



engineering and construction
contracting association

**41st
Annual
ECC
Conference**

**September 9 - 12, 2009
Hyatt Lost Pines Resort
Bastrop, Texas**

The Perfect Storm

Navigating Through the Turbulence of
Risk and Change



Labor Law Changes: Impact on Engineering and Construction



Lewis Smoak

Shareholder

Ogletree, Deakins, Nash,
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Steve Hoech

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Zachry Industrial, Inc.



“After making millions of phone calls and knocking on millions of doors [during the 2008 elections], the nation’s labor unions have begun a new campaign: to get the new president and Congress to pass legislation that would make it easier for workers to unionize.”

November 8, 2008, New York Times

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Who will be driving the new phase of labor policy?

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U.S. Department of Labor



Hilda Solis – Secretary of Labor

- “We’re **thrilled** at the prospect of having Representative Hilda Solis as our nation’s next labor secretary”

*John J. Sweeney,
president of the AFL-CIO*

- “Sided with the AFL-CIO in 97% of the votes that she has cast on the Hill”

U.S. Chamber of Commerce

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U.S. Department of Labor

“Make no mistake about it:
The Department of Labor is
back in the enforcement
business.”

Secretary Solis' Statement at the 2009 American Society of
Safety Engineers' Annual Conference

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U.S. Department of Labor

- **2010 DOL Budget Increases:**
 - Overall, DOL's budget - \$400 million increase
 - Promise to hire 670 new investigators
 - OSHA - \$51 million increase – plan to hire 160 new in enforcement staff
 - Wage & Hour Division - \$35 million increase – plan to hire 250 new field investigators.
 - OFCCP - \$27 million increase – plan to add 213 new employees



National Labor Relations Board



Wilma Liebman – Chair

- “America’s working men and women will finally have the fair and committed leader they deserve....What a refreshing change.”

John Sweeney

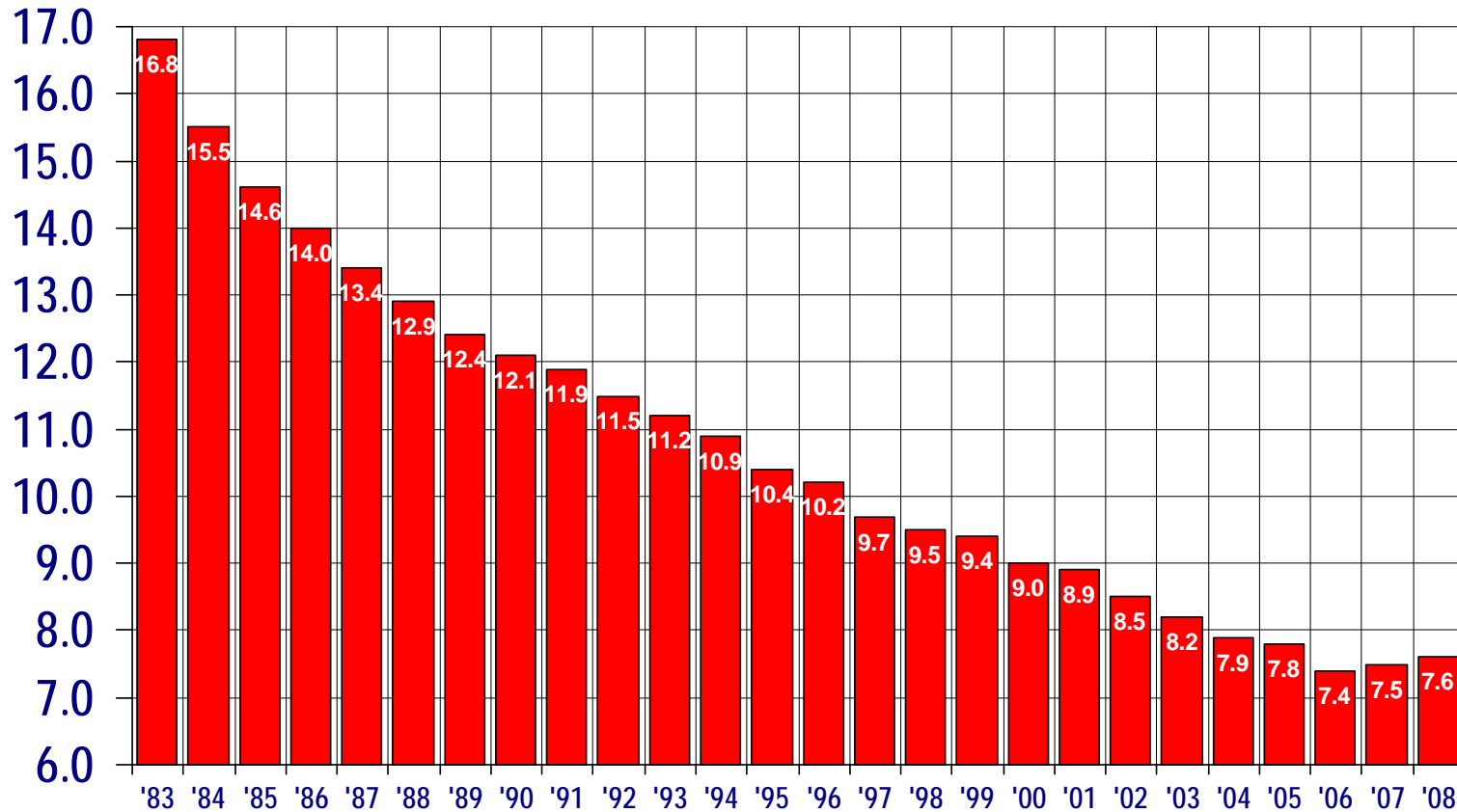
AFL-CIO President

- Teamsters Counsel (1974-1980)
- Bricklayers and Allied Craftsmen Union Counsel (1990-1993)



Union Membership

Total PRIVATE Workforce

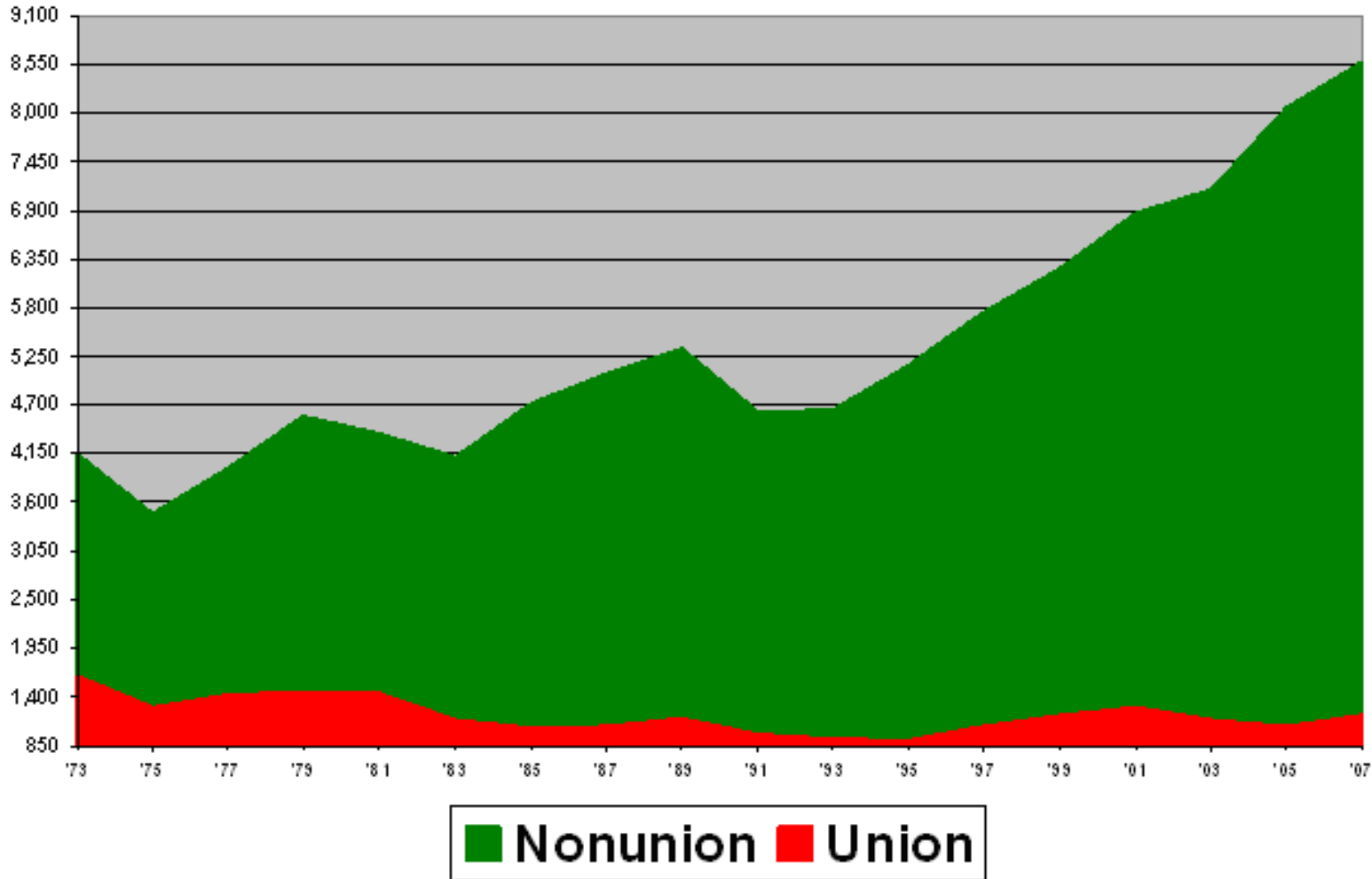


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TOTAL CONSTRUCTION EMPLOYMENT

(Employment In Thousands)



Source: Bureau of Labor Statistics 1973-2008.

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“EFCA”

(Employee Free Choice Act)

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The Original EFCA

What does the EFCA do?

It would amend the National Labor Relations Act in 3 crucial respects:

1. Streamline the union certification process (Card Check)
2. Expedite Initial Collective Bargaining (Mandatory First Contract)
3. Stricter enforcement of violations of the National Labor Relations Act

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The “New” EFCA

What does the EFCA “alternative” do?

Most Likely Compromise Legislation

1. Replaces “Card Check” with “Quickie Elections”:
 - Quickie elections
 - Card check only for a “super majority” (e.g. 60% or 70%)
2. Grants union access to employees at work
3. Bans employer “Captive Audience Meetings”
4. Retains “Mandatory First Contract”
5. Retains stricter enforcement for unfair labor practices and bad faith bargaining delays

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The “New” EFCA

Quickie Elections

- Elections must be held within 5-10 days of the filing of a petition
 - Replaces the current 40-day time frame
 - Gives companies hardly any time to develop strategy and deliver the company’s message



The “New” EFCA

Union Access

- Unions have access to employees on company property
 - Opens the door for confrontation and disruption
 - Potential for more frequent legal challenges

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The “New” EFCA

Ban on Captive Audience Meetings

- Substantially limits companies’ ability to message to employees
 - Limits the important impact of “face time” with employees
 - Forces companies to use less effective, more expensive and more impersonal communication tools

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The “New” EFCA

Bargaining Obligations

- Bargaining must commence within 10 days of written request by the Union
 - “Duty to bargain in good faith” supplemented by obligation to “make every reasonable effort to conclude and sign a collective bargaining agreement.”

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The “New” EFCA

Mandatory Arbitration

- MANDATORY, binding interest arbitration of first union contracts after 90 days bargaining and 30 days mediation
- Result: Government-imposed wages, benefits, and other terms & conditions of employment for 2 years

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The “New” EFCA

Problems Presented By Mandatory Arbitration

- Provides union excuse for failure to deliver on promises
- Not likely to benefit employers
 - Terms could put company at competitive disadvantage
- Guarantees contract
 - Good faith bargaining no longer the standard
 - Effectively extends certification bar

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The “New” EFCA

Arbitrator’s Power?

- Dues check-off
- Union security
- Successor language
- Limit sub-contracting
- Overtime after 8 hours
- Limitations on work schedules, scheduling of overtime
- Arbitration clause – “final” (no appeal)
- Pension Plan (Defined Benefit)
- 401(k), increased match
- Health Insurance – impose union plan?
- Shift differential amounts
- Grievance time paid for by Company
- Superseniority for Stewards
- Much more...

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The “New” EFCA

Stricter Enforcement Against Employers

- Priority Investigation
 - Mandatory Injunctions
- Back Pay plus liquidated damages of Double back pay (triple back pay)
- Plus Civil Penalties of \$20,000 for willful or repeat violations

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The “New” EFCA

Stricter Enforcement Against Employers

- Will increase the number of charges filed
 - May make doing so a campaign tactic
- Will distract employer with obligation to expedite response and to defend injunction action
 - Risk reinstatement order from federal court
- Will incite frivolous claims
- Will make charges more difficult and costly to settle

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“RESPECT Act”

(Re-Empowerment of Skilled and Professional
Employees and Construction Tradesworkers Act)

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“RESPECT ACT”

- Significantly amends NLRA Section 2(11) definition of “supervisor”
 - Requires that employee spend majority of time in a supervisory capacity
 - Deletes the terms “assign” and “responsibly to direct” from definition of supervisor under the Act



“RESPECT ACT”

Supervisor Defined

The term “supervisor” means an individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

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“RESPECT ACT”

Why is supervisor classification important?

- Legal liability
- Scope of unit
- Early detection of problems and activity
- Communication
- Shaping employee perceptions
 - Fair treatment
 - Management credibility

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PROACTIVE STEPS TO START NOW

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Proactive Steps

- Review and establish proper evidence to create the “optimal unit”
- Review the supervisory structure and revise as necessary to properly exclude “supervisors” from the employee unit



Proactive Steps

- Conduct periodic surveys to detect and resolve employee relations issues
- Conduct vulnerability assessments to gauge the company's exposure to unionization at "hot spots"
- Conduct legal audits to ensure compliance with EEO, FLSA, OSHA and other legal standards

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Proactive Steps

- Establish appropriate policies to limit exposure to outside union organizing efforts and internal use of company email and resources for organizing purposes
- Assess campaign resources (management, PR, etc.)
- Establish meaningful community relationships
- Establish a culture of fairness from the top down

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Proactive Steps

- Maximize employee involvement in workplace decisions, hiring and termination reviews
- Establish a written positive employee relations program with assignments, calendared dates of execution and accountability
- Communicate accomplishments



Thank You!

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