Negotiating a First Labor Contract Takes Time and Care

EFCA Proponents Argue: *"First contract arbitration is the only meaningful solution to the tragedy of tens of thousands of workers who obtained union recognition, only to have their free choice of collective bargaining savaged by employer resistance."*

Brent Garren and Zachary Henige, "The Employee Free Choice Act ("EFCA"): Salvaging Sec. 7 Rights," 6 (2008)

Inconsistent Statistics Illustrate Lack of Clear Data on Initial Contracts

Proponents of EFCA claim that compulsory first contract interest arbitration is necessary because even after a union is elected as the employees' bargaining representative, it takes months and even years to negotiate an initial first collective bargaining agreement. The statistics on which such claims are based are wholly inconsistent.

For example, one study claims that during "the year after initially forming a union, workers are unable to negotiate initial collective bargaining agreements 32 percent of the time."[1] Another study uses Federal Mediation and Conciliation Service (FMCS) data to conclude that unions were unable to negotiate an initial contract 45 percent of the time within a year.[2] Yet, another study "tells us that a contract is negotiated in only 20% of the cases after a NLRB certification."[3]

In fact, there is no definitive data on this point. Yet, even assuming that one of the numbers proposed is somewhere in the ballpark, EFCA's proponents contend that failure to reach agreement on a first contract can be attributed exclusively to employer recalcitrance as part of a strategy of undermining the union's support among the employees. Such allegations fail to take into consideration union behavior and numerous other important factors that impact collective bargaining.

Complexity of Initial Contract Negotiations

The difficulties in negotiating a first contract cannot be understated. Because collective bargaining agreements are often complex agreements affecting the long term economic interests of both employees and employers, negotiations typically take several months and even longer in first contract situations. Indeed, the National Labor

[1] Brent Garren & Zachary Henige, *The Employee Free Choice Act ("EFCA"): Salvaging Sec. 7 Rights*, 5 (2008) (citing Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing. Part II: First Contract Supplement* (2001)).
[2] Brent Garren & Zachary Henige, *The Employee Free Choice Act ("EFCA"): Salvaging Sec. 7 Rights*, 5 (2008).
[3] William B. Gould IV, *The Decline & Irrelevance of the NLRB & What Can be Done About it: Some Reflections on Privately Devised Alternatives*, 5 (Oct. 31, 2008).

Relations Board (NLRB) recently noted the difficultly of first contract negotiations and recognized that such negotiations can typically take twice as long as negotiations on subsequent contracts.[4]

Inflated Union Promises Impede Agreement on a Realistic Contract

One significant factor that makes first contract negotiations more difficult is newly certified unions trying to make good on promises made to employees while campaigning for their support. Under current law, unions are free to make promises to employees — however unrealistic — during an election campaign, no matter how outlandish and even if the union knows that the employer is not in a financial position to make good on those promises. Employers, on the other hand, are strictly forbidden by law from making any promises. Thus, when these promises come up against reality at the bargaining table, it is often very difficult to reach agreement, especially when an employer is already offering wages and benefits to its employees that match those of its competitors. It is important to note that under EFCA's card check procedures where there may have been little or no opportunity for the other side to be heard, expectations would likely be even higher.

When this reality is combined with a lack of any historic track record between the parties, especially where coupled with inexperienced negotiators at the bargaining table, reaching agreement on a package that satisfies the union's political needs while being economically realistic or even feasible for the employer can be extremely difficult and time consuming.

EFCA's Compulsory Arbitration Provision

In reality, EFCA's proponents seek compulsory first contract arbitration because it would alleviate the newly elected union's responsibility to deliver on unreasonable campaign promises, thus providing a powerful boost to organizing efforts. Under EFCA's first contract bargaining provision, the parties would bargain for 90 days, followed by 30 days of mediation (if requested by either party) and then compulsory arbitration by a panel appointed by the FMCS. The panel's decision or "contract" would be binding on the parties for two years. Thus, EFCA's first contract provision would mandate that government arbitration panels dictate the terms and conditions of employment such as wages, benefits, and other working conditions for newly organized employees if the parties cannot reach agreement within 120 days. Such an arbitrary and short time period is completely unrealistic and fails to take into account the difficulties surrounding first contract negotiations.

First Contract Negotiations Are the Most Important

Not only would the compulsory arbitration provisions undermine collective bargaining, they would handicap the bargaining relationship from the very beginning and the importance of first contract bargaining cannot be overstated in the development of the parties' bargaining relationship. Collective bargaining for the first agreement

[4] *American Golf Corporation*, 350 NLRB No. 28 slip op. at *1-2 (July 19, 2007).

is the "most important negotiation" and will "normally set the dominant tone of their [labor and management] relationship for years to come."[5] Interjecting a third-party panel of government arbitrators to impose terms that the parties are supposed to negotiate will hinder the development of the bargaining relationship that the parties must rely on to achieve prosperous labor relations.

In addition, the parties will be less inclined to negotiate disputes under an imposed contract, which will result in industrial strife and even more arbitration regarding the terms and application of the imposed contract. In the end, it is safe to say that some or all of the stakeholders — the employees, union and employer — will be dissatisfied and unhappy under an imposed contract.

[5] Charles S. Loughran, NEGOTIATING A LABOR CONTRACT: A MANAGEMENT HANDBOOK, 458-59 (2d ed. 1992) ("*Management should assume that whatever it agrees to include in the first contract with respect to work practices and basic contract provisions will remain there forever*.") (emphasis in original).