



Don Wilson Interview:

The Employee Free Choice Act and its Impact on American Business



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This is an interview with Donald P. Wilson, CEO of Labor Relations Institute, concerning the Employee Free Choice Act. The interview was recorded on video in July of 2008. You can view a shortened version online at: www.lrionline.com/efca/free_choice_act_interview.htm.

Q: The Employee Free Choice Act -- what is it?

A: The Employee Free Choice Act is a piece of legislation that was introduced in Congress last year, that basically sounds fairly simple, but is -- would be the most enormous change in Labor Law since 1935 and would have a disastrous impact on most employers. It contains three parts. The first is card check recognition which simply means that the legislation would take away the fundamental right to vote from employees who are deciding whether or not they want to be represented by a union. Ever since the National Labor Relations Act was introduced, that has been the cornerstone of the way employees make a decision. The union's required to file a petition. A campaign period exists where both sides get to make their presentations. The employees listen to both sides. And then make a decision on how to vote in a secret ballot election. This first provision takes away that right to vote and now, under the new Act, employees who sign cards would in effect be voting for the union. Fifty percent plus one card, the union is certified.

Q: Now unions a lot of times say that it doesn't take away the right to vote. That the right to vote stays in law, but it just adds this other component of cards. What would you say to that?

A: As I've said earlier, we've participated in over ten thousand elections since 1988. And in probably 95% of those elections, the union had over 50% of the employees signed authorization cards. They are simply running unopposed. They can use all kinds of pressure tactics. All kinds of harassment. All kinds of other tricks in order to get people to sign cards, but people knew that they always had this second opportunity. After the cards were signed, they could listen to both sides and make a decision. It is true, under this legislation, that if the union gets less than, over 30% but less than 50% of the cards signed, they can petition for an election. That will never happen. Unions don't petition unless they get at least 65%.

Q: There are other provisions to the Free Choice Act. What are some of these?

A: Once a union becomes the collective bargaining agent of a group of employees, the proposed Employee Free Choice Act sets a time limit on negotiations. Ten days after a union is certified, negotiations must begin. Those negotiations will last 90 days. Today, it lasts until an agreement is reached. But there's an artificial deadline, 90 days. At the end of that 90 days, a representation of the Federal Mediation and Conciliation Service comes in to mediate the dispute, to try to bring the sides closer together. That process lasts 30 days. At the end of that 30 days, the proposed legislation says that it's then turned over to an



arbitration board that both sides present to. And then the arbitration board determines what's in the contract. Probably the worse system you could ever dev -- I don't know how anybody thinks that this is going to work. It's going to be disastrous to American business and frankly, it's not going to be that good of a deal for the unions either.

Q: Why do you say that?

A: Well the fundamental principal of collective bargaining is that the two parties get together. Negotiate over terms and conditions of employment -- wages, hours and working conditions. And they try to find a middle ground. But both sides know about this business. They know how it operates. They know how the pay structure works. They know how all the formulas that have to do with running a business, they know all about those. So if they sit down and negotiate in good faith, there's a pretty good chance that within a reasonable period of time, they're going to reach an agreement that is fundamentally sound and workable for both parties. When you have a bureaucrat who has probably never written a labor contract in his life, deciding what your labor agreement is going to contain, he's almost certain to get it wrong. It's almost guaranteed, this is not going to work. So those labor contracts, under the Employee Free Choice Act, have to stay in effect for at least two years. So now the company's stuck, the union is stuck with a contract that some pinhead wrote, and they're going to have to live with it. Whether they can or not, it doesn't make any difference. They're going to have to live with it. It's final and binding. Period. Paragraph. End of conversation.

Q: Unions will say that this arbitration process is already in place, that there's police and fire department contracts that are being negotiated all the time where there's an arbitration provision if the parties can't come to an agreement, so why is it so bad to have that process in place for private companies?

A: You're comparing apples to oranges. In the first place, in police and fire contracts, they don't have a right to strike. If the arbitrator imposes a different set of wages than are currently in effect and the city can't afford it, they just simply go to the taxpayers, increase taxes and get the money that way. They're not in competition with anybody else. It's -- it's not -- it's just not the same thing.

Q: So what if you're a private company and you're in that same kind of situation. So an arbitrator says, "We're going to increase wages by 10% and you live with it for two years."

A: Well if you can't pass those costs on, then you go out of business. You're toast. There's no choice. I mean there's no appeal. You -- you can't -- there's no provision in this legislation for anything to happen other than once this arbitration panel, whatever that means, writes your contract and it's in effect for two years. And that's the other thing about this provision. Nobody really knows what it means because they use terminology, but they don't explain this is how it's going to work. What is an arbitration board? Is it two people? Five people? I mean it's obviously more than one, but that's all we know. How are they going to decide? Is the company going to present a proposed contract? Is the union going to present a proposed contract? And then the arbitrator has to select between the two? Or does the arbitrator have an example to pick what he likes out of this one and picks what he likes out of that one and then set the wages where he



wants and go happily on his way? Nobody knows.

Q: And there's this third provision in the Employee Free Choice Act. What does it provide?

A: Well currently the National Labor Relations Act provides relief for unfair labor practice charges that is remedial. In other words, they try to fix the problem. Under the Employee Free Choice Act, there are then now punitive damages that can be assigned. So if you -- if management commits an unfair labor practice, there's a twenty thousand dollar fine. If a person is discharged, it's a twenty thousand dollar fine plus triple damages. And only management, presumably, can commit unfair labor practices because there are no such fines for the union. So if you need any evidence as to how one sided this law is, look no further than that.

Q: If the law is this bad, why isn't there a giant uproar about it?

A: It's amazing to me. Unions have been talking about it like it was the second coming. But for whatever reason, either through lack of news reporting, through lack of just understanding how dramatically this is going to shift the balance of power, it has been woefully unreported and -- and -- and not understood by the management community. I think that's beginning to change but in November, it's too late. I mean you just can't look ahead and not see this huge storm cloud coming and yet people are thinking, "Well I don't even think it's going to rain." It probably is going to take a few really bad examples before people really understand the devastating nature of this legislation. I don't believe -- I'm almost certain that Congress doesn't understand what this is going to do.

Q: Most American business owners would just say that's insane, that's -- there's no way that that's going to happen.

A: It passed the House. Last year it passed the House by about a 2 to 1 margin. It would have passed the Senate but not by enough votes in order to invoke closure, so the bill basically died. The Democratic Party knew that, that President Bush would veto it and they didn't have the votes to override the veto. They didn't have the votes to cut off debate for a filibuster, so it basically died. But if you look at the political reality and what is likely to happen in November, this bill is going to pass. And frankly, if the Democrats do as well as it looks like they might, not only is it going to pass in this form, but strike a replacement legislation making it illegal to replace economic strikers is going to be part of it. So this not only affects companies without unions, it is going to critically affect those that do have them.

Q: What is the likelihood that -- that the Senate gets enough votes to make this long?

A: Well the House is -- is not even in play. The Democrats are probably going to pick up, depending on the polls that you look at, a minimum of 10 to a maximum of 25 or 30 additional seats in the House. They picked up 30 seats the last election. They're probably going to pick up about the same this time. There are, at least, a dozen Senate seats that are in play right now. Where either the Democratic candidate is ahead, it's considered a tossup, or the Republican candidate who is in the lead has less than 50% approval ratings. It is



almost inconceivable that the Republicans are going to take the house. I mean that -- I mean the Senate. That's just not going to happen. The question is, how many Senators the Democrats will have. If they get to -- if they pick up five or six and get to 54, 55 -- last time the two Independents voted in favor of the Free Choice Act, one Republican Senator voted in favor of it, they are at 58 or 59, picking up the minimum that we see them getting in the election. So one or two of those states that are toss ups, they go the wrong way, this legislation is going to breeze through without really any opposition. The Republicans are not going to be in a position to do anything. It will probably be passed within the first three or four months of the next Session. If McCain is elected, it's hard to say what's going to happen. You would hope that he would veto the bill and the Democrats would not have the votes to override. If Obama wins the election, it's a no brainer. I mean he's publically stated that he fully supports the Free Choice Act and has independently stated that he favors putting an additional provision in concerning striker replacement, making it illegal for companies to replace economic strikers.

Q: What should a company now be doing to prepare for this Free Choice Act legislation?

A: Well there's a number of things. First they should inoculate all of their present employees and all of their new employees against unionization. Once this law passes, there is going to be a tremendous volume of organizing activity going on. More than the union has people in place to manage. So they're basically going to be going after the low-hanging fruit. The companies that are the most vulnerable are the ones that are going to be organized. The companies who have an inoculation program in place who have talked to their employees about what's going on, about what is likely to happen, and giving them advanced information about why unions are not a good idea, are simply going to be passed over. I mean the unions are not going to go after them. They're going to go after the place next door that hasn't done that because those people are going to be a lot easier to persuade to sign a card than the people who have been inoculated. So that's step one. Step two, is every company, right now, should be training their management and supervisors on how to identify the early signs of organizing activity. Under the law as it stands right now, the unions get the cards and then there's a campaign period. So if the company's not successful in getting the cards signed, they still have a four to five week window in which to cause employees to change their mind. It doesn't exist under the Employee Free Choice Act. You -- the union gets the card signed, it's over, done, you're unionized. So it's absolutely critical that the people on the floor, your managers, your supervisors who are on the floor, interacting with these people every day, know how to identify the early signs of union organizing. If you can catch this early, you can implement a campaign while the card signing is going on to prevent people from signing additional cards. That's the only chance you're going to have and it's going to be very short. The union is not going to stay around trying to get cards signed if they're meeting resistance. They're going to go someplace else. So the resistance doesn't have to be incredible, it just has to be there. But as long as it's there, then you've got a decent shot of at least sending the union down the street. I believe that it -- it's very important to have a plan in place. Know in advance what you're going to do if union activity starts. Have your meetings laid out. Have your literature laid out. Know exactly who's in charge. Exactly what you're going to do because Murphy's Law says that if this starts, it's going to start at 2 o'clock in the morning on Saturday, when nobody's there. So the people that are there on the floor need to know what to do in case they see this happening. It's almost like these little things you see in a hotel room where it says, "Break glass in case of an emergency" and you just flip the lever and it makes all the phone calls and does everything you're supposed to do. That's what you need to have in effect. Union activity is recognized. Break the glass, pull the lever, everything happens automatically. So if employers will do that, then again, they have an excellent opportunity of causing the union to say, "You know, this is too much trouble. Let's go



down here.”

Q: You’re sending out this message to employer organizations and to law firms and, you know, people who partner with companies around the country. Why are you reaching out to those folks?

A: We -- we want to reach as many people as we possibly can. We’re willing to partner with management side law firms, with employers associations, with anybody who can help us get the message out to their members or their clients. We have a program that’s already put together that they can offer. It’s -- it’s, as I say, very critical for people to be prepared and I know that most labor attorneys would like their clients to be prepared. I know that every employer organization wants their members to be prepared. And our job is to get the word out. To let them know that we’re here, ready, willing and able to help and that you know, those people that accept the help are going to be far less likely to be unionized than those people who don’t.

Q: This Employee Free Choice Act Tool Kit, what is it?

A: It is a system that we’ve put together for management that allows them to do everything that I’ve said that needed to be done earlier with your employees. It includes an inoculation video that is designed to be shown to your current employees plus anybody that you hire. It includes a management and supervisory training program to alert your supervisors to be able to identify early signs of union activity. It contains a one-week campaign plan with all the posters, all the letters, all the videos, everything you need to just take it off the shelf, plug it in and after you get that started, then you can sit down and work with your attorney or your consultant or whatever about what you need to do after week one. But it gets week one done. And then it also includes just an overview of the Act that people can use if they’re trying to explain what’s going to happen to either their employees, their business associates. There’s a power point presentation if people would prefer to do the power point rather than the DVD. There is all the handouts, the collateral materials, the posters, the letters, the cartoons, everything that you need for that critical first week is there. Now do I recommend that a company customize that a little bit for their own organization? Sure. But all of this is on a CD Rom which is adjustable. I mean you can put the name of your company, you can put your own issues, you can put anything in it that you want, but all that’s there. And that is designed to be used today under the National Labor Relations Act. We talk about the Free Choice Act, the possibility that it’s coming, but all this is designed to be used today. When the Employee Free Choice Act passes, then all of the DVD’s and the CD and all the collateral material that are in the tool kit will be replaced with the same thing except it covers the law as it is changed. You can’t -- you can’t put out anything yet on what life is going to be like after the Free Choice Act because we don’t know what they’re going to do. But I believe that what’s been proposed is probably the minimum.

Q: Some people will say, you know, why do anything right now when the law’s going to change in November. It’s not that far away. Why don’t we just wait until we see what happens and then do something?

A: As I said, unions are going after the low-hanging fruit. The people that are prepared, they’re going to just leave you and go someplace else that’s not prepared. It’s -- I know that, that people think that, “Well



since we don't know what's going to happen we don't need to do anything yet." But what is likely to happen is after the law changes but before the rules are put in place, the union can go out and get cards signed from anybody they want. Those cards are good for a year. You know that the regulations are going to be written in less than a year. So as soon as the regulations come down, now all of a sudden you've got 500 or 5,000 or however many companies that the union has worked on since the legislation passed but before it takes effect, they'll just turn the cards into the board -- you're done. And I feel very strongly that, you know, people need to get the word out. I don't know whether there's time left or not. But boy, I mean, it's coming and just you better get ready for it. Because again, those companies that have prepared are the ones that are going to survive. The ones that haven't prepared, are going down.

About Don Wilson:

Donald P. Wilson is Founder and CEO of Labor Relations Institute, Inc., an organization providing a wide range of labor and employee relations services to employers of all sizes throughout the United States since 1980.

Mr. Wilson holds a Bachelor of Arts degree in Psychology and Business Administration from Northeastern State University. He is the author of *Total Victory!*, now in its second edition, which is widely recognized as the most comprehensive publication available relative to NLRB representation election campaigns.

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.¹ 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 unions² with the EFCA Tool Kit, visit us at www.lrionline.com/efca.

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¹ 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.

² 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.