



## The EFCA Problem For Retailers

Gallons of ink have been spilled by lawyers and journalists concerning the Employee Free Choice Act (EFCA). But this law is likely to have a particular effect on retailers, and retailers – more so than other employers – should start planning for the worst now.

EFCA would greatly simplify unions' task in organizing workplaces. As it currently stands, the law provides for "card check" recognition of the union. A union only has to have a majority of a workforce's employees sign a card seeking recognition. The obvious fear is that those signatures will be coerced or obtained through deception. EFCA has been passed by the House, and it's likely the Obama administration will support the law.

EFCA entirely does away with the present system of secret-ballot elections, and it requires mandatory arbitration over a first contract if the parties cannot agree within 120 days.

### Why Should Retailers be Especially Concerned?

Most retailers are presently non-unionized, so they present an attractive target.

It's a truism among labor lawyers that it is easier for a union to organize a small workforce than a large workforce. Of course, many "small box" or "mid-box" chain stores often are lightly staffed. Under EFCA, obtaining only a handful of cards in such a store could trigger union representation.

Small and mid-box stores may operate at times without exempt managers being on-site. This complicates the employer's ability to detect union organizing in its early stages, when it is most likely to be able to respond appropriately to a union drive.

Unlike many kinds of businesses, retail operations cannot be outsourced or moved overseas. In the manufacturing sector, for example,

unions have found themselves frequently thwarted because companies have either relocated operations, or used the specter of being unable to compete globally, as a tool to defeat unions. That, of course, is not the case with retailers, which must locate where the customers are.

Many retail workforces have high turn-over. These high-turn over employees are more likely to focus on the short-term (i.e., a union's promise of higher pay) and more likely to discount the long-term (higher costs could eventually cause the store to become non-competitive or even close).

### What To Do?

You can decide to be reactive or proactive.

The reactive: front-line, in-store management has to be on board to be able to timely spot union activity. Regional managers can't do it; district managers can't do it. In larger stores, it's likely that upper-level store management can't do it. These managers simply don't have enough day-to-day contact with employees to spot card-gathering. Front-line management has to be trained to detect the signs of incipient union activity and alert the proper people.

The proactive: As noted above, retailers are especially vulnerable under EFCA. If EFCA passes, it likely will completely change the way retailers approach the task of remaining non-union. Presently, companies generally don't communicate with their employees about unions unless there's a clear and present danger. Under EFCA, when the danger becomes apparent, it may be too late.

Our advice to retailers is to develop a union-free communication program that begins when an employee is hired and continues throughout employment. If you need help designing such a program, we can help.

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## Those "Other" Causes Of Action

By Andy Scott (Atlanta)

I suspect that we too often focus all our preventive efforts on the well-known discrimination causes of action (race, disability, age, and so on). But retailers are subject to a number of other state-law employment-related causes of action, and we are seeing these causes of action used more frequently by creative lawyers. Retailers should know something about these causes of action so they can take steps to forestall them.

From a plaintiff's point of view, these causes of action have a variety of potential benefits. The time in which to file claims is generally longer than the limitations period for filing an EEOC charge. Also, most of these causes of action allow an employee to sue a local individual as well as the company, and thereby litigate the case in state court. As a general rule, state courts are more favorable to plaintiffs than federal courts.

### Defamation

This cause of action usually arises in the wake of a termination for some "bad act," such as theft. If the termination was at all high profile – that is, if your Asset-Protection department interviewed employees or if the police were called – it is likely that store employees knew about the termination and they discussed it among themselves, with their friends, and – most problematically – with customers.

Truth is always a defense to defamation claims, of course. But a problem arises if the employees say something like, "She got caught stealing," when in fact there is only a suspicion about the disciplined employee, not hard proof.

What to do? In the wake of a termination or other discipline, warn employees that they should not discuss the situation with **anybody** other

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than company managers and lawyers. One way to make sure this warning has teeth is to remind employees that they are individually subject to being sued along with the company for any alleged defamation.

### False Imprisonment

In many states, this claim is disturbingly easy to assert. A person merely has to be wrongfully “detained,” which can mean nothing more than he or she is told to “stay there” in a commanding tone of voice. Asset-Protection interviews with suspected employees (or customers, for that matter) can create fodder for a false imprisonment claim.

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In some states, there is a privilege to detain a customer for questioning in the wake of suspected shoplifting without fear of a false imprisonment allegation. The law is not so helpful when it comes to interviews of employees. In some states the shoplifter privilege extends to detentions of employees; in other states, it does not extend to employees; and in yet other states, it is unclear.

The key to avoiding false imprisonment claims is good asset-protection-interview techniques. The person conducting the interview may wish to repeatedly inform the subject that they are free to leave at any time. While the meeting should certainly be private, the door to the interview space should be left open, or the interview should be conducted in an open location, if possible. Interviewers should not position themselves between the person being interviewed and the door, but instead allow the person being interviewed to sit closest to the door.

You may want to consider having witnesses present for the statement that the interviewee can leave at any time, or have a witness attend the entire interview. The interviewer should of course remain calm and matter-of-fact to avoid any allegation of “coercing” the subject.

### Assault and Battery

We are aware of a plaintiff’s lawyer who wrote an article advising her fellow practitioners to abandon asserting sex harassment claims under federal laws. This lawyer felt that federal law, with its “restrictive” definitions of a harassing environment, and employer defenses related to stray comments and the victim’s obligation to complain, is insufficiently “pro-plaintiff.” This lawyer counseled that plaintiffs should instead sue for assault or battery.

Both assault and battery are broad enough to encompass many sorts of allegations that otherwise could be brought as harassment claims. Battery is generally defined as an unconsented-to touching. Any harmful or offensive touching qualifies; there need not actually be a physical injury. Assault generally means placing someone in fear of receiving a battery. Again the image in most peoples’ minds is of something akin to a fist fight. The reality can be quite different.

Luckily, covering your bases to prevent these sorts of claims entails the same kind of training that you should already be doing to prevent sexual harassment. Make sure that employees understand the bounds of proper workplace behavior and don’t engage in improper horseplay, inappropriate language, etc.

### Workers’ Compensation Retaliation

Disciplining someone? Has that person recently been on workers’ compensation leave? If so, add workers’ compensation retaliation to the list of causes of action that you need to guard against. Although this is a state cause of action, and thus its standards differ by location, in general it is similar to retaliation under the federal anti-discrimination laws. Make sure that the company can articulate, clearly, a legitimate reason for its actions unrelated to the workers’ comp leave.

And be aware of other so-called whistleblower laws. For example, the federal laws protect employees who make complaints about violations of wage/hour laws, safety complaints, and the like. Many states have similar laws, as well as complaints concerning things like adulterated food products. Even if the underlying complaint is investigated and found to be meritless, an employee who brought the complaint in good faith is protected from any retaliation.

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