elections
- Expedited NLRB hearing procedures
- Union access to employees at work
- Expanded picketing – recognition/secondary boycotts
- First contract mediation
- Enhanced penalties for both sides
- Small business exemption
- Components of RESPECT Act and other bills
- Reduced NLRA preemption of state/local laws

MICHAEL BEST'S EFCA TEAM

- If you have questions about how to prepare your company, train your management team, or develop “union awareness” strategies and tool kits for your business, contact Jon Levine at 414.271.6560, or jlevine@michaelbest.com