FACTS ABOUT THE
EMPLOYEE FREE CHOICE ACT

An overview of EFCA's impact on employees, businesses, and the economy

What's In This Toolkit

On March 10, 2009, the Employee Free Choice Act (EFCA) was re-introduced in the U.S. Congress with 223 House and 40 Senate co-sponsors. The legislation is highly controversial, and Congress thus far has been reluctant to move it. However, there are powerful forces pushing for the legislation, and it will remain under active consideration by Congress until some kind of resolution is reached. For that reason, it is of the utmost importance that employees, companies, policy makers and the general public educate themselves about the impact it could have on our businesses.

Enclosed are materials that the HR Policy Association has developed to better inform its members and the public about the Employee Free Choice Act and its provisions. These materials include:

- Fact sheets on key components of EFCA

- Research findings on the impacts of EFCA

- Information about how EFCA can affect the American public

At HR Policy Association, we are dedicated to providing the most up-to-date and fact-based information on HR public policy and practices in the United States and globally. In the United States right now, there is no bigger piece of labor legislation than EFCA.

To keep up with the latest changes to the legislation, we have also launched www.EFCA-info.org , an interactive website. The website will provide visitors with a balanced view of EFCA and its implications, and allow visitors to sign up for updates on the legislation and other resources.

We hope you will find this information useful. For comments or suggestions, please email info@EFCA-Info.org .

FACT SHEET

Why the Employee Free Choice Act Should Be Defeated

The Employee Free Choice Act (EFCA) is legislation being considered by Congress that would change the methods for establishing how a union becomes the representative of the employees in a workplace, and the process for determining the initial contract, or collective bargaining agreement, between the employer and the union.

If EFCA were enacted it would:

- **Eliminate a secret ballot election for union representation**, if the union organizers are able to obtain signed cards from 50% plus one of the workers.
- **Replace collective bargaining with binding arbitration,** imposed by a government appointed arbitrator.
- **Add additional penalties on employers only,** during the unionization and bargaining period.
- **Apply to small businesses**, all business over $500,000 of annual revenue would be affected.
- **Permit unionization of individual departments within a business,** rather than organizing an entire business unit, which makes it easier for unions to gain recognition.

EFCA is bad for business and employees, and it should be defeated. It takes away the privacy rights of employees, puts important decisions affecting the lives of workers and the health of the business in the hands of the government, adds costs to small businesses and hurts the global competitiveness of American industry. For more details, regular updates or to make your voice heard, visit www.EFCA-info.org.

Facts about the Employee Free Choice Act
Table of Contents

The Employee Free Choice Act: An Overview ..... Section 1

Who Does EFCA Impact? ..... Section 2

Frequently Asked Questions ..... Section 3

Tilting Labor Laws ..... Section 4

Economic Impact of EFCA ..... Section 5

Protecting Private Ballot Votes ..... Section 6

First Contract Arbitration ..... Section 7

Responses to What EFCA's Supporters Say ..... Section 8

- Economic Impact of EFCA ..... Page 24
- Another Look at the Current System ..... Page 36
- Private Ballots vs. Card Check ..... Page 42
- First Contract Arbitration ..... Page 52
- Remedies ..... Page 59
- Opinion Polls ..... Page 62
- Canada ..... Page 65
- Small Business ..... Page 68

EFCA Analysis ..... Section 9

Sample Letters to Congress ..... Section 10

Section 1
The Employee Free Choice Act: An Overview

FACT SHEET

The Employee Free Choice Act: An Overview

The Employee Free Choice Act (EFCA) is legislation being considered by Congress that would (1) change the methods for establishing how a union represents employees in a workplace, and (2) the process for determining the initial contract, or collective bargaining agreement, between the employer and the union.

"Card Check" Provision

Under current labor law, the U.S. National Labor Relations Board (NLRB) certifies a union as the exclusive representative of employees if the union is elected in a secret-ballot election conducted by the NLRB. The election is held if more than 30 percent of employees sign statements asking either for representation by a union, or for such an election. After a campaign period typically lasting 40 days—in which employees hear all sides of the issue from the union, the employer and coworkers—the election is held, supervised by the NLRB, which ensures that employees cast their ballots in a confidential manner with no coercion by either management or the union.

Assuming EFCA became law, here's what would happen.

If 50 percent of the employees plus one signed cards indicating they support the creation of a union, that would require the NLRB to certify the union as the official representative of the employees. There would be no secret ballot election. EFCA would not explicitly prohibit elections, but votes would only take place if a union or a group of employees filed a petition with authorization cards signed by less than a majority of the workers, which rarely occurs under current law.

Additionally, there are no time limits on card collection. The unions would be able to collect the signed cards from employees and independent contractors for as long as it takes to get the 50 percent plus one majority. Once a card is signed, it gets counted, even if employees change their minds. Employees never get their cards back. In fact, because of the lack of time limit, it is possible that some unions have already started collecting signed cards in anticipation of the passing of EFCA.

Here's a chart that explains the whole thing.

Current Process	Card Check
Union gathers signatures of at least 30% to have an election Employers and unions mount informational campaigns to present both sides NLRB supervises a private-ballot election If majority approve union in the election, NLRB certifies the union	Union gathers card signatures of at least 50% + 1, unsupervised by NLRB, and a union is formed (no private ballot, no election)

"First Contract Arbitration" Provision

Under current law, once a union is elected, the union and the employer negotiate to reach a collective bargaining agreement. That agreement that will define the wages, benefits and other critical workplace issues, such as seniority, promotions, overtime, job classifications, grievance procedures, compulsory union agency fees (except in "right-to-work" states) and myriad other issues.

Both parties are required by law to bargain in good faith to try to reach an agreement.

Under EFCA, bargaining would begin within 10 days after the union requested it. The union would serve as the exclusive bargaining representative for an appropriate unit of employees via the card check process.

If the union and employer cannot agree upon the terms of a first collective bargaining contract within 90 days, either party could request federal mediation. If after 30 days of mediation, there is no agreement, a panel of arbitrators appointed by the Federal Mediation & Conciliation Service would write the contract.

Where government arbitration determines terms of the agreement, employees would not have a right to ratify the terms of that agreement. In other words, whatever the arbitrator writes, that's what everyone gets whether they like it or not, no matter how unfair it is. The terms of these agreements would include the arbitrator's decisions on wages, hours and all other work-related issues, including how people get promoted, what people's job descriptions are, how work gets assigned and who gets overtime.

Current Process	First Contract Negotiation
Union and management are required to negotiate in good faith to try to reach an agreement that is decided entirely by the parties	Union and management begin bargaining within 10 days of the union's request Union and management have 90 days to negotiate If no agreement after 90 days, mediator works with union and management for 30 days to try to reach agreement If mediation fails, government appoints panel of arbitrators to write the contract which will govern all workplace employment issues for two years

Penalties

Finally, EFCA would provide for liquidated damages of three times back pay if employers were found to have unlawfully terminated pro-union employees. Under current law, the employer only owes back pay. EFCA also would impose a $20,000 penalty on the employer each time the NLRB and/or a court decides the violation was willful or repetitive and the violation occurs either while the union is seeking to organize the employer's employees or the while the employer and union are negotiating the initial contract.

Under the proposed legislation, unions would not face any fines for similar violations. In other words, the penalty provisions in EFCA are completely one-sided.

Section 2
Who Does EFCA Impact?

Who Does EFCA Impact? Small Businesses Are at Greatest Risk

There is a widespread misperception that the Employee Free Choice Act (EFCA) would not apply to small businesses. Some have even gone as far as to say "the corner grocery probably won't face an organizing drive."

However, nearly every business in America could potentially be impacted by EFCA.

Currently, small businesses are covered by a small business exemption in the National Labor Relations Act (NLRA). EFCA amends the NLRA and, under EFCA, there is no small business exemption.

Although there is no exception in the statute based on business size, the NLRB has adopted standards based on an annual minimum dollar volume of business. These amounts generally range from $100,000 (office buildings, radio or television stations) to $500,000 (hotels, restaurants, country clubs, and casinos).

Right now, the Service Employees International Union (SEIU) is currently positioned as the fastest growing union. That means businesses such as restaurants, catering companies, hotels, motels, franchisees, and retailers stand to face the greatest impact if EFCA is enacted. These businesses are typically small, and locally owned and operated. They could face heavy financial burdens as a result of lengthy mediation and arbitration processes.

Some of the industries and businesses that would be impacted by EFCA include:

- Hotels
- Restaurants
- Franchisees
- Retailers
- Catering companies
- Landscapers
- Hospital administrators
- Telecommunications industry
- Gaming industry
- Temp agencies
- General contractors
- Grocery stores
- Manufacturers
- Airline industry
- Trucking industry
- Radio industry
- Farming industry
- Grain mills
- Theater industry
- Iron industry
- Steel industry
- Blacksmith industry
- Technical engineering
- Electrical industry
- Bricklaying industry
- Plumbing industry
- Utility companies
- Carpentry companies
- Security companies
- Pizza delivery drivers
- Graphics designers
- Janitorial companies
- Painting companies
- Textile companies

Small Businesses Would Be Covered by the Employee Free Choice Act

Current NLRB Threshold, Which Is Not Changed By EFCA, Covers Most Small Businesses

There is a widespread misperception that the Employee Free Choice Act (EFCA) will not apply to small businesses, with at least one commentator concluding that "the corner grocery probably won't face an organizing drive."[1] Wrong. The reality is that small businesses will be covered by EFCA.

Currently, small businesses are covered by the National Labor Relations Act (NLRA). While EFCA amends the NLRA, it does so without exempting small businesses. So if you are small business owner and want to know how EFCA will affect you, please read on.

Low Jurisdictional Standard Established in 1959

Under the NLRA, the National Labor Relation Board (NLRB) has jurisdiction over labor disputes including elections, bargaining, and unfair labor practice questions. This applies to large and small businesses alike. Though there is no exception in the statute based on business size, the NLRB has adopted jurisdictional standards that cover small businesses under the Act.

These standards are based on an annual minimum dollar volume of business (as opposed to profit), which varies for different enterprises or industries, with separate thresholds for over 30 different categories of businesses. These generally range from $100,000 (office buildings, radio or television stations) to $500,000 (hotels, restaurants, country clubs, and casinos).

These standards have not been adjusted for inflation for 50 years and, because they are so low, the NLRB casebooks are filled with cases involving small businesses. For example, in a case called Pit Stop Markets, 279 NLRB 1124 (1986), the NLRB applied the retail business standard asserting jurisdiction over an employer operating a convenience store/gas station. This store averaged about $100,000 in gross sales of groceries and $1 million in gross gasoline sales even though the employer received a mere $43,000 in commissions from the gasoline distributer. The Board determined that "it is the gross volume sales amounts to which the Board looks to determining jurisdiction, not profit margin or some other yardstick."[2]

Even the Small Grocery Store Is Covered by EFCA

The Board's meager jurisdictional standards would not be amended under EFCA. Contrary to commentators' claims, EFCA would apply to all but the smallest small businesses including the "local corner grocery." For example, in a case called Tonnor Brother Foods, Inc., 200 NLRB 409 (1972), a grocery store with a total of 20 employees (eight of whom

[1] Matthew Cooper, Labor Pains, *Conde Nast Portfolio*, Jan. 6, 2009.
[2] Id. at 1125.

were part-time high school students) was covered under the NLRA. This corner grocery met the jurisdictional threshold in 1972, and the result would be the same today if EFCA were to be enacted. More recently, the NLRB, in J. Shaw Associates, 349 NLRB 939 (2007) asserted jurisdiction over an Exxon station and Blimpie stand with nine to 13 employees. The result would be the same if EFCA passed. The legislation simply does not exempt small businesses.

In Summary, the Negative Impact on Small Business Cannot Be Overstated

The fact that most small businesses would be covered by EFCA is no small matter. As is noted by University of Chicago Professor Richard Epstein in *The Case Against the Employee Free Choice Act*:

> Small businesses, which as a group are the largest source of new jobs in the country … often operate on small budgets, without the assistance of full-time lawyers. Under EFCA, their first exposure to unions could come at the conclusion of a secret campaign, which requires them to both hire and acquire expertise on contentious matters for which they are ill-equipped to deal, at a cost which they can ill afford to bear. These calls for unionization will divert management from the essential tasks of product development, marketing and sales on which their business models necessarily depend.

So, if you are small business owner, this law probably covers you.

Section 3
Frequently Asked Questions

Card Check

What is card check?

Card check is the term used for a method of organizing employees into a labor union. It is a concept that would become the primary way that union organizers would form workers into a union under legislation called the Employee Free Choice Act (EFCA). Under card check, a union would be formed if a majority of employees (50 percent plus one) sign union authorization forms or cards.

What is an authorization card?

An authorization card is typically a three by five card that a union organizer asks employees to sign. The printing on the card typically states, at a minimum, "I hereby designate the [NAME OF UNION] to as my collective bargaining representative."

How are unions formed currently?

Under current labor law, the National Labor Relations Board (NLRB) certifies a union as the exclusive representative of employees if it is elected through a secret-ballot election conducted by the NLRB. That election is held if more than 30 percent of employees sign cards asking either for representation by a union or for such an election to be held.

After a campaign period that typically lasts 40 days—in which employees hear all sides of the issue from the union, the employer and coworkers—an election is held that is supervised by the NLRB to ensure employees cast their ballots in a confidential manner with no coercion by either management or the union.

Current law also allows the union to become the employees' exclusive representative if the employer chooses to forego an election and recognize the union when a majority of the employees have signed cards authorizing the union to be their representative (called a "card check process").

How would card check change the way employees currently choose union representation?

Under EFCA, if a union files a petition with the NLRB and presents authorization cards signed by a 50 percent-plus-one majority of the employees, the NLRB would certify the union as the collective bargaining representative and the employer would be required to bargain with the union without an election. Unlike the secret-ballot election process currently in place, the NLRB would not directly supervise the card-signing process, and there is no time limit under EFCA for collecting the authorization cards.

EFCA would not explicitly prohibit elections, but an election would only occur if a union or a group of employees filed a petition with cards signed by fewer than 50 percent of the workers, which rarely occurs under existing law.

Current Process	Process Under Card Check
Union gathers signatures of at least 30% to have an election Employers and unions mount informational campaigns to present both sides NLRB supervises a private-ballot election If majority approve union in the election, NLRB certifies the union	Union gathers card signatures of at least 50% + 1, unsupervised by NLRB, and a union is formed (no private ballot, no election)

Why do unions want to implement card check?

The simplest answer is that card check would make it much easier for union organizers to form workers into unions and that it would give unions a large increase in membership. A large increase in membership also means an increase in membership dues, or funding for the unions. Unions plead for card check rules because they claim employees suffer at the hands of employers as a result of NLRB elections. However, unions continue to enjoy just about the same rate of victory—typically, 55 to 60 percent, but as high as 67 percent in the first half of 2008—in secret-ballot elections as they did in 1965. This relatively constant success rate suggests that labor's disappointment with election results likely has more to do with the waning desire of employees to be union members than actions by employers.

Why should card check not be implemented?

Workers have traditionally decided the important question of whether to be represented by a union through a secret-ballot election supervised by the NLRB. The secret-ballot process ensures a number of protections for employees.

- First, **employees get to hear all sides in a campaign-style setting.** They can gather information from their employers, coworkers, and the union to help inform their decision on how to vote. Because card check drastically shortens the time in which a union can be formed and certified, employees would not have the opportunity to make an informed decision.

- Second, **the secret-ballot process ensures employees are not coerced by management or the union at the critical moment when the employee indicates his or her preference.** Under EFCA, authorization cards would be signed in the presence of an interested party—a pro-union co-worker or an outside union organizer—with no governmental supervision. Card check would make employees susceptible to pressure from union organizers or their peers.

- Finally, **holding a secret-ballot election is a process that is a cornerstone of American democracy that has worked in NLRB elections for decades.** According to the Bureau of National Affairs, unions won 67 percent of private-ballot representation elections in the first six months of 2008. EFCA would take away employees' right to a secret-ballot vote, free from coercion or intimidation. The way employees vote, either for or against forming a union, should be their own personal business, and no one else's—just like on Election Day.

First Contract Arbitration

What is first contract arbitration?

The Employee Free Choice Act (EFCA) would substantially alter the process for establishing a collective bargaining agreement in newly unionized workplaces. The bill would require that a panel of government arbitrators impose the first collective bargaining agreement on the parties if they could not reach agreement within a 120-day timetable.

How are contracts agreed upon currently?

Where a union has been recognized by the employer or certified by the National Labor Relations Board (NLRB) as representing the employees, the National Labor Relations Act (NLRA) requires employers and unions to engage in good faith collective bargaining.

This process requires that the parties negotiate with the intent of trying to reach an agreement unless and until they reach a deadlock. That negotiation process is called “free collective bargaining” because neither party has to agree to a proposal or concession, and the government does not interfere with the bargaining process unless there is a violation of law.

If a party fails to negotiate in good faith, it will be prosecuted by the NLRB for committing an unfair labor practice. In addition to the prospect of legal sanctions, the parties are motivated to reach an agreement in order to avoid economic pressure by the other party either through a strike or a lockout. This process forces each party to prioritize important issues and find ways to achieve them through trade-offs or compromises. The end product reflects these trade-offs in a way that only the parties themselves can achieve.

How would EFCA change the process?

Under EFCA’s first contract arbitration provision, employers and unions would bargain for 90 days, followed by 30 days of mediation if either party requests it. If that mediation fails, the Federal Mediation and Conciliation Service (FMCS) would appoint a government arbitrator to settle the contract for the parties.

The government arbitrator’s decision which becomes the contract between the employer and employees 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.

Why should EFCA's first contract arbitration provision not be enacted?

- **EFCA imposes unrealistic time frames** for employers and employees to negotiate the terms of a first contract, which can take many months to get right. For employees, contracts are about training and education, vacation and sick leave policies, healthcare and other benefits, the ability to work overtime, and grievance processes—an entire set of rules that will govern the relationship between employees and employers for years to come.

  First contracts are complex and set the tone for all future contracts to follow. If the first contract is done too quickly to meet an arbitration deadline, it could lock in arrangements that harm employees and the company, for years to come.

- **EFCA discourages good-faith bargaining.** Because EFCA would automatically impose arbitration at the request of either party, there is a big risk that companies and employees would face. Rather than earnestly seeking agreement, both parties are likely to spend the 130-day period positioning themselves for the upcoming arbitration with proposals unlikely to be accepted by the other party. That is, employers and unions would take positions so extreme that they know the other party wouldn't accept them, knowing that a government arbitrator would eventually impose a "middle ground" solution. There would be little or no incentive for the parties to develop reasonable proposals, prioritize important issues, and engage in the give-and-take that is part of the collective bargaining process.

- **EFCA is vague leaves many questions unanswered.** EFCA is vague and provides no details on who the government arbitrators will be, how they would be chosen, or what their qualifications are. Arbitrators could be unfamiliar with the industries and businesses they are assigned to work with even though they would be determining salaries and benefits for employees who have highly specialized jobs or work environments. Finally, EFCA provides no standards for how an arbitrator is to make his or her decisions. Because labor contracts are important components of a business strategy, an arbitrator's unfamiliarity could be detrimental to a business's ability to execute its strategy and compete.

- **EFCA will create substantial economic harm to employers and their employees.** EFCA would put government-appointed arbitrators with little or no business experience in charge of making fundamental decisions affecting the company's costs and way of doing business. This could add substantial costs that the company's competitors will not have to incur, thus causing a potential loss of business along with the employees' jobs that depend on that business.

Unions

What is a union?

Labor unions, sometimes called trade unions, are organizations that represent employees in a particular workplace. Unions are formed when groups of employees seek to negotiate the terms of their employment as a group, rather than individually. While it is not always the case, a group of employees will typically elect a union that also represents other workplaces with employees who perform similar work (e.g., nurses, autoworkers, etc.).

What do unions do?

Unions are legally certified to act as the employees' official representative to a company's management, and they help negotiate the terms and conditions of employment—which includes issues such as grievances, labor disputes, wages, rates of pay, vacation time, sick leave, hours of employment, or work conditions—into a legally binding contract.

Unions also take an active role in politics, lobbying Congress for legislation establishing new workplace requirements and mobilizing their members to campaign for candidates they support.

Who can join a union?

Most workers in the United States have the right to join or form a union. While there are a number of laws and statutes governing who can organize, as well as when and how a union can be formed, the National Labor Relations Act of 1935 is the legislation that applies to most American workers.

Unions represent employees at companies of all sizes, and in a number of industries and professions, both blue-collar and white-collar. In the United States, there are hundreds of unions representing a variety of industries and skills, including those for construction workers, professional baseball players, pilots, police officers, nurses, actors, miners and postal workers.

Most states allow "union shops," which require represented employees to pay union dues or fees within a set time after being hired. However, 22 states have legal restrictions, called "right-to-work laws," that prohibit requiring payment of union dues or fees as a condition of employment.

How are unions formed?

A federal government agency called the National Labor Relations Board (NLRB) oversees union organizing in the United States for all private-sector and U.S. Postal Service employees. In addition to investigating unfair labor practices, one of the NLRB's chief duties is holding elections to determine whether employees want to form a union or be represented by an existing one.

Currently, in order to be certified by the NLRB as the representative of employees at a company, a union must first file a petition with the NLRB showing support from at least 30 percent of the employees they wish to represent. Usually, the union will present authorization cards, or individual forms each employee signs to state that he or she wishes to be represented by the union. Almost always, the union will wait to file the petition until well over 50 percent of the employees have signed cards. This is because, up to that point, employees typically have only heard the union's side and, after the election process is triggered, both sides of the question will be aired.

Once the NLRB has confirmed that at least 30 percent of employees support the petition, it will organize a secret-ballot election in which all employees vote on whether or not to be represented by the union. If a majority of employees vote in favor of the union in this election, the NLRB certifies the union to represent the employees to management. The election process does not occur if the employer agrees to recognize the union based on a majority of the employees signing union authorization cards. In those instances, the union is not certified by the NLRB but the employer is required to bargain with the union and treat it as the exclusive representative of its employees.

According to the Bureau of National Affairs, unions won 67 percent of private-ballot representation elections in the first six months of 2008.

How are unions organized?

Larger unions typically have a national leadership that sets the policy and administrative direction for the union nationally. These unions usually are divided further into "locals," or chapters in a state or city.

Many unions also are united into national federations, which affiliate with their international counterparts. Most unions in America are affiliated with one of two federations, the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) or the Change to Win Federation, although many remain independent.

How long have there been unions in the United States?

While unions have been around in some form for hundreds of years, the first national union in the United States, the National Labor Union, was created in 1866, followed closely by the American Federation of Labor (AFL), in 1886.

By the mid-1950s, approximately 36 percent of American workers were represented by unions. Today, about 15.4 million Americans (or 12.4 percent of the workforce) are members of a labor union.

Section 4
Tilting Labor Laws

EFCA Would Tilt Labor Laws to Promote Union Organizing

Bill Seeks to Strengthen Union Organizing Through Card Check Certification, Compulsory Arbitration of First Contracts, New Employer-Only Penalties

Using the rationale of protecting "employee free choice," Congress is considering the most significant change to the nation's labor laws in 60 years. In fact, the Employee Free Choice Act (EFCA) would eliminate employee choice over union representation and substitute government dictation of wages and benefits for voluntary collective bargaining in newly unionized workplaces.

Workers have traditionally decided the important question of being represented by a union through a federally supervised private-ballot election process. This process ensures that employees hear all sides and are ensured confidentiality and protection against coercion at the critical moment when each employee indicates his or her preference. If a majority chooses the union, it serves as their representative at the bargaining table in the attempt to reach an agreement with the employer on an initial collective bargaining agreement.

This is how the system has worked since the end of World War II. When unions thrived in the post-war era, few alterations were considered. If anything, the system was often viewed as unfairly tilted in favor of labor. Only when labor's representation started to decline as a result of a globalized economy, increased workforce mobility, expansion of government regulation of the workplace, and other factors did labor begin to complain that the system was broken.

Current Procedures Ensure Uncoerced, Informed Choice

Under existing National Labor Relations Board (NLRB) procedures, a union representation election typically takes place after the union has demonstrated to the NLRB that at least 30 percent of those it is seeking to represent wish to have an election. This interest is usually demonstrated by signed union authorization cards that typically indicate a desire by the employee to be represented by the union or to have an election to determine that issue. After a campaign period that typically lasts 40 days — in which employees hear all sides of the issue from the union, the employer and co-workers — an election is held, supervised by the NLRB, which ensures that employees cast their ballots in a confidential manner with no coercion by either management or the union.

Under EFCA, union authorization cards would be signed in the presence of an interested party — a pro-union co-worker or an outside union organizer — with no governmental supervision as described in the chart below. Even where there is no coercion, as Chief Justice Earl Warren acknowledged: "The unreliability of the cards is … inherent, as we have noted, in the absence of secrecy and the natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees."[1]

[1] NLRB v. Gissel, 395 U.S. 575, 602 n.20 (1969).

Bargaining Ensures Realistic Agreement Balancing Employer and Employee Needs

If a union is elected, the union and the employer negotiate over a collective bargaining agreement that will define the wages, benefits, and other critical workplace issues, such as seniority, overtime, job classifications, grievance procedures, compulsory union agency fees (except in "right-to-work" states) and myriad other issues. Because the employer has the best understanding of its business model and competitive needs, and the union is presumed to have the best understanding of the employees' wishes, only the parties themselves can determine whether the terms of the agreement are realistic.

The role of the law is to ensure that they are negotiating in good faith with the goal of reaching agreement. For a variety of reasons, agreement is not always possible, especially where the union in its campaign has raised unrealistic expectations amongst the workers, thus precluding it from settling for far less in the face of the economic realities of the business enterprise.

EFCA Places Critical Workplace Decisions in Government Arbitrators' Hands

The Employee Free Choice Act provides that, where a new union and an employer have failed within 120 days to arrive at a collective bargaining agreement, the contract dictating all terms and conditions of employment in the workplace will be decided by an arbitration panel designated by the Federal Mediation and Conciliation Service (FMCS). Thus, instead of genuine bargaining, the parties would more often position themselves to obtain the most favorable arbitration decision.

This would dramatically transform the role of arbitrators from interpreting the contract negotiated by the employer and the union to actually writing the contract, making critical economic decisions impacting the employer's business model and ability to remain competitive. Employers would be given no right of review, and employees, already denied the right to a secret ballot election on union representation, would further be denied the right to vote on the contract mandated by the arbitration panel.

As has been noted by former NLRB Chairman Peter Hurtgen, who also served as Director of the FMCS: "The negotiation of a collective bargaining agreement is the search for mutually resolving each side's interests. It must be done with tradeoffs and separate prioritizing. Only the parties can do that. There are no standards for arbitrators to apply. There is no skill set for arbitrators to use. Solomon is simply unavailable."

New Penalties for Employers But Not Unions

The bill abandons the traditional "make whole" approach of the NLRA by adding new and enhanced enforcement provisions and penalties in situations where employees are being organized or first contract negotiations are taking place. Make whole means the employee is put back in the same position and paid the same amount of money ("backpay") as if the employer had not violated the law. The Employee Free Choice Act would provide triple backpay,

fines of $20,000 per violation and automatic injunctions for employer violations occurring during union organizing and first contract negotiations. Significantly, these provisions would only apply to employer — not union — violations, even though unsupervised card check organizing lends itself to coercive union tactics.

Forced, Not Free, Choice

Throughout the 70-year history of the NLRA, both management and labor have had complaints about how it works and have proposed changes. Yet, for all of its flaws, its centerpiece is the ability of employees to register their vote in private, with government supervision to ensure privacy and the absence of coercion or other activities that would taint that vote. Moreover, once that preference has been expressed, if the union is selected, it has been left to the parties to negotiate the agreement that will decide mutually satisfactory conditions in the workplace. That's called collective bargaining.

With a few brief provisions, the EFCA would fundamentally alter these basic tenets while soundly contradicting the very title of the legislation.

Section 5
Economic Impact of EFCA

March 5, 2009

THE ALLIANCE to Save Main Street Jobs

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Employee Free Choice Act Will Cost US Economy 600,000 Jobs in 2010
Increased Unemployment and Stifled Job Growth
Will Claim Millions More in Decades to Come

WASHINGTON, D.C. — Empirical data shows that organized Labor's effort to pass the Employee Free Choice Act (EFCA) comes with a terrible cost to jobs and the economy, according to a detailed study released today by noted economist Dr. Anne Layne-Farrar.

According to the study, *An Empirical Assessment of the Employee Free Choice Act: The Economic Implications*, every 3 percentage points gained in union membership through card checks and mandatory arbitration will result in a 1 percentage point rise in the unemployment rate the following year.

Dr. Layne-Farrar concludes "The costs [of EFCA] should be carefully weighed against any purported benefits of passing the Act, all of which appears to benefit some groups at the expense of others. There is no coherent theoretical argument that explains how the higher costs, greater legal uncertainty, and expanded government intervention entailed in EFCA would improve overall social welfare."

The report finds conclusively that the unionization of 1.5 million existing jobs under EFCA in year one would lead to the loss of 600,000 jobs by the following year. Job losses directly attributed to the passage of the Employee Free Choice Act would be equal to the entire population of Boston, MA.

Recent comments made by organized labor reinforce the economic peril associated with the report's findings.

> "Andy Stern, head of the Service Employees International Union, predicts that ECFA would cause unions to 'grow by 1.5 million members a year, not just for five years but for 10 to 15 straight years.'" (*Labor Goes for the Brass Ring, The American Spectator, September 16, 2008)*
>
> "Stewart Acuff, special assistant to AFL-CIO president John Sweeney, said the 428,000 new members last year is just a small portion of what unions could recruit if the card-check bill passes." (*Union membership rises for second straight year,* Associated Press*," January 28, 2009)*

"EFCA would help achieve organized labor's goal of increasing dues-paying members at the cost to the U.S. Economy and, ironically jobs," said Philip A. Miscimarra of Morgan, Lewis & Bockius LLP, and counsel to the Alliance to Save Main Street Jobs. "This research shows EFCA would promote a surge in job losses and stifled job creation. These are terrible problems at any time, but devastating in today's economic environment."

The consequences of EFCA passage would affect the entire economy and would overwhelm any anticipated wage and benefit increases among the subset of workers that gain union status. The empirical results presented in the paper therefore recommend against passing EFCA.

The study complements a recent report authored by renowned legal scholar Richard A. Epstein titled the *Case Against the Employee Free Choice Act*. Professor Epstein's report summarized the economic impact of EFCA by suggesting that "The bottom line therefore is that the passage of EFCA will create huge dislocations in established ways of doing business that will in turn lead to large losses in productivity."

To view the full report by Dr. Layne-Farrar visit http://ssrn.com/abstract=1353305

A recording of Dr. Layne-Farrar's press conference from this morning will be available at 3pm EST by dialing (800) 642-1687 and entering ID# 88698348.

Funding for the Study was provided by the Alliance to Save Main Street Jobs

About the Author:
A highly regarded economist from the non-partisan firm LECG Consulting, with more than more than a decade of experience Dr. Anne Layne-Farrar received her BA in economics with honors, summa cum laude, from Indiana University (Bloomington), her master's and her PhD in economics from the University of Chicago. She has published articles in *Antitrust*, *Global Competition Review*, and *Regulation Magazine* and has numerous publications in academic journals, including *Antitrust Law Journal*, *Harvard Journal of Law and Public Policy*, and *Journal of Competition Law and Economics*.

About the Alliance to Save Main Street Jobs:
The Alliance is chaired by HR Policy Association and includes the American Hotel and Lodging Association, the Associated Builders and Contractors, The International Council of Shopping Centers, the Real Estate Roundtable, the Retail Industry Leaders Association and the U.S. Chamber of Commerce.

# # #

Section 6
Protecting Private Ballot Votes

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FOR IMMEDIATE RELEASE
November 10, 2008

New Data Shows Unions Winning Two of Every Three Elections

66.8 Percent Win Rate in 2008 Elections Contradicts Claims
that Current Law Denies Employees a Fair Choice to Form Unions

WASHINGTON—A new report by the Bureau of National Affairs (BNA) shows unions winning 66.8 percent of private ballot representation elections conducted by the National Labor Relations Board (NLRB) in the first six months of 2008. This is a substantial increase from the 58.5 percent in the same period of 2007. The data is being released at a time when Congress is preparing to consider the Employee Free Choice Act, which would deprive employees of the private ballot on the premise that the current system deprives employees of a fair mechanism to register their choice.

Under current law, employees vote in a private ballot election where confidentiality and freedom from coercion by either the employer or the union is protected by NLRB supervision of the balloting process. According to NLRB data (available at http://www.nlrb.gov/shared_files/Press%20Releases/2008/R-2675.pdf), 95 percent of all elections are conducted within 56 days of the filing of a petition by the union, with a median of 38 days. This period of time gives employees an opportunity to hear from and discuss all sides of the unionization issue with the union, fellow employees and the employer.

The Employee Free Choice Act would replace the current system with a "card check" in which employees would register their choice by signing union authorization cards in the presence of union organizers. The union would be certified if 51 percent of the employees sign the cards, with no notice required to be given to the other 49 percent that the process is underway. Thus, employees would be denied confidentiality, protections against coercion, and a reasonable time frame in which to hear all sides of the question. Moreover, once the union is certified, if the employer and the union failed to agree on a collective bargaining agreement, the agreement would be dictated by a government-appointed arbitrator who would decide wages, benefits and all other work rules with no right of review.

"This new data clearly demonstrates that the current system, if anything, is working to the unions' advantage. It shows that, when allowed to hear both sides of the issue and register their choice in a confidential, un-coerced manner, employees are frequently willing to side with the union," said Daniel V. Yager, Chief Policy Officer and General Counsel of the HR Policy Association, a public policy advocacy organization representing the senior human resource executives of more than 240 leading employers doing business in the United States. Collectively, its members employ over 12 percent of the U.S. private sector workforce.

The BNA data shows unions won 518 of 776 private sector elections (66.8 percent) held in the first half of 2008, up from 454 wins (58.5 percent) in the same period of 2007. The full report may be purchased from BNA Plus at bnaplus@bna.com or 800-372-1033 (Option 5, then Option 3).

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# # #

Procedural Safeguards: Private-Ballot Elections vs. Card Check

The following side-by-side comparison explains some of the procedural safeguards found in the NLRB election process along with any counterpart card check protections:

Private-Ballot Election	Card Check
An NLRB-approved notice that explains the workers' rights must be posted by the employer at least three days before the election.	Workers are informed of their rights only to the extent articulated by the union organizer.
"Captive audience" speeches within 24 hours of the election are prohibited.	Employees are subject to un-rebutted, pro-union speeches up until the time they sign an authorization card.
The election is conducted by an agent of the NLRB in conjunction with an equal number of observers selected by the union and employer.	Union authorization cards are solicited in the presence of union organizers.
The names of prospective voters are compared against a previously established eligibility list before they may cast their ballots.	Anyone may sign union authorization cards. Although forgery of authorization cards is prohibited, there is no safeguard that prevents forgeries before the fact.
The election ballot box is physically inspected and sealed by the NLRB agent immediately before voting.	The union maintains control over signed authorization cards.
The NLRB agent retains positive control over the ballots at all times.	The union retains control over authorization cards at all times.
The ballots are secret: no name or other identifying information appears on the ballot to indicate how an employee voted.	The union knows which employees signed authorization cards.
Employees may not be assisted in casting their votes by agents of the union or employer.	Union organizers may fill out and sign authorization cards on behalf of the workers with their express or implied permission, regardless of whether they have read the cards.
Electioneering near the polls is prohibited.	Solicitation of authorization cards may be accompanied by any pro-union propaganda that does not rise to a material misrepresentation regarding the consequences of signing the card.
Neither the employer nor the union may engage in coercive or threatening conduct prior to the election.	The union may not use threats or coercion in order to obtain signed cards nor may the employer use threats or coercion to prevent cards from being signed.

Section 7
First Contract Arbitration

How the Employee Free Choice Act's Compulsory First Contract Provision Would Destabilize Collective Bargaining

Parties Would Position Themselves for Most Favorable Arbitration Decision Rather Than Reaching Agreement on First Contract in Newly Unionized Workplaces

In addition to rewriting the rules on the election of unions, the "Employee Free Choice Act" (EFCA) would also substantially alter the process for establishing a collective bargaining agreement in newly unionized workplaces. The bill would require that a government appointed panel of arbitrators — third parties who are strangers to the workplace — impose the first collective bargaining agreement on the parties if they could not reach agreement within the bill's unreasonably short 120-day collective bargaining timetable. The predictable effect in most instances would be to effectively eliminate good faith bargaining for a first contract and replace it with the parties positioning themselves for arbitration.

The Free Collective Bargaining System

Where a union has been recognized by the employer or certified by the National Labor Relations Board (NLRB) as representing the employees, the National Labor Relations Act (NLRA) requires employers and unions to engage in good faith collective bargaining. This requires that the parties negotiate with the intent of trying to reach an agreement unless and until they reach an impasse.

Because the Act neither compels either party to agree to a proposal nor requires a concession and does not interject the government into the determination of the content of the agreement, ours is commonly called a "free collective bargaining" system. If a party fails to negotiate in good faith, it will be prosecuted by the NLRB for committing an unfair labor practice. In addition to the prospect of legal sanctions, the parties are motivated to reach an agreement in order to avoid economic pressure by the other party either through a strike or a lockout. This process forces each party to prioritize important issues and find ways to achieve them through trade-offs or compromises. The end product reflects these trade-offs in a way that only the parties themselves can achieve.

EFCA's Compulsory Arbitration Provision

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, assuming mediation fails, compulsory arbitration by a panel appointed by the Federal Mediation and Conciliation Service (FMCS). The panel's decision or "contract" would be binding on the parties for two years. Thus, the first contract provision mandates that arbitration panels dictate the terms and conditions of employment such as wages and benefits for newly organized employees if the parties cannot reach agreement within 120 days.

The Parties Position for Impending Arbitration

Because of its short time frame and automatic imposition of arbitration at the request of either party, the parties, rather than earnestly seeking agreement, would be more likely to position themselves for the impending arbitration with proposals unlikely to be accepted by the other party. The strategic premise would be that their respective positions would serve as an outside boundary from which the arbitrators would seek the "middle ground" in writing the contract. There would be little or no incentive for the parties to develop reasonable proposals, prioritize important issues and engage in the give-and-take that is part of the collective bargaining process.

As one arbitrator explained, "the availability of a procedure yielding compulsory [arbitration] awards tends to demoralize the bargaining process. Such procedures, it is widely believed, inhibit normal bargaining by inviting unreasonable offers and demands designed to compel arbitration … by deterring bargainers from assuming responsibility for a settlement when they believe better terms might be arrived at through terminal arbitration."[1]

For the same reasons, another arbitrator agreed with a union's argument that forcing arbitration of new contract terms "operates to prevent the parties from really attempting to settle their differences by negotiation."[2] Indeed, President Truman's Secretary of Labor, Lewis B. Schwellenbach recognized that the imposition of compulsory arbitration create "a weakening of free bargaining and an increasing reliance on the compulsory arbitration procedures."[3]

In testimony on the Employee Free Choice Act, former FMCS Director Peter J. Hurtgen, also a former NLRB Chairman, echoed the same sentiments:

> I spent 20 years of my practice in Florida where I represented many public employers in the negotiation of their collective bargaining agreements. That process, under state law, ended in non-binding interest arbitration. More often than not, the parties bargained simply to set the issues up for the arbitrator which resulted in days and weeks of hearings. The process led to hearings and imposed legislative body decisions — not agreements. *Any process which ends with an imposed contract will perforce put the parties into their positioning and arbitrating shoes, not their bargaining shoes*.[4]

[1] Pacific Neo-gravure, 51 LA 14, 25 (Platt, 1968).
[2] San Joaquin Baking Co., 13 LA 115, 125 (Haughton, 1949).
[3] H.R. Rep. No. 80-245, at 101 (1947).
[4] Testimony of Peter J. Hurtgen before Senate Health, Education, Labor and Pensions Committee, at 16 (March 27, 2007) (emphasis added).

Elimination of Accountability for Content of Agreement

One fundamental premise underlying collective bargaining — that neither the employer nor the union is obligated to accept a proposal — all but guarantees that contract negotiations will take time and the results will have been carefully considered by the parties. In contrast, EFCA's 120-day "bargaining" timetable encourages "surface bargaining" and positioning for arbitration by both parties. Union negotiators would have no inhibitions in making unreasonable demands, consistent with inflated campaign promises that may have been made to obtain enough signatures on authorization cards to be certified under EFCA's card check provisions.

Indeed, under the first contract provisions, labor is no longer accountable to deliver on campaign promises because if the panel does not give the union everything it promised the employees, the union can simply blame it on the arbitrators, knowing that it will still get to collect its dues from those new union workers. In the end, there is no real downside for a union to wait four months for arbitration.

Importance of First Contract Negotiations

The compulsory arbitration provisions 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. Indeed, collective bargaining for the first agreement is the most important negotiation and sets the dominant tone of the union's and employer's relationship for the years to come.

Interjecting a third-party panel of 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. Moreover, the parties will be less inclined to negotiate disputes under an imposed contract, which will simply result in more arbitration regarding the terms and application of the imposed contract.

Section 8
Responses to What EFCA's Supporters Say

Economic Impact of EFCA

A Strong Middle-Class Does Not Depend on Higher Unionization Rates

EFCA Proponents Argue: *"From 2000 to 2007, the income of the median working-age household fell by $2,000 — an unprecedented decline. In that time, virtually all of the nation's economic growth went to a small number of wealthy Americans. An important reason for the shift from broadly-shared prosperity to growing inequality is the erosion of workers' ability to form unions and bargain collectively."*

Lawrence Mishel, et al, "Passage of the Employee Free Choice Act is Critical to Rebuilding our Economy," Paid Advertisement, *Washington Post*, Feb. 25, 2009, A7

A Wide Variety of Median Working Household and Family Income Measures Increased from 2000 to 2007, *Despite a Decline in Unionization Rates*

The median income statistic cited by Mishel et al is a classic example of cherry-picking data to make your case. In fact, U.S. Census Bureau data from 2000 to 2007 confirms:

- The real median income for households with one worker actually *increased* by $232, and rose a substantial $2,841 for households with two workers — while the private-sector unionization rate declined from 9.8 percent to 8.2 percent.[1]
- The real median income for *all families* increased by $272, remained about the same for families with one worker, and rose a significant $3,912 for households with two workers.[2]
- The real median income for all individuals increased by $719.[3]

The Share of Income Going to the Middle Class Increased from 2000 to 2007, *Even as Unionization Declined*

It is simply not true that "virtually all of the nation's economic growth went to a small number of wealthy Americans." In fact, U.S. Census Bureau data from 2000 to 2007 confirms:

- The share of income going to wealthy households (the top 5 percent of income) actually *decreased* from 22.1 percent to 21.2 percent, and the share of income going to wealthy families *decreased* from 21.1 percent to 20.1 percent — while real GDP *increased* by 17.4 percent.[4]

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[1] Census Bureau, Table H-12, available at: www.census.gov/hhes/www/income/histinc/h12AR.html. The entire decline EFCA proponents cite occurred in households with median incomes above $100,000 per year and four or more workers.
[2] Census Bureau, Table F-12, available at: www.census.gov/hhes/www/income/histinc/f12AR.html.
[3] Census Bureau, Table P-7, available at: www.census.gov/hhes/www/income/histinc/p07AR.html.
[4] Census Bureau, Table H-2 and Table F-2, available at: www.census.gov/hhes/www/income/histinc/h02AR.html, and www.census.gov/hhes/www/income/histinc/h02AR.html. Real GDP data from the Bureau of Economic Analysis.

- The share of income going to the broadest measure of middle-class households (the middle 60 percent) *increased* from 46.7 percent to 46.9 percent, while the share going to the very middle (20 percent of all households) remained the same (14.8 percent).[5]
- The share of income going to the broadest measure of middle-class families *increased* from 47.9 percent to 48.6 percent, while the share going to the very middle increased from 15.4 percent to 15.6 percent — *while the private-sector unionization rate declined from 9.8 percent to 8.2 percent*.[6]

This data strongly suggests that any effort to increase unionization rates will have little or no impact on the relative incomes of middle-class workers and the share of income that goes to that group of families.

Increased Union Power Is Not the Answer

Few would disagree that a strong middle class is a critical public policy objective. However, government statistics confirm that changing the nation's labor laws to increase union power is unlikely to help achieve that objective. In fact, it may even negatively affect workers as illustrated by the collapse of the American steel industry in the 1980s and the challenges facing the U.S. auto industry today.

[5] Census Bureau, Table H-2, available at: www.census.gov/hhes/www/income/histinc/h02AR.html.
[6] Census Bureau, Table F-2, available at: www.census.gov/hhes/www/income/histinc/f02AR.html.

Economic Recovery Is Not Dependent On Higher Unionization Rates

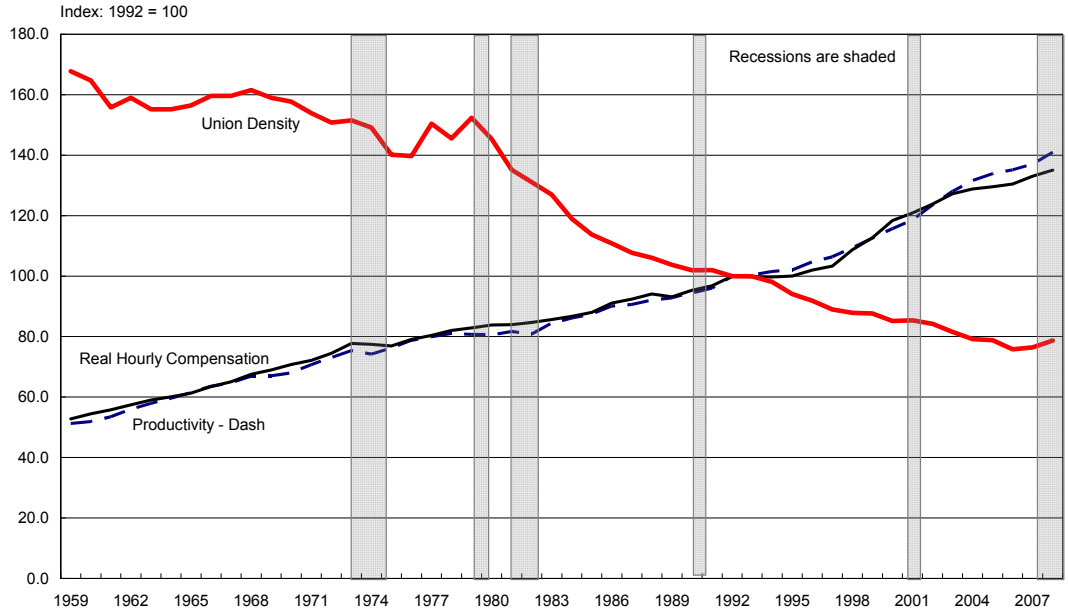
EFCA Proponents Argue: *"The link between greater productivity and higher wages has broken down. Workers help the economy grow by becoming ever more productive, but they receive only a small share of the new wealth they help create. What is sustainable is an economy where workers are adequately rewarded and have the income they need to purchase goods. This is where unions come in."*

David Madland and Karla Walter, "Unions Are Good for the American Economy," Center for American Progress Fund, February 2009

The Link Between Greater Productivity and Higher Compensation Is Not Broken

Although higher wages are important to workers, what matters most to them is the combination of wages and benefits, or compensation, they receive. As Chart 1 shows, when appropriately adjusting hourly compensation with the same price index that is used with the productivity measure, the increase in real hourly compensation closely tracks the increase in productivity over time. Moreover, the significant decline in rate of unionization since 1969 has not had an impact on this very stable trend.

Chart 1: Increases in Real Hourly Compensation Closely Tracks Productivity Growth and the Decline in Union Density has had No Impact on This Trend



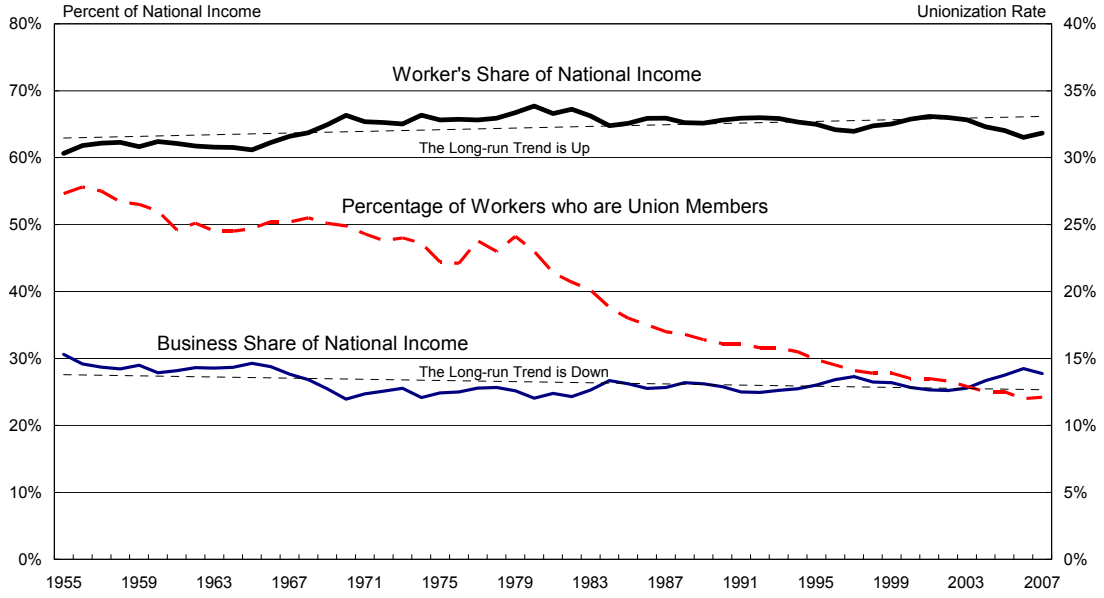
Source: Applied Economic Strategies, LLC, data from the Bureau of Economic Analysis, the Bureau of Labor Statistics, and Barry T. Hirsch, *Union Membership And Earnings Data Book, 2008.*

Although the productivity and compensation trends appear to diverge after 2003, this is largely due to the significant increase in the contribution of capital intensity and the impact of technology, rather than the contribution of labor composition or unionization rate.[1] Moreover, compensation and productivity have diverged at times in the past and have always reverted back to their long-run trends whether unionization rates were high or not.

The Share of National Income that Goes to Workers Has Increased

It is simply not true that workers receive only a small share of the wealth they create. As Chart 2 shows, the long-run trend in the share of national income that goes to workers is up. In fact, in 2008 (not shown on the chart), the compensation of employees continued to rise (1.8 percent) while corporate profits fell in the recession by 9.8 percent.[2] Moreover, the relatively stable trend in the share on national income going to workers has occurred as the rate of unionization has declined.

Chart 2: As the Unionization Rate has Declined, The Share of National Income Going to Workers has Increased and the Share Going to Business has Decreased



Source: Applied Economic Strategies, LLC, data from the Bureau of Economic Analysis and Barry T. Hirsch, Union Membership And Earnings Data Book, 2008.

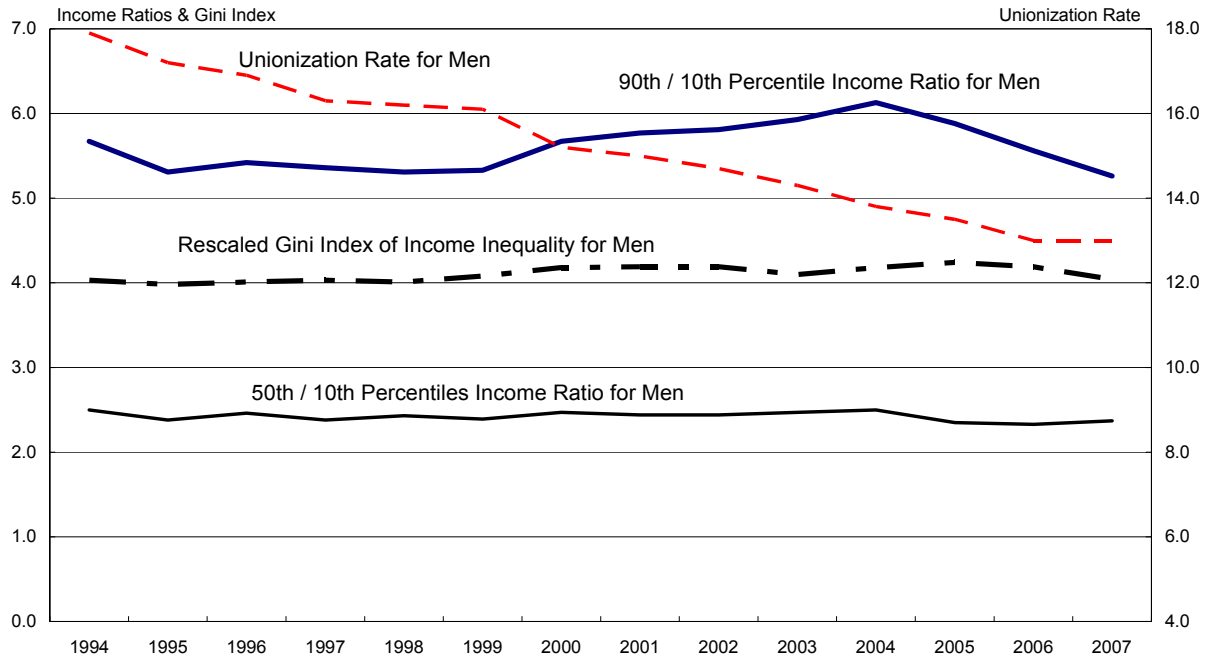
[1] Bureau of Labor Statistics, Preliminary Multifactor Productivity Trends, 2007, Table B, May 6, 2008, available at: www.bls.gov/news.release/pdf/prod3.pdf.
[2] Bureau of Economic Analysis, Table 1.12, National Income by Type of Income, available at: www.bea.gov/national/nipaweb/TableView.asp?SelectedTable=53&Freq=Qtr&FirstYear=2006&LastYear=2008.

Further, the argument that unions are needed to ensure low-wage and middle-class workers receive their "fair share" of national income does not hold up when one compares the recent income trends for full-time year-round workers and the continuing decline in unionization. As Chart 3 shows below, three important income-fairness measures for men who work full-time year-round — the 90th percentile/10th percentile income ratio; the 50th percentile/10th percentile income ratio; and the Gini Index — have remained fairly stable as the unionization rate for men has fallen.

This data strongly suggests that any effort to increase unionization rates will have little or no impact on the relative incomes of low-wage and middle-class men. To the extent that income shares have become more unequal since 1973, it has more to do with increasing returns to education, global and regional competition, advancements in technology, and high levels of immigration, than it does to declining unionization rates.

In fact, higher unionization rates can have a variety of negative labor market effects on low-wage and middle-class workers. The more likely direction of causation begins with increasing unionization rates: this increase leads to higher labor costs, which leads to a substitution of capital and non-union labor for union workers and hours, which, finally, leads to fewer jobs for union workers in the long run.

Chart 3: Since 1994, the the Significant Decline in the Unionization Rate for Men Has Not Increased the 90/10 and 50/10 Income Ratios for Men or Their Gini Index Measure of Inequality



Source: Applied Economic Stragegies, LLC, data from the Census Bureau and the Bureau of Labor Statistics.

Higher Unionization Rates Will Lead To Higher Unemployment

A recent economic study by Dr. Anne Layne-Farrar of LECG Consulting found that passing the Employee Free Choice Act (EFCA) would lead to a 1 percentage point increase in the unemployment rate for every 3 percentage point increase in the rate of union membership brought about by a system of card checks and mandatory arbitration.[3]

For example: If EFCA passed today and resulted in an increase in unionization from the current rate of about 12 percent to 15 percent, then unemployment a year from now would rise by 1.5 million, to 10.4 million workers.[4]

Conclusion

Economic recovery and a strong middle-class are not dependent on higher unionization rates. The economic arguments that EFCA proponents make often fail to recognize that the American and global economies have significantly changed. Compensation growth still tracks productivity and workers continue to receive their "fair share" of national income. Significantly changing the nation's labor relations law is unlikely to have any impact on these trends and may lead to a variety of unintended negative impacts on workers.

[3] Anne Layne-Farrar, *An Empirical Assessment of the Employee Free Choice Act: The Economic Implications*, LECG Consulting, February 25, 2009.
[4] *Ibid.*

EFCA: Who Pays for the Unintended Consequences?

EFCA Proponents Argue: *"The Employee Free Choice Act … holds the promise of boosting unionization rates and improving millions of Americans' economic standing and workplace conditions. If union coverage rates increased by just 5 percentage points over current levels, newly unionized workers would earn an estimated $25.5 billion more in wages and salaries per year. Increasing unionization is a good way to get out of our current economic troubles."*

David Madland and Karla Walter, "Unions Are Good for the American Economy," Center for American Progress Fund, February 2009

If EFCA Achieves Its Goals, Someone Will Have to Pay

Everyone agrees that passage of the Employee Free Choice Act (EFCA) will be the most significant change in the nation's labor-relations laws since 1949. For good or bad, bypassing the secret-ballot process — thereby enabling the recognition of union representation by the "card check" process and mandating collective bargaining agreements by government arbitrators — will dramatically increase the power of unions in the American economy. Clearly, some workers will benefit because, on average, union members are paid $4.01 more per hour than their non-union counterparts and receive $6.67 more per hour in benefits.[1]

However, a policy decision such as passing EFCA is not cost-free; someone has to pay for it. Economic research and state-by-state comparisons indicate that American workers, including union members, will end up paying for a large part of EFCA's costs through higher unemployment, slower job growth, fewer job opportunities and slower wage growth[2] — costs that most workers cannot afford, especially in this recession.

Research also shows that higher labor costs are passed on to consumers through higher prices, and to businesses though lower profits[3] — two additional costs that will hit the economy just as profits have collapsed and family budgets are under great stress.

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[1] Bureau of Labor Statistics, *Employer Costs for Employee Compensation–September 2008*, Table 5, available at: www.bls.gov/news.release/pdf/ecec.pdf.
[2] Daniel S. Hamerhmesh and Albert Rees, *The Economics of Work and Pay,* Harpercollins, 1993; and Richard K. Vedder, Ph.D. & Lowell E. Gallaway, Ph.D., *Do Unions Help the Economy? The Economic Effects of Labor Unions Revisited*, National Legal and Policy Center and The John M. Olin Institute for Employment Practice and Policy, 2002.
[3] *Ibid.*

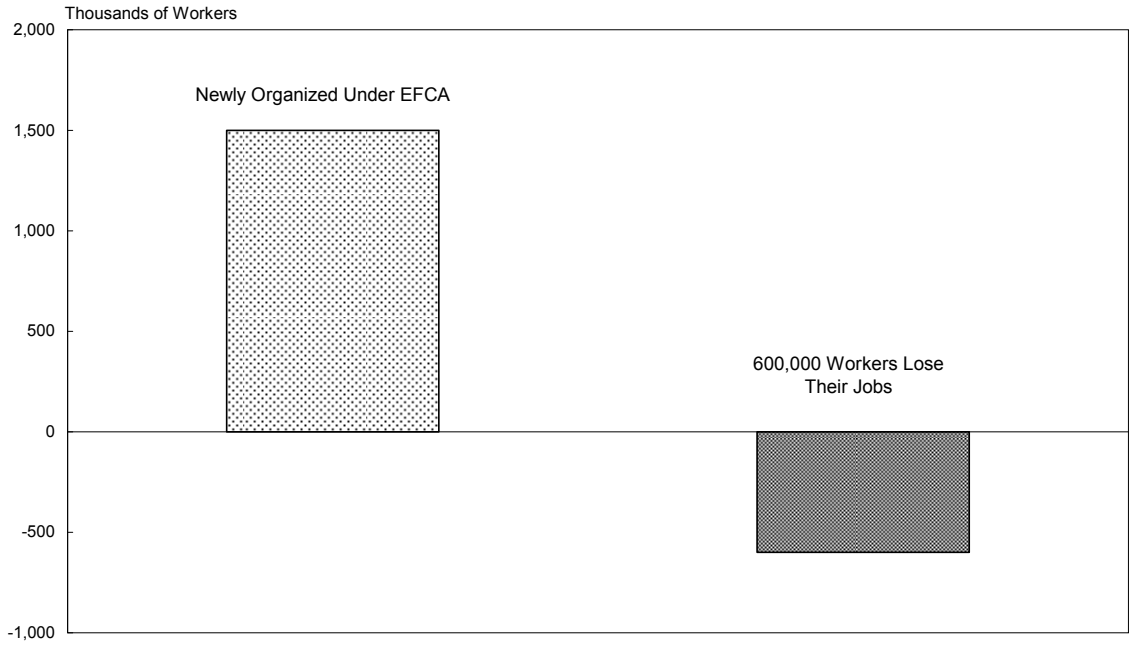
Increase in Unemployment

A recent economic study by Dr. Anne Layne-Farrar of LECG Consulting estimates that passing EFCA would lead to a one percentage-point increase in the unemployment rate for every three percentage-point increases in the rate of union membership.[4]

Specifically:

- For every 1.5 million workers organized under EFCA, 600,000 workers will lose their jobs in the following year.[5] (See Chart 1, below.)
- Should the rate of union membership in the United States increase by 5 percentage points from 12.1 percent to 17.1 percent, as one study suggested is possible, up to 2.7 million workers would become unemployed in the following year and the unemployment rate would rise by up to 1.8 percentage points.[6]

Chart 1: For Every 1.5 Million Workers Who are Organized Under EFCA, 600,000 Americans Lose Their Jobs the Following Year



Source: Applied Economic Strategies estimate base on Layne-Farrar economic analysis.

[4] Anne Layne-Farrar, *An Empirical Assessment of the Employee Free Choice Act: The Economic Implications*, LECG Consulting, March 4, 2009, available at: http://ssrn.com/abstract=1353305.
[5] Applied Economic Strategies estimate based on Layne-Farrar economic analysis.
[6] Anne Layne-Farrar, *An Empirical Assessment of the Employee Free Choice Act: The Economic Implications*, LECG Consulting, March 4, 2009.

Further, a comparison of state data also shows that states with greater levels of union power and higher unionization rates have significantly higher unemployment rates. For example:

- In 2008, the average unemployment rate in the 10 states with the highest unionization rates was 0.7 percentage points higher than in the 10 states with the lowest unionization rates (5.8 percent vs. 5.1 percent).
- In 2008, the unemployment rate was 8.4 percent in the state with the highest unionization rate (Michigan) compared to 6.3 percent in North Carolina, the state with the lowest unionization rate.

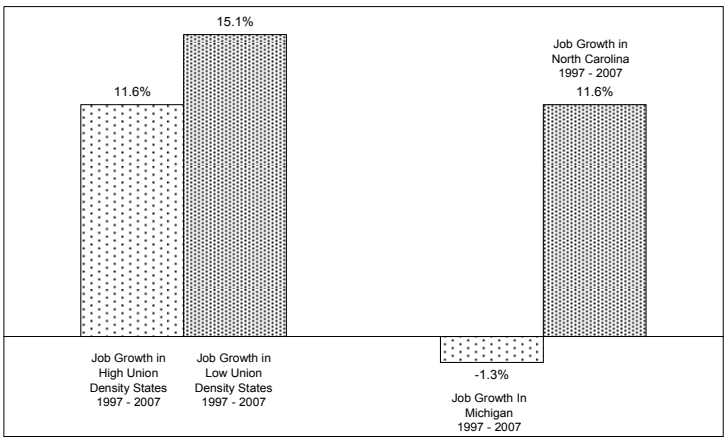
At a time when unemployment is rising and threatening to increase further, American workers can ill-afford the chance of even a slight increase in the unemployment rate that would likely occur if EFCA is enacted.

Slower Job Growth

The economic study by Dr. Layne-Farrar also estimates that if enacting EFCA were to increase the rate of union membership in the United States from 12.1 percent to 17.1 percent, then up to 1 million fewer jobs would be created in the following year. A comparison of state data also shows that states with greater levels of union power and higher unionization rates have significantly slower job growth. For example:

- From 1997 to 2007, the number of jobs increased by an average of 11.6 percent in the 10 states with the highest unionization rates compared to a 15.1 percent increase in the 10 states with the lowest unionization rates, a difference of over 30 percent. (See Chart 2, below).
- From 1997 to 2007, the number of jobs decreased by 1.3 percent in the state with the highest unionization rate (Michigan) compared to an increase of 11.6 percent in North Carolina, the state with the lowest unionization rate.

Chart 2: Job Growth is Slower In High Union Density States



Source: Applied Economic Strategies estimates based on BEA data.

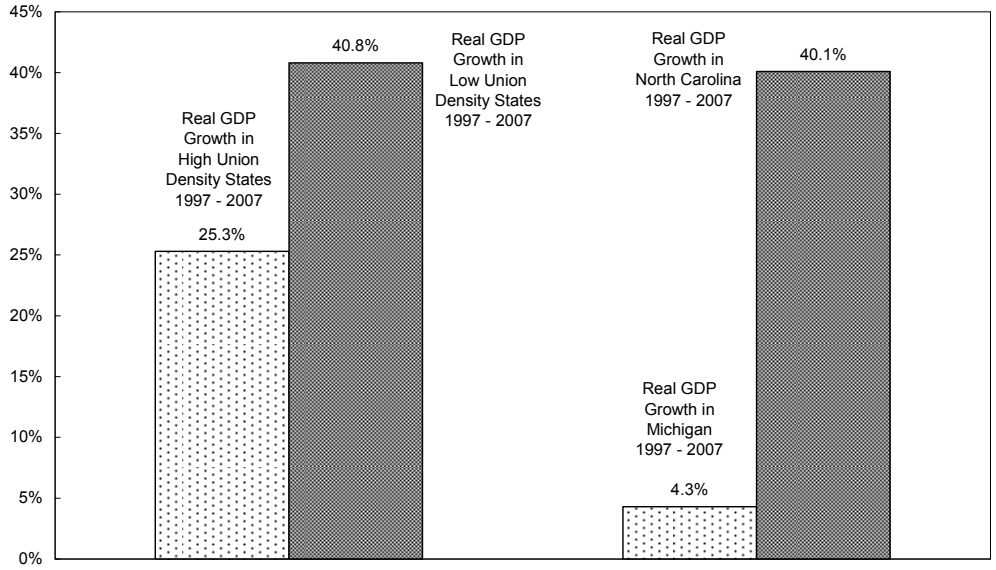
This data strongly suggests that increasing union power by enacting EFCA will lead to significantly slower real job growth in the United States and slower per-job growth in those states whose unionization rates increase — a prospect that would certainly slow any future economic recovery.

Slower State GDP and Per Capita Income Growth

A comparison of state data also shows that states with greater levels of union power and higher unionization rates have significantly slower growth in the real gross domestic product (GDP) they produce and in their real per capita income. For example:

- From 1997 to 2007, real GDP in the 10 states with the lowest unionization rates increased by 40.3 percent compared to a 25.3 percent increase in the 10 states with the highest unionization rates, a difference of almost 62 percent.[7] (See Chart 3, below.)
- From 1997 to 2007, real GDP increased by just 4.3 percent in Michigan, the state with the highest unionization rate, compared to 40.1 percent in North Carolina, the state with the lowest unionization rate, an almost 10-fold difference.[8]

Chart 3: States With Greater Levels of Union Power and Higher Unionization Rates have Significantly Slower GDP Growth Rates



Source: Applied Economic Strategies, estimates based on BEA data.

[7] Bureau of Economic Analysis, *Regional Economic Accounts: Gross Domestic Product by State,* available at: www.bea.gov/regional/gsp/.
[8] *Ibid.*

- From 1997 to 2007, real per capita income in the 10 states with the lowest unionization rates increased by 15.3 percent compared to a 19.4 percent increase in the 10 states with the highest unionization rates, a difference of over 26 percent.[9]
- From 1997 to 2007, real GDP increased by just 4.3 percent in Michigan, the state with the highest unionization rate, compared to 40.1 percent in North Carolina, the state with the lowest unionization rate, an almost 10-fold difference.[10]

This data strongly suggests that increasing union power with the passage of EFCA will lead to slower real GDP growth and slower per capita income growth in those states whose unionization rates increase.

Slower Wage Growth

Although average union members are paid more per hour than their non-union counterparts and receive more per hour in benefits, their wages grow considerably slower than non-union workers. For example:

- From 1997 to 2007, the real median weekly earnings of non-union workers grew twice as fast as union members (14.9 percent vs. 7.7 percent).[11]
- Even in states with low union densities, the real median weekly earnings of non-union workers grew faster than union members (10.9 percent vs. 14.3 percent). In both high and low union density states the real weekly earnings of non-union workers increased faster than union members.[12]
- From 1997 to 2007, real median weekly earnings increased by just 2.3 percent in Michigan, the state with the highest unionization rate, compared to 7.1 percent in North Carolina, the state with the lowest unionization rate, a threefold difference.[13]

[9] *Ibid*.
[10] *Ibid.*
[11] Applied Economic Strategies, estimates based on data from Barry T. Hirsch, *Union Membership and Earnings Data Book,* Table 5a, 2008.
[12] *Ibid.*
[13] *Ibid.*

Another Look at the Current System

There Is No Delay in the Vast Majority of NLRB-Conducted Private-Ballot Elections

EFCA Proponents Argue: *"Under the NLRB election process, delays of months and even years are common, during which management uses every imaginable procedural option to stretch out the process and frustrate the desire of employees to form a union."*

American Rights at Work, "Employee Free Choice Act: A Resource Guide for Responsible Employers"

Vast Majority of Elections Held Within Two Months

EFCA's proponents like to point to National Labor Relations Board (NLRB) delays in conducting elections, but they rarely note that such delays only occur in a small minority of cases. In fact, the median time for conducting elections after the filing of a petition with the NLRB has significantly decreased since 1980 (see Chart 1). In fiscal year 1980 the median time for conducting elections was 50 days after the petition was filed, dropping to 38 days in FY 2008.[1] Similarly, in FY 2008, 95 percent of all elections were conducted within 56 days from the filing of the petition, whereas in FY 1997, 87.5 percent of all elections were conducted within 57 days.[2] Thus, in the great majority of situations, an election is held soon after the petition is filed and the time periods are actually decreasing.

A Supermajority of Elections Are Conducted Pursuant to Parties' Agreement

Not only are union representation elections being conducted in a timely manner, but according to the NLRB in fiscal year 2007, "the overwhelming majority of elections conducted by the NLRB resulted from some form of agreement by the parties on when, where, and among whom the voting should occur."[3] This is not a new trend, either. For example, statistics for fiscal year FY 2005 show that an overwhelming majority (more than 81 percent) of all representation elections were conducted based on an election agreement between the employer and the union where no hearing was necessary.[4] In other words, in the vast majority of NLRB-conducted elections the union and employer agreed upon the terms and conditions of the election.

A Small Minority of Elections Are Delayed

The reality is that some elections are delayed beyond the typical 60-day period because of critical issues that must be resolved by the NLRB before the balloting. These issues usually relate to the employees who make up the

[1] Littler Mendelson, P.C., The Employee Free Choice Act: A Critical Analysis, July 2008, and Office of General Counsel, Summary of Operations (Fiscal Year 2008) at 1.
[2] *Id*.
[3] Seventieth Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 2007, at 11.
[4] Seventieth Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 2005, at 14.

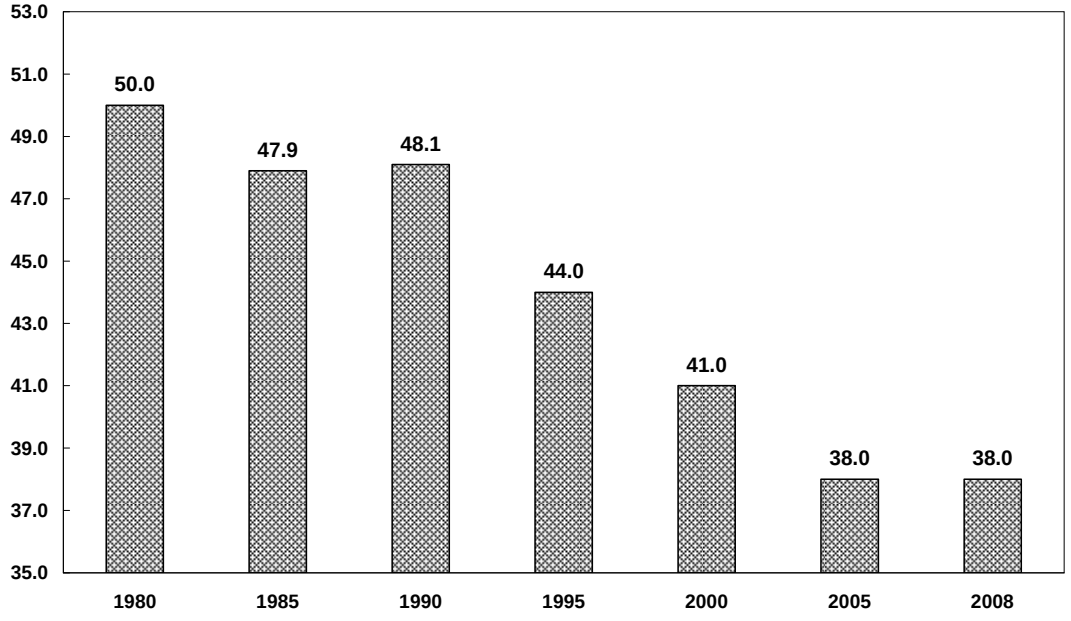
"appropriate bargaining unit"—*i.e.*, those employees who are authorized to vote and ultimately be represented by the union if it is elected. A small minority of elections are also delayed by unfair labor practice charges filed against either the union or employer. These so-called "blocking charges"—filed by unions and employers alike—delay the election pending adjudication by the NLRB. It is worth noting that the filing of such charges is a common tactic used by unions to delay elections held to determine whether a union should be *de*certified, even though such elections are triggered by a petition filed by the represented employees.

Employees Need Time To Hear All Sides

EFCA's proponents complain about election delays but, as shown above, the facts show that the overwhelming majority of elections are conducted in reasonable time period and pursuant to an election agreement between employers and unions. In depriving employees of the typical six-week election period, one of EFCA's primary consequences is to curtail debate of all sides—including the views not only of the employer but of employees who do not wish union representation.

Up to the point of an election petition being filed, the employees have heard primarily a one-sided sales pitch by the union. After the petition is filed, the election campaign is underway and there is a healthy debate in which all interested parties participate. The purpose of the card check procedure is not to eliminate the election delays but to silence those opposed to the union, leaving the unions with a monopoly on the messaging and information. Ultimately, the employees are precluded from hearing all sides of the issue and having an adequate opportunity to weigh the different positions.

Chart 1: The Median Number of Days from Filing a Representation Petition to Holding an Election Has Significantly Decreased Since 1980



Source: Littler Mendelson, P.C., *The Employee Free Choice Act: A Critical Analysis* , July 2008

The Truth about Alleged Improper Employer Action

EFCA Proponents Argue: *"Since about 1980, employers — with substantial legal support and cover — have engaged in a systematic attack on unions, especially on union efforts to organize new workers. Aggressive, even illegal, employer behavior has undermined the ability of U.S. workers to create unions at their work places."*

Center for Economic and Policy Research, "Dropping the Ax: Illegal Firings During Union Election Campaigns, 1951-2007"

EFCA Proponents Base Data on Information from Union Organizers

EFCA supporters most frequently cite a study[1] by Kate Bronfenbrenner, the director of labor education research at Cornell University, which concludes that employers fire workers in about one-quarter of union organizing campaigns, and half of all employers in those situations threaten to shut down operations if their workplace unionizes. However, Bronfenbrenner based her conclusions on information from 400 interviews with union organizers, and not on any independent objective data. Moreover, her study does not distinguish between legal and illegal employer campaign activities, but questions *all* employer activities merely because they may persuade an employee to vote against union representation. Another study reached similar conclusions based on interviews with union organizers, union staff and 11 anonymous employees — again, not on any independent objective data.[2]

In contrast to these claims, other studies using National Labor Relations Board (NLRB) data have found that employers improperly fired employees in just 2.7 percent (2005) and 3.75 percent (2007-2008) of organizing campaigns.[3] Moreover, when employers do fire union supporters during an election campaign, it often helps the union get elected. As one Teamsters official has said: "Employers actually make a mistake when they fire employees during a Teamsters organizing drive. In effect, they create martyrs that strengthen the solidarity of the employees when the see the support the Teamsters give the discharged worker."[4] An AFL-CIO survey of union organizers conducted in the 1980s confirmed this assessment: "Interestingly, unions seem to have a higher success rate (46%) when there is a firing than when there is not a firing (41%).[5]

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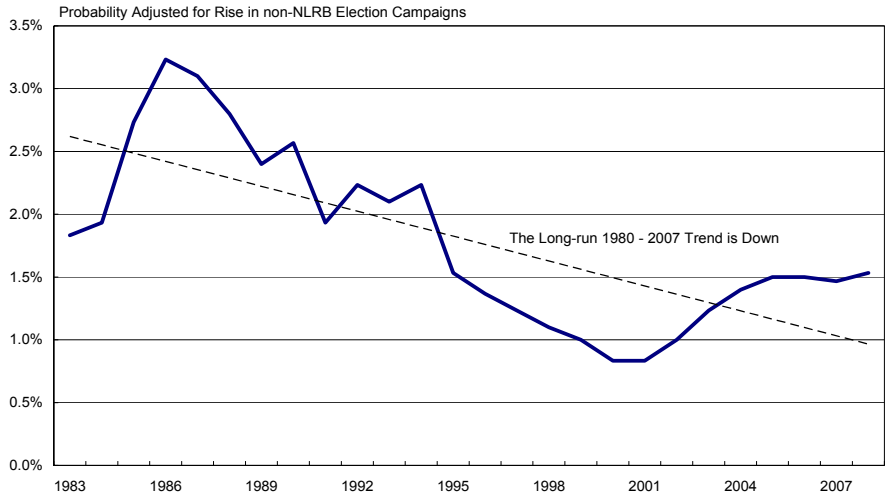
[1] Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing*, ILR Collection Research Studies and Reports, 2000.
[2] Nik Theodore and Chirag Mehta, *Undermining the Right to Organize: Employer Behavior During Union Representation Campaigns*, American Rights at Work, December 2005.
[3] James Sherk, *The Truth About Improper Firings and Union Intimidation*, The Heritage Foundation, June 20, 2007; J. Justin Wilson, An Analysis of Current NLRB Data on Unlawful Terminations During Union Organization Campaigns, 2007 to 2008, Center for Union Facts, Feb. 26, 2009.
[4] Letter from John P. Morris, President, Pennsylvania Conference of Teamsters to the Editor, *The Philadelphia Inquirer*, July 28, 1994.
[5] Department of Organizing and Field Services, *AFL-CIO Organizing Survey: 1986-1987 NLRB Elections* (AFL-CIO, Washington, DC, February, 1989).

Reality: Unlawful Actions Have Declined

Although the "Dropping the Ax" study cited above argues that since about 1980, employers have engaged in a systematic attack on union efforts to organize new workers, the study's own findings, replicated below in Chart 1, clearly rebuts that argument. In fact, from 1984 to the late 1990s, the probability of a pro-union worker being fired during an organizing campaign dropped from 2.7 percent to around 1 percent. Even though the probability of such firings has risen slightly from its late 1990 lows, it is still down significantly from the mid-1980s.

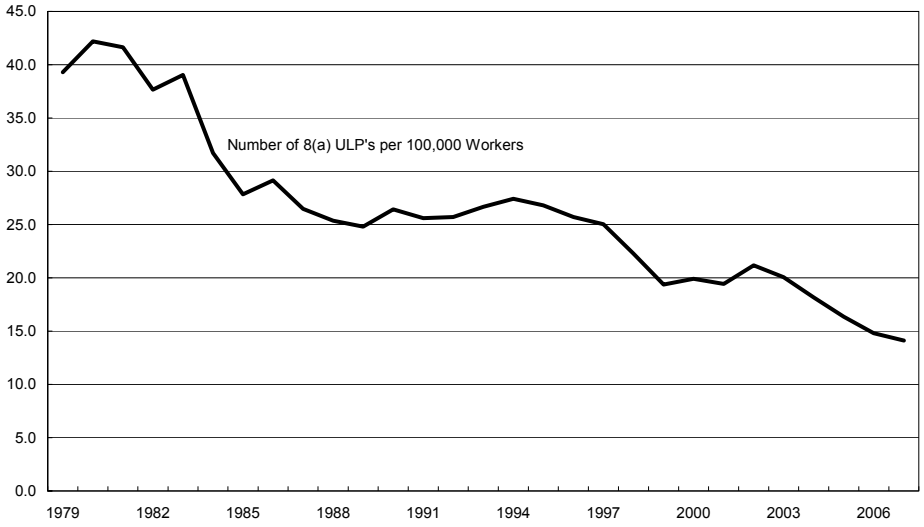
Chart 1: Since the 1980s, The Probability that a Pro-Union Worker is Fired During A Union Election Compaign has Decreased



Source: Schmitt and Zipperer, Dropping the Ax, Center for Economic and Policy Research, March 2009.

Moreover, the number of employer unfair labor practice cases per 100,000 payroll jobs has declined dramatically since 1980. (See Chart 2, below.) From 1980 to 2007, the number of employer ULPs per 100,000 workers has fallen by more than 66 percent from 42.2 to 14.1. Accordingly, the data simply does not support EFCA proponents' claims.

Chart 2: The Number of 8(a) Unfair Labor Practice Cases Received per 100,000 Workers has Declined since 1980



Source: Applied Economic Strategies estimates based on NLRB Annual Report data and Bureau of Labor Statistics data.

Private Ballots vs. Card Check

EFCA Does Not Provide Employees a Choice in How Unions Will Be Selected

EFCA Proponents Argue: *"The Employee Free Choice Act would make that choice — whether to use the NLRB election process or majority sign up — a majority choice of the employees, not the employer."*

Democratic Majority, House Education and Labor Committee Web Site

Employees Get No Real Choice Under EFCA

Claims that the Employee Free Choice Act (EFCA) gives employees the option of choosing between the card check procedure and a private ballot election for selecting union representation simply ignore the reality of union organizing. The fact is, under EFCA, once a union receives more than 50 percent of union authorization and petitions for recognition, the National Labor Relations Board (NLRB) must certify the union as the employees' sole representative.

Currently, in order to hold an NLRB election, a union must demonstrate that at least 30 percent of the employees have some interest in union representation evidenced by signed union authorization cards. In practice, however, unless a union has well over 50 to 70 percent of the employees' signed cards, it will, as a general rule, not file a petition seeking an election. The NLRB does not keep data on the percentages of cards turned in with a petition, but unions openly acknowledge that they do not petition for elections without a supermajority.[1]

The Union Holds All the Cards

EFCA mandates that if a union files a petition with the NLRB backed by authorization cards signed by a majority of the employees, the Board "shall not direct an election but shall certify the … labor organization as the representative." Indeed, once unions have one card over 50 percent, EFCA would foreclose the option of a private ballot election and mandate that the NLRB, instead of conducting a private-ballot election, automatically certify the union as the bargaining representative of the employees.

The bill does not require that the authorization cards give the employees an opportunity to express a preference for a private-ballot election. Thus, under EFCA, once the union files the certification petition, an election would be foreclosed, even if 30 percent or more of the employees would prefer an election. Theoretically, a group of employees—constituting at least 30 percent of the unit and acting entirely on their own—could file a petition asking for an election before the union files the cards. However, this would be exceedingly rare given that of the 2,302

[1] "[A]s a practical matter, the [Teamsters] prefers about 70 percent of the eligible voters to have signed cards." Graphic Communications Conference of the International Brotherhood of Teamsters, "Organizing a union in the United States," available at http://www.gciu.org/orgus.shtml.

petitions for representation elections that were filed with the NLRB in fiscal year 2007, only three (0.1 percent) were filed by individuals, with the rest (99.9 percent) being filed by unions.[2]

EFCA Gives the Choice to Unions Not Employees

Under EFCA, because the unions hold the cards, the union—not the employees—will choose the certification procedure. The strategies unions employ are guided by whatever is most likely to secure the union's place as the employees' representative. So it is unrealistic to think that, after securing a majority of cards, the union would seek anything other than automatic and immediate NLRB certification under EFCA. Indeed, one of the very purposes of EFCA is to make it so unions no longer need collect a supermajority of cards but instead gather cards from a simple majority.

[2] *Seventy Second Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 2007*, at 121.

Private-Ballot Elections Are the Fairest Process and Best Measure of Employee Sentiment

EFCA Proponents Argue: *"In order to form a union, U.S. workers endure an undemocratic election process that allows too many employers to run aggressive and intimidating anti-union campaigns prior to the vote."*

American Rights at Work, "Employee Free Choice Act: A Resource Guide for Responsible Employers"

Unions Win a Majority of Elections

Proponents of the Employee Free Choice Act (EFCA) claim that the current method of voting on and certifying union representation — private-ballot elections supervised by the National Labor Relations Board (NLRB) — needs to be replaced with the less reliable card check procedure on the premise that the NLRB election process provides an unfair advantage to employers, particularly those who hire outside counsel or consultants.

However, unions actually prevail in a majority of representation elections. A recent report by the Bureau of National Affairs (BNA) showed that unions won 66.8 percent of NLRB-supervised private ballot representation elections in the first six months of 2008[1] — a substantial increase from the 58.5 percent in the same period of 2007. This data clearly demonstrates that the current system of private ballot elections, if anything, is working to the unions' advantage.

The NLRB Election Process Actually Favors Unions

While organized labor is critical of the private-ballot election process, occasionally contrasting it unfavorably with political elections, the process enjoys a number of advantages that are not available to employers. These advantages were described in testimony[2] on EFCA by former NLRB Member Charles Cohen, who pointedly contrasted NLRB elections with political elections:

- "The union controls whether and when an election petition will be filed. Imagine if the challenger in a political election controlled the timing of the election."
- "The union largely controls the definition of the bargaining unit in which the election will occur, because the union need only demonstrate that the petitioned-for unit is an appropriate bargaining unit. Imagine if the challenger in a political election had almost irreversible discretion to gerrymander the voting district to its maximum advantage."

[1] The full report may be purchased from BNA Plus at bnaplus@bna.com or 800-372-10330 (Option 5, then Option 3).
[2] Testimony of Charles I. Cohen before House Education and Labor Subcommittee on Health, Employment, Labor and Pensions at 12-13 (Feb. 8, 2007), available at http://edlabor.house.gov/testimony/020807ChuckCohentestimony.pdf

- "The union usually has obtained signed authorization cards from a majority of employees at the time the petition is filed. Thus, the union already knows the voters and has conducted a straw poll before the employer is even aware that an election will be held. Imagine if the challenger in a political election could campaign and poll the electorate without the incumbent's knowledge, wait until the polls show that the challenger has majority support, and then give the incumbent less than 60 days' notice of the election."
- "Even though the union already knows the voters well by the time the election petition is filed, the employer must give the union a list of all of the voters' names and home addresses after the petition is filed. The union, but not the employer, is permitted to visit the employees at home to campaign for their vote."
- "The union, unlike the employer, can make campaign promises to the employees to induce them to vote for the union."

These facts illustrate that, far from being unfair to unions, the NLRB's election process offers unions many unique advantages. Given these advantages, it is not surprising that unions prevail in elections more often than not.

Compliance With the Law Often Requires Outside Assistance

The NLRB has developed an intricate scheme of procedures and rules to protect employees' rights not only during elections but for some time preceding them. These substantive and procedural protections are designed to ensure that employees are able to make their decision in an atmosphere that is free of coercion and intimidation by either the employer or the union (called "laboratory conditions").

Once a union files an election petition, the election period begins, and employers and unions must operate within these laboratory conditions. Violation of these rules will draw election objections and/or possible unfair labor practices, which may result in the NLRB's rejection of election results and a new election. It is worth noting that employers and unions only file objections in fewer than 5 percent of all elections.

Because unions organize employees on a regular basis, their organizers are typically well-versed in how to remain with the confines of the law. Employers, on the other hand, are in the business of providing customers with goods or services, not dealing with union organizing drives. Thus, if they wish to express their view to employees, they often retain outside assistance to ensure they do not make statements or take action that would violate the laboratory conditions.

Indeed, unions are as familiar with NLRB election rules as employers are about their particular line of business. Therefore, without outside counsel employers can be at a real disadvantage. Employers should not be faulted in seeking expert advice on how to comply with rules, procedures or handle situations with which they are unfamiliar. Unions certainly are not criticized for using their expertise and resources during a campaign.

Private-Ballot Elections Have Always Been the Preferred Mechanism of Employee Choice

EFCA Proponents Argue: *"Majority sign-ups [card checks] have always been legal under the NLRA and were once the preferred method of gauging employee choice. In the early years of the NLRA, majority sign-up procedures were presumptively used absent special circumstances requiring an NLRB-supervised election. Today, majority sign-up procedures implemented at the discretion of management are becoming more common in light of the failures of the NLRB election process."*

American Rights at Work, "Employee Free Choice Act: A Resource Guide for Responsible Employers"

Even in the Early Years, the NLRB Favored Private-Ballot Elections

While it is true that before the 1947 Taft-Hartley Act the National Labor Relations Board (NLRB) had the option of certifying unions based on authorization cards, it was never a presumptive favorite of the Board. Professor William Gould, who was Chairman of the NLRB under President Clinton, points out in a recent law review article that, in 1939, the Board, in *Cudahy Packing Co.*,[1] deemed an election the "more satisfactory" process if "the doubt in the disagreement of the parties regarding the wishes of employees" was to be eliminated and the Act's policies would be "best effectuated if the question of representation which has arisen is resolved in an election by secret ballot."[2]

The NLRB and the Courts, and Even Organized Labor, Have Strongly Endorsed Private Ballot Elections

For decades, the courts and the NLRB — and even organized labor, when it comes to the decision by employees to discontinue union representations — have recognized that the NLRB secret-ballot election is the best and most reliable method of deciding whether employees want union representation.

As stated succinctly by Supreme Court Justice William O. Douglas:

> [I]n terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored.[3]

[1] 13 NLRB 526.
[2] Gould, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can be Done About the Broken System of Labor-Management Relations Law in the United States,* 43 U.S.F. Law Rev. 291, 306-7 (Fall 2008).
[3] *Linden Lumber v. NLRB,* 419 U.S. 301, 307 (1974).

In *NLRB v. Gissel Packing Co*., the Supreme Court stated:

> The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory — indeed the preferred — method of ascertaining whether a union has majority support.[4]

As recently as 1998, in making the case for requiring secret-ballot elections for employees to get rid of unions (i.e., decertification), the AFL-CIO, the United Auto Workers (UAW) and the United Food & Commercial Workers (UFCW) argued to the National Labor Relations Board:

> A representation election "is a solemn … occasion, conducted under safeguards to voluntary choice" … other means of decision-making are "not comparable to the privacy and independence of the voting booth," and [the secret ballot] election system provides the surest means of avoiding decisions which are "the result of group pressures and not individual decision[s]." In addition … less formal means of registering majority support … are not sufficiently reliable indicia of employees' desires on the question of union representation to serve as a basis for requiring union recognition.[5]

Employer Agreements to Card Checks Often a Result of Pressure Tactics

In recent years, the use of card checks has probably increased, although there is no available data to prove it. However, this is because of a change in tactics by organized labor that focuses more on pressuring the employer than winning the support of employees. As one United Food & Commercial Workers organizer has said:

> [O]rganizing without the NLRB means putting enough pressure on employers, costing them enough time, energy and money to either eliminate them or get them to surrender to the union.[6]

The pressure is applied through so-called "corporate campaigns," which have been described by former NLRB Chairman Peter Hurtgen and former NLRB member Charles Cohen as "forcing a decision by the employer, with little regard for how the employees actually feel, *i.e.,* 'organizing employers, not employees.'"[7]

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[4] 395 U.S. 575, 602 (1969).
[5] Joint Brief of the United Automobile, Aerospace, and Agricultural Implement Workers of America, the United Food and Commercial Workers, and the AFL-CIO in *Chelsea Industries and Levitz Furniture Co. of the Pacific, Inc.*, Nos. 7-CA-36846, 7-CA-37016 and 20-CA-26596 (NLRB) at 13 (May 18, 1998), *quoting NLRB v. Gissel Packing Co*., 395 U.S. 575, 602 (1969) and *Brooks v. NLRB*, 348 U.S. 96, 99, 100 (1954).
[6] Joe Crump, "The Pressure is On: Organizing Without the NLRA," *Labor Research Review* 18 (1991): 32, 35-36.
[7] *Making Your Vote Count: The Case For Preserving Confidentiality in Employee Union Representation Decisions* 49, available at http://www.hrpolicy.org/documents/MYVCBook_v6.pdf

EFCA Effectively Eliminates Private-Ballot Elections

EFCA Proponents Argue: *It is an "inaccurate claim that EFCA would strip workers of the right to a secret-ballot union organizing election."*

Bill Menezes, "Clearing Up EFCA Facts," *Denver Daily News*, Jan. 30, 2009

Claims that Elections Survive EFCA Ignore the Realities of Labor Relations

Claims that the Employee Free Choice Act (EFCA) would not eliminate private-ballot elections in union representation simply ignore the reality of union organizing. While, as a technical matter, NLRB-conducted private-ballot elections would still be available, the manner in which union organizing drives occur would eliminate their use. Because 99.9 percent of all union elections are initiated by unions[1] — as opposed to employees acting on their own without union affiliation — it is instructive to consider how those elections are currently initiated.

Unions Do Not Seek Elections with Less Than Strong Majority of Cards

Currently, for the National Labor Relations Board (NLRB) to hold an election a union must demonstrate that at least 30 percent of employees have some interest in union representation evidenced by signed union authorization cards. In practice, however, unless a union has well over 50 percent of the employees' signed cards, it generally will not file a petition seeking an election. The NLRB does not keep data on the percentages of cards turned in with a petition, but unions openly acknowledge that they do not petition for elections without a supermajority:

- "To obtain an election through the services of the NLRB, at least 30 percent of the employees in the bargaining unit must sign authorization cards for a valid petition. As a practical matter, the [Teamsters] prefers about 70 percent of the eligible voters to have signed cards."[2]
- "[T]he rule of thumb in the SEIU is that it's unwise to file for an election when less than 70 percent of the workforce has signed interest cards."[3]
- "Signed pledge cards typically are needed from at least 30 percent of the employees to trigger an NLRB-sanctioned election. Maritas said the SPFPA's policy is to collect pledge cards from at least 70 percent of the workers before filing an election petition."[4]

[1] *Seventy Second Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 2007*, at 121.
[2] Graphic Communications Conference of the International Brotherhood of Teamsters, "Organizing a union in the United States," available at http://www.gciu.org/orgus.shtml.
[3] Steven Henry Lopez, Reorganizing the Rust Belt: An Inside Study of the American Labor Movement, (Berkeley, Cal.: University of California Press, 2004), p. 38.
[4] Donald Wittkowski, "Union drive targets casino security guards," *Press of Atlantic City*, Feb. 24, 2007.

- It is the policy of the New England Nurses Association to "have 70-75 percent of members sign cards; if unable to reach this goal, review plan."[5]

Under EFCA a Union Is Certified with a Simple Majority of Cards

Under EFCA, if a union files a petition with the NLRB backed by authorization cards signed by a majority of the employees, the Board "shall not direct an election but shall certify the … labor organization as the representative." Under EFCA, the unions, following their admitted rule of not filing a petition with less than a majority of authorization cards, would foreclose the option of a private-ballot election. Instead, the law would mandate that the NLRB, instead of conducting a private-ballot election, automatically certify the union as the bargaining representative of the employees even if 30 percent or more of the employees would prefer an election.

A Real-World View of EFCA

So EFCA would not expressly eliminate elections on paper, but votes would only take place in instances where unions file a petition with authorization cards signed by 30 to 50 percent of employees. Anyone who understands labor relations knows that the card check procedure mandated by the legislation will, in fact, eliminate the use of employees selecting union representation through a private-ballot election. Claims to the contrary are wholly disingenuous.

[5] New England Nurses Association, "Why a Union?" at http://www.nenurses.org/your_rights.htm, Aug. 12, 2008.

Procedural Safeguards: Private-Ballot Elections vs. Card Check

The following side-by-side comparison explains some of the procedural safeguards found in the NLRB election process along with any counterpart card check protections:

Private-Ballot Election	Card Check
An NLRB-approved notice that explains the workers' rights must be posted by the employer at least three days before the election.	Workers are informed of their rights only to the extent articulated by the union organizer.
"Captive audience" speeches within 24 hours of the election are prohibited.	Employees are subject to un-rebutted, pro-union speeches up until the time they sign an authorization card.
The election is conducted by an agent of the NLRB in conjunction with an equal number of observers selected by the union and employer.	Union authorization cards are solicited in the presence of union organizers.
The names of prospective voters are compared against a previously established eligibility list before they may cast their ballots.	Anyone may sign union authorization cards. Although forgery of authorization cards is prohibited, there is no safeguard that prevents forgeries before the fact.
The election ballot box is physically inspected and sealed by the NLRB agent immediately before voting.	The union maintains control over signed authorization cards.
The NLRB agent retains positive control over the ballots at all times.	The union retains control over authorization cards at all times.
The ballots are secret: no name or other identifying information appears on the ballot to indicate how an employee voted.	The union knows which employees signed authorization cards.
Employees may not be assisted in casting their votes by agents of the union or employer.	Union organizers may fill out and sign authorization cards on behalf of the workers with their express or implied permission, regardless of whether they have read the cards.
Electioneering near the polls is prohibited.	Solicitation of authorization cards may be accompanied by any pro-union propaganda that does not rise to a material misrepresentation regarding the consequences of signing the card.
Neither the employer nor the union may engage in coercive or threatening conduct prior to the election.	The union may not use threats or coercion in order to obtain signed cards nor may the employer use threats or coercion to prevent cards from being signed.

First Contract Arbitration

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).

EFCA Would Disenfranchise Employees and Put Their Jobs in the Hands of Government Arbitrators

EFCA Proponents Argue: *EFCA "would give workers a fair and direct path to form unions through majority sign-up, help employees secure a contract with their employer in a reasonable period of time, and toughen penalties against employers who violate workers' rights."*

American Rights at Work, "Employee Free Choice Act: A Resource Guide for Responsible Employers"

EFCA Would Effectively Eliminate Private-Ballot Elections

Claims that the Employee Free Choice Act's (EFCA) card check procedure would provide employees a fairer method for selecting union representation than the traditional federally supervised private-ballot election is inconsistent with reality. Under EFCA, if a union files a petition with the National Labor Relations Board (NLRB) backed by authorization cards signed by a majority of the employees, the Board "*shall not direct an election* but shall certify the … labor organization as the representative" (emphasis added). The bill does not require that the authorization cards give the employees an opportunity to express a preference for a private-ballot election.

Elections Are the Fairest Measure of Employee Choice

EFCA's card check procedure does not permit private-ballot elections once the union gets more than 50 percent of the employees to sign cards. Yet a federally supervised private-ballot election assures that employees hear both sides and are ensured confidentiality and protection against coercion at the critical moment when each employee indicates his or her preference. The private-ballot election process has long been considered superior to the card check process in making union representation decisions.

Notably, when the issue is whether employees can choose to stop being represented by a union (called a "decertification"), organized labor holds a sharply different viewpoint. In a case before the NLRB on whether an election is required in those situations, the AFL-CIO argued that elections represent "a solemn … occasion, conducted under safeguards to voluntary choice;" that other means of decision-making are "not comparable to the privacy and independence of the voting booth;" and [the private ballot] election system provides the surest means of avoiding decisions which are "the result of group pressures and not individual decision[s]." In addition, the AFL-

CIO says that "less formal means of registering majority support … are not sufficiently reliable indicia of employees' desires on the question of union representation to serve as a basis for requiring union recognition."[1]

By contrast, under EFCA, union authorization cards would be signed in the presence of an interested party — a pro-union co-worker or an outside union organizer — with no governmental supervision. (See chart, "Procedural Safeguards: Private-Ballot Election vs. Card Check," below). Moreover, EFCA's card check procedure would permit a simple majority of employees to choose union representation without other affected employees even knowing about the union campaign — let alone being able to vote their preference in a private election. In addition to silencing employees, the effect of the card check procedure would also be to silence employers, thus denying employees the opportunity to hear their employer's views and give the union a monopoly on the message.

EFCA's Mandatory First Contract Arbitration

Proponents of EFCA also claim that first contract compulsory interest arbitration is necessary to provide employees a direct and more equitable path to unionization. EFCA provides for mandatory "interest arbitration" for newly organized employees if an employer and union cannot reach agreement within 120 days. Interest arbitration is extremely rare in private-sector labor relations, and is used only when an employer and union both voluntarily agree to have an arbitrator decide disputed contract issues instead of resolving them through collective bargaining.

Under EFCA, a government arbitration panel — not the parties — would write the terms of the contract. There is no assurance that the panel would have any familiarity with the workplace and industry, even though it ultimately would decide the rules that govern almost all aspects of employment. The contract written by the government arbitrator would be in force for two years regardless whether it is unfair or an economically harmful decision that costs the employees their jobs. There is no right to appeal such a decision under EFCA, and employees would not have the opportunity to vote on whether they accept the contract/decision — it would be imposed on them.

First Contract Arbitration Undermines Union Accountability

The fundamental premise of collective bargaining — that neither the employer nor the union is obligated to accept a proposal — all but guarantees that provisions in the final contract will have been carefully considered by the parties. This process takes time.

In contrast, EFCA's "bargaining" timetable encourages only a *pretense* of bargaining in which the parties are actually positioning themselves for arbitration rather than trying to reach agreement. The unions can be expected to make inflated campaign promises in order to obtain enough signatures on authorization cards to be certified under EFCA's

[1] Joint Brief of the United Automobile, Aerospace, and Agricultural Implement Workers of America, the United Food and Commercial Workers, and the AFL-CIO in *Chelsea Industries and Levitz Furniture Co. of the Pacific, Inc.*, Nos. 7-CA-36846, 7-CA-37016 and 20-CA-26596 (NLRB) at 13 (May 18, 1998), *quoting NLRB v. Gissel Packing Co*., 395 U.S. 575, 602 (1969) and *Brooks v. NLRB*, 348 U.S. 96, 99, 100 (1954).

card check provisions. Under EFCA, the union would likely demand that those promises be realized to maintain its credibility with the employees.

By turning the decision over to government arbitrators, EFCA relieves the union of any accountability. If the arbitrators do not give the union everything it promised the employees, the union can simply blame the arbitrators. Even though the employees may not get what they were promised, the union will still get to collect its dues from those workers for as long as the employer can keep them employed. In sum, it is a *win-win-win for the union* even though it may be a devastating outcome for the employees and the employer.

Remedies

Current NLRB Remedies Effectively Deter Unfair Labor Practices by Employers

EFCA Proponents Argue: *"Current remedies against employer coercion are ineffective. … The NLRA's penalties against illegal firing of union supporters are so minimal that employers treat them as a minor cost of doing business. … Moreover, the employer usually is not required to pay any compensation until years after the firing has occurred."*

American Rights at Work, "Employee Free Choice Act: A Resource Guide for Responsible Employers"

Labor Law Remedies Reflect a Unique Enforcement Scheme That Clearly Benefits Employees

Despite organized labor's criticism of National Labor Relations Act (NLRA) procedures and penalties, the fact remains that enforcement is far more accessible to an aggrieved employee because of the Act than with most other employment laws. With the NLRB procedures,[1] employees do not need to hire an attorney, who often may take the case only if significant awards are available or if the party's case is a "slam dunk." Instead, under the NLRA, employees need only to file a charge with the National Labor Relations Board (NLRB) General Counsel, who then effectively becomes the employee's attorney and prosecutes the case at least to the Board level. If the Board decides in favor of the employee, the General Counsel will continue to represent them if the decision is appealed in the federal courts.

The Current Enforcement and Remedial Scheme Produces Prompt Resolution of Claims

Except in rare cases, the make-whole remedies of the NLRA and the assignment of a government prosecutor (*i.e.*, the NLRB General Counsel) to assist the employee produces clear benefits for the aggrieved employee. Rather than trying to obtain a huge monetary reward or imposing severe penalties on labor law violators, the Board's goal is to obtain quick relief through reinstatement with back pay. In more than 90 percent of all meritorious cases, this is achieved through a settlement,[2] typically within a very short time frame — often a matter of weeks.

Many times, when faced with the prospect of engaging in a lengthy and expensive legal battle with the federal government, employers will simply settle the case with or without an admission of guilt, resulting in a quick reinstatement of the employee.

[1] Under Title VII and other discrimination laws, the employee must file a charge with the Equal Employment Opportunity Commission or a state agency. However, unlike the NLRB, which must proceed in a case where a charge has merit and is not settled, those agencies have the discretion as to whether to proceed or issue a so-called "right to sue" letter to the individual.
[2] Office of General Counsel, Summary of Operations (Fiscal Year 2006) at 1.

Lengthy Delays Are Costly to Employers

The small minority of cases that take longer to resolve typically involve more complicated or ambiguous factual or legal determinations that are left to an administrative law judge and the Board — and occasionally the federal courts — to resolve. As pointed out in a recent law review article by Sen. Arlen Specter, R-Penn., an employer who chooses to lengthen the proceedings by contesting a claim pays a price, especially if it eventually loses:

> The burden of such extended litigation often falls on employers. In cases of alleged misconduct by the employer, as the calendar runs, the potential back pay penalty continually grows. For smaller employers, this liability may be substantial. Addressing this problem in an unfair labor practices case, the Supreme Court held that, despite the Board's "deplorable" delay and the associated costs, the courts could not shift those costs to the employees. The employer has to bear the full cost of the Board's administrative holdup by paying the back pay penalty that accrued while the case was pending before the Board.[3]

Current Remedies Apply Evenly to Both Employers and Unions

Because the goal of the National Labor Relations Act is to protect employees, the remedies available under the Act have, with one general exception, applied equally to employer and union violations. The one exception has been in the area of so-called "secondary activity," where a union applies pressure to a neutral party (*e.g.*, a customer or supplier) as a means of coercing the employer with whom it has a dispute. The NLRA does provide extraordinary procedures and remedies for those employers in order to protect them and their employees against suffering economic damage because of another employer's dispute.

EFCA Provides No New Remedies for Union Violations

The Employee Free Choice Act eliminates the balance under current law by providing for new penalties and procedures that would apply only to employer violations. Yet, if anything, the bill's other provisions increase the likelihood of union violations. With EFCA's elimination of private-ballot elections in favor of card checks, it is reasonable to expect new protections for employees against coercive tactics used by unions to obtain their signatures. In addition, by creating the possibility of binding arbitration of the first contract after a union has been certified, there is an increased likelihood that unions will drag their feet at the bargaining table in hopes of obtaining a better deal from the arbitrator. Since unions, like employers, have a legal obligation to bargain in good faith, increased penalties for those violations could also be justified.

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[3] Arlen Specter and Eric S. Nguyen, "Representation Without Intimidation: Securing Workers' Right to Choose Under the National Labor Relations Act," 45 Harvard Journal on Legislation 311, 324 (2008).

Opinion Polls

A Solid Majority of Americans Oppose EFCA

EFCA Proponents Argue: *"Sixty-eight percent of middle class Americans would like their Members of Congress to vote for the Employee Free Choice Act and more than half of U.S. workers — 60 million — say they would join a union right now if they could."*

American Rights at Work, "Employee Free Choice Act: A Resource Guide for Responsible Employers"

Polls Show Strong Opposition to EFCA

In a January 2009 poll conducted by McLaughlin & Associates, nearly three-quarters (74 percent) of union households were opposed to the card check provisions in the Employee Free Choice Act (EFCA). An overwhelming 88 percent of union households believed that a worker's vote should be kept private during a union organizing election, and 85 percent of union households believed that a secret-ballot election is the best way to protect the individual rights of workers when they are deciding whether to join a union.

The same poll found that 68 percent of those who voted for Barack Obama in the last election believe the binding arbitration provisions in EFCA are "risky and unwise," and 61 percent of Obama voters would be less likely to vote for a Member of Congress who voted to take away the private ballot from workers.

History of Contradictions with Union Polling

The source of the claim that a majority of U.S. workers would join a union if they could is a recent poll by Peter D. Hart Research Associates. Yet historical evidence shows considerable fluctuation among poll results on this issue, perhaps because its complexity does not lend itself to a simple "yes" or "no."

For example, in February 2005, a Hart poll asserted that 53 percent of America's non-union workers — in other words, 57 million workers — wanted a union in their workplace. Yet a poll conducted by Zogby International for the Public Service Research Foundation in June 2005 replicated that question and found 16 percent "definitely for," 20 percent "probably for," 18 percent "probably against," and 38 percent "definitely against" joining a union. The sample of that poll was only employed people.

Meanwhile, a Zogby poll conducted for the Public Service Research Foundation in August 2006 asked, "Would you personally like to be a member of a labor union?" Only 19.8 percent said "yes" while 74 percent said "no." Previously, a September 1999 Gallup Poll asked, "Would you personally like to belong to a labor union at work, or not?" Only 20.96 percent said "yes" while 75.99 percent said "no." The rest were undecided or refused to answer.

Poll Data Underscores Importance of Hearing Both Sides

The lack of consistent data on the issue of whether employees wish to be represented by a union suggests that most employees really don't know whether they wish to be represented by a union without knowing more about what union may be seeking to represent them, what it claims that it can provide for them, and how it would affect their current workplace. These attitudes can only be assessed after a reasonable timeframe in which the employees have the opportunity to hear not only from the union, but their coworkers and the employer as well. This opportunity would be denied by the card check provisions of the Employee Free Choice Act.

Canada

Canada is Not a Model for Our Labor Laws

EFCA Proponents Argue: *"First contract mediation and arbitration has been successful in Canada. Labor laws in the Canadian provinces of Manitoba, British Columbia, Ontario, Quebec, Newfoundland, Saskatchewan and the federal jurisdiction all provide for first contract mediation and binding arbitration."*

American Rights at Work, "Employee Free Choice Act: A Resource Guide for Responsible Employers"

Canada Has Not Benefited from EFCA-Like Laws

The reality is that the card check procedure and mandatory first contract arbitration, as proposed under the Employee Free Choice Act (EFCA), have negatively impacted the overall welfare of Canada. Indeed, a number of Canadian jurisdictions have abandoned card checks and returned to using private-ballot elections.

Studies on the impact of card check and mandatory first contract arbitration on Canadian markets show that such procedures have "a negative impact on employee productivity, a 28 to 50 percent reduction in research and development spending, and a 15 percent reduction in profits."[1]

A recent U.S. study of the potential impact of EFCA on the U.S. economy used the Canadian experience as the basis for concluding that "for every 3 percentage points gained in union membership through card checks and mandatory arbitration, the following years unemployment rate is predicted to increase by 1 percentage point and job creation is predicted to fall by around 1.5 million jobs."[2]

Canadian Arbitration Requirements Undermine Collective Bargaining

A recent article by a prominent Canadian labor lawyer concluded that "the process as it exists today in various Canadian jurisdictions has created a stagnant and outdated mode of resolving labour conflicts."[3] The article produces substantial evidence to bolster this claim.

Even though EFCA's first contract provision purports to achieve a timely first contract, the statistics demonstrate that the average waiting time in Quebec between the initial referral to arbitration and the moment when the arbitrator renders an award is 291 days.[4] Since EFCA arbitrarily establishes a 120-day bargaining period prior to arbitration, this means it would be well into the second year before a first contract would be established.

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[1] Susan Martinuk, "Obama's labour law will bring harassment," *Calgary Herald*, March 6, 2009.
[2] Dr. Anne Layne-Farrar, *An Empirical Assessment of the Employee Free Choice Act: The Economic Implications*, March 3, 2009, at 1.
[3] Danny J. Kaufer and Michael D. Grodinsky, *The Employee Free Choice Act (EFCA): Lessons to be Learned from the Canadian Experience*, Oct. 2008, at 60.
[4] *Ibid*., at 50.

Meanwhile, because the bargaining process has been taken out of the hands of the parties, they fail to acquire the bargaining experience they will need to negotiate later contracts. Indeed, in Quebec, "only 47 percent of binding first contract arbitration awards are followed by a second-generation collective agreement and only 24 percent eventually reach the stage of a third-generation agreement."[5]

Even When Arbitration Not Used, "Barely Tolerable" Agreements Reached

EFCA's proponents claim that first contract arbitration works in Canada because "it is rarely used … and the overwhelming majority of cases are resolved through mediation or settlement between the parties."[6] For one thing, Canadian laws do not have the rigid timetables that EFCA imposes — thus there is no certainty that arbitration will occur after a specific time frame.

Meanwhile, one observer suggests an additional explanation: "[E]mployers often agree to terms which they can barely tolerate in order to avoid having an arbitrator impose terms which are often even more unacceptable than what is agreed upon in 'direct negotiations.'"[7] Indeed, it is widely recognized that "the presence of any arbitration procedure determines the environment within which the parties negotiate, and consequently, directly affects the terms of the negotiated agreement."[8]

Indeed, some Canadian labor relations experts consider first contract arbitration as a union tool to pressure an employer to unwillingly make concessions. The purpose of first contract arbitration in Canada was to give organized labor "a tool by which it will force employers to live with contractual terms which they never would have accepted otherwise."[9]

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[5] Ibid., at 59.
[6] AFL-CIO, "The Employee Free Choice Act: Facilitating Initial Labor Agreements Through Mediation and Arbitration," http://www.aflcio.org/joinaunion/voiceatwork/upload/facilitating.pdf.
[7] Danny J. Kaufer and Michael D. Grodinsky, *The Employee Free Choice Act (EFCA): Lessons to be Learned from the Canadian Experience* (Oct. 2008) at 48.
[8] Henry Farber and Harry Katz, *Interest Arbitration, Outcomes, and the Incentive to Bargain*, 33 INDUS. & LAB. REL. REV. 55, 55-63 (1979).
[9] Danny J. Kaufer and Michael D. Grodinsky, *The Employee Free Choice Act (EFCA): Lessons to be Learned from the Canadian Experience* (Oct. 2008) at 41.

Small Business

Small Businesses Would Be Impacted By EFCA

EFCA Proponents Argue: *"The legislation doesn't apply to small businesses, so the corner grocery probably won't face an organizing drive."*

Matthew Cooper, "Labor Pains," *Condé Nast Portfolio*, Jan. 6, 2009

There Is No Small Business Exemption in EFCA

Despite the widespread misperception that the Employee Free Choice Act (EFCA) will not apply to small businesses, the reality is that small businesses are covered by the National Labor Relations Act (NLRA), which EFCA amends, and there is no small business exemption in EFCA.

Current Labor Law Covers All but the Smallest Small Businesses

Under the NLRA, the National Labor Relation Board (NLRB) has jurisdiction over all private-sector labor relations that "affect" interstate commerce. (The only major industry exceptions are agriculture, airlines and railroads.) This authority applies to large and small businesses alike. Though there is no exception in the statute based on business size, the NLRB has adopted administrative jurisdictional standards for establishing coverage under the Act.

These standards are based on an annual minimum dollar *volume* of business (as opposed to profit), which varies for different enterprises or industries, with separate thresholds for more than 30 different categories of businesses. The standards generally range from $100,000 (e.g., office buildings, radio or television stations) to $500,000 (e.g., hotels, restaurants, country clubs, casinos).

These standards have not been adjusted for inflation for 50 years. Thus, according to the methodology used by a 2002 General Accountability Office report, more than 84 percent of the workers, or 29.4 million employees, in 4.7 million small businesses that have annual revenues of less than $5 million dollars per year, are covered by EFCA.[1]

The Casebooks Are Filled with Small Business Labor Disputes

Because the statutory thresholds are so low, the NLRB casebooks are filled with cases involving small businesses. For example, in *Pit Stop Markets*, 279 NLRB 1124 (1986), the NLRB applied the retail business standard asserting jurisdiction over an employer operating a convenience store/gas station, which averaged about $100,000 in gross

[1] Applied Economic Strategies, estimate based on General Accountability Office methodology in *Collective Bargaining Rights: Information on the Number of Workers with and without Bargaining Rights,* GAO-02-835, September 13, 2002; and Small Business Administration, Office of Advocacy, data available at: www.sba.gov/advo/research/us_rec_mi.pdf.

sales of groceries and $1 million in gross gasoline sales even though the employer received a mere $43,000 in commissions from the gasoline distributer.

In *Tonnor Brother Foods, Inc.*, 200 NLRB 409 (1972), a grocery store with a total of 20 employees (eight of whom were part-time high school students) was covered under the NLRA. *J. Shaw Associates*, 349 NLRB 939 (2007) asserted jurisdiction over an employer (an Exxon station and Blimpie stand) with nine to 13 employees.

Impact on Small Business Cannot Be Overstated

The fact that most small businesses would be covered by EFCA is no small matter. As is noted by University of Chicago Professor Richard Epstein in *The Case Against the Employee Free Choice Act*:

> Small businesses, which as a group are the largest source of new jobs in the country … often operate on small budgets, without the assistance of full-time lawyers. Under EFCA, their first exposure to unions could come at the conclusion of a secret campaign, which requires them to both hire and acquire expertise on contentious matters for which they are ill-equipped to deal, at a cost which they can ill afford to bear. These calls for unionization will divert management from the essential tasks of product development, marketing and sales on which their business models necessarily depend.

Section 9
EFCA Analysis

POLICY BRIEFING

Analysis of H.R. 1409 / S. 560, The Employee Free Choice Act

"The legislation is called the Employee Free Choice Act, and I am sad to say it runs counter to ideals that were once at the core of the labor movement. Instead of providing a voice for the unheard, EFCA risks silencing those who would speak. … Under EFCA, workers could lose the freedom to express their will in private, the right to make a decision without anyone peering over their shoulder, free from fear of reprisal."

– Former Senator George McGovern, D-S.D., 1972 Democratic presidential candidate

"One method of approach to the problem of industrial peace would be for the Government to invoke compulsory arbitration, or to dictate the terms of settlement whenever controversy arises. Where this procedure has been tried in European nations it has met with only questionable success. In any event, it is so alien to our American traditions of individual enterprise that it would provoke extreme resentment and constant discord."

– Senator Robert F. Wagner, D-N.Y., chief sponsor and original architect of the National Labor Relations Act

March 27, 2009

Introduction

Under the guise of protecting "employee free choice," Congress is considering the most significant change to the nation's labor laws since the National Labor Relations Act (NLRA) became law. Contrary to its proclaimed goals, the "Employee Free Choice Act" (H.R. 1409/S. 560) would constrain employee choice over union representation and substitute government dictation of wages and benefits for voluntary collective bargaining in newly unionized workplaces. Because the legislation has been considered in a politically charged atmosphere, very little attention has been paid to the details or profound implications of the legislation.

In the U.S., workers have traditionally decided the important question of being represented by a union in a federally supervised secret ballot election. The secret ballot process is the best way to ensure confidentiality and protection against coercion by either the employer or the union. Over the years, the courts and the National Labor Relations Board (NLRB) have recognized secret ballot elections as the most reliable method in determining union representation.

Once the employees have chosen to be represented by a union, it serves as their representative at the bargaining table in the attempt to reach an initial collective bargaining agreement with the employer. Because the employer has the best understanding of its business model and competitive needs, and the union is presumed to have the best understanding of the employees' wishes, only the parties themselves can determine the terms of the agreement. The role of the law is to ensure that they are negotiating in good faith with the goal of reaching agreement. For a variety of reasons, agreement is not always possible, especially when the union campaign has raised unrealistic expectations among the workers, precluding it from settling for less in the face of the economic realities of the business enterprise.

This, in a nutshell, is how the system has worked since the end of World War II. When unions thrived in the post-war era, few alterations were considered. If anything, the system was often viewed as unfairly tilted in favor of labor. Only when labor's representation started to decline as a result of a globalized economy, increased workforce mobility, expansion of government regulation of the workplace, and other factors did labor begin to complain that the system was broken.

While the language of the bill is relatively sparse, the Employee Free Choice Act would fundamentally restructure American labor relations by:

- mandating that the NLRB certify a union that presents authorization cards signed by a majority of the workers in a unit in the presence of union organizers;
- imposing compulsory arbitration by government-sponsored arbitrators to determine the wages and other terms and conditions of employment for newly organized workers;
- imposing substantial new penalties for certain labor law violations by employers, but not unions; and

- requiring the NLRB to seek an injunction when a complaint is issued against an employer during union organizing or first contract negotiation.

In the 110th Congress, the Employee Free Choice Act quickly passed by 241 to 185 in the House of Representatives on March 1, 2007, a little less than two months after convening. On June 26, 2007, the bill's supporters were only able to gain 51 of the 60 votes needed in the Senate to shut off debate, with 48 voting against. Thereafter, the bill lay dormant, awaiting the results of the November 2008 elections. The bill was introduced in the 111th Congress on March 10, 2009.

Card Check Certification: The Inferior Process for Labor Elections

Union Authorization Cards and the Current Method for Choosing Unions

Union authorization cards are generally used to demonstrate support for a particular union. The wording of these cards varies widely. They may authorize the union to act on behalf of the employee, affirm that the employee is a union member, or state that an employee will vote for a union if a secret ballot election is held. In its most modest form, the card simply indicates that the employee is interested in having a union representation election conducted.

There are some general rules regarding the content of cards — for example, that employees generally must sign and date the cards for them to be valid. However, as far as the card-signing process is concerned, there are virtually no procedural requirements other than a general prohibition against union or employer coercion or deception in obtaining the signature. The cards may be signed anywhere — at work, home, a bowling alley, a bar, etc. — and typically are signed in the presence of union organizers or other union supporters. Because authorization cards were merely intended to establish a "showing of interest" sufficient to invoke a secret ballot election, the Board has generally adopted a hands-off approach to regulating the process, strategy, and tactics unions use to obtain signatures.

Currently, union authorization cards are used or considered in three situations.

NLRB Election Trigger. The first, and intended, use of authorization cards is for a union to establish a "showing of interest" so the NLRB can conduct a secret ballot election. For the NLRB to hold an election a union must demonstrate that at least 30 percent of the workers have some interest in union representation evidenced by signed authorization cards. In reality, unions rarely file a petition supported by less than a majority of the workers because, once the election campaign begins and the employees hear both sides of the issue, support for the union typically wanes.

Voluntary Employer Recognition. Another way unions use authorization cards is to secure voluntary recognition from an employer without an election. An employer may lawfully recognize a union voluntarily as the collective bargaining representative of the "unit" employees if the union can show that a majority of employees support the union. It is an unfair labor practice for the employer to recognize the union without such a showing. "Majority status" is usually established by acquiring authorization cards signed by more than 50 percent of the unit.

Voluntary recognition by the employer may result from an acknowledgment that the union clearly has the majority support of the employees and an election would be a mere formality. However, in recent years, it is often the result of an aggressive "corporate campaign" by the union, described by George Washington University Professor Jarol Manheim, a noted expert on corporate campaigns, as:

> a multifaceted and often long-running attack on the business relationships on which a corporation (or an industry) depends for its well-being and success. It is a highly sophisticated form of warfare in which a target company is subjected to diverse attacks — legislative, regulatory, legal, economic, psychological — the function of which is to so thoroughly undermine confidence in the company that it is no longer able to do business as usual.[i]

In one example of such a corporate campaign leading to a card check recognition, the Culinary Workers union launched a corporate campaign against the MGM Grand Hotel in Las Vegas when the latter refused to agree to a card check recognition. The campaign included negative reports issued to investment analysts, opposition to MGM's planned expansion into other locations, a sit-in of 500 employees in the hotel's lobby, and several demonstrations. After suffering financial losses, the company agreed to recognize the union in November 1996 after 1,494 employees out of 2,840 eligible employees — or 52.6 percent — signed cards.

In response, a group of workers called the "Organization of Non-Union Cast Members" alleged that the union threatened and intimidated workers into signing cards and filed several petitions in an attempt to obtain a secret ballot election on union representation, with the final petition supported by 1,910 signatures out of a total of approximately 3,000 employees. However, because the employer had recognized the union, the NLRB rejected the petition pursuant to the so-called "recognition bar," which prohibits any election following voluntary recognition while the employer and the union are engaged in bargaining.[ii]

In 2007, the NLRB modified this rule in Dana/Metaldyne,[iii] a case involving a similar set of facts. The Board modified the "recognition bar" by requiring notification to the employees of the recognition and allowing them, upon being notified, to file a decertification petition within 45 days of the employer recognition if the petition is supported by at least 30 percent of the workers in the unit.

Gissel Bargaining Orders. The third situation in which cards are considered is when the Board orders an employer to recognize and bargain with a union regardless of the outcome of an election. Such bargaining orders, known as Gissel orders, are issued when an employer's unfair labor practices have tainted the results of an election and are so egregious as to prevent the holding of an untainted election. For a Gissel order to be issued, there must also be objective evidence — usually signed authorization cards — that, at some point, the union had a majority status.

NLRB-Supervised Secret Ballot Election

In contrast to the unsupervised manner in which authorization cards are signed, the Board has developed an intricate web of procedures and rules to protect workers' rights not only during elections but also for some time preceding them, as well. As noted, the employees and/or the union initiate the process by filing a petition with the Board establishing a showing of interest — i.e., at least 30 percent of the employees in a bargaining unit want an election — by filing authorization cards in support of the petition.

Prompt Elections. While much is made of NLRB delays in conducting elections, it is rarely noted that these delays occur in a small minority of cases. According to NLRB statistics for fiscal year 2005, an overwhelming majority (more than 81 percent) of all representation elections were conducted based on an "election agreement" between the employer and the union, where no hearing was necessary.[iv] Moreover, the median time for conducting elections after the filing of a petition has decreased in recent years. In FY 1997 the median time for conducting elections was 42 days after the petition was filed, dropping to 39 days in FY 2007.[v] Similarly, in FY 2007, 93 percent of all elections were conducted within 56 days of the filing of the petition, whereas in FY 97, 87.5 percent of all elections were conducted within 57 days.[vi]

Thus, in the great majority of situations, an election is held soon after the petition is filed. However, occasionally there are critical procedural issues that must first be resolved. These issues, which must be decided by the NLRB Regional Office, often relate to the employees who make up the "appropriate bargaining unit" — i.e., those employees who are authorized to vote and will ultimately be represented by the union if it is elected. If a party disagrees with the Regional Office's decision, it may appeal that decision to the five-member NLRB in Washington, D.C. The Board may sustain the decision, decide that the Regional Office incorrectly applied the Board's precedent, or reverse or modify its own precedent. Elections may also be delayed by unfair labor practices charges filed against either the employer or the union. These so-called "blocking charges" will delay the election pending their adjudication if the Board deems the alleged violations serious enough to interfere with employee free choice in the election.

"Laboratory Conditions." Once the procedural issues have been disposed of, the election is conducted under NLRB supervision by secret ballot with strict procedures designed to protect the employees' free choice. The election is usually held in the workplace, as that is generally the most convenient location for the workers in the bargaining unit.

These substantive and procedural protections are designed to ensure that "laboratory conditions" exist to maximize the workers' free choice regarding union representation.[vii] The purpose of such protections is to ensure that the employee casts his or her vote in the strictest confidentiality and without union or employer coercion. For example, employees vote in private booths and are asked not to sign their ballots.[viii] Moreover, "no one, other than a Board agent and the individual voter, is permitted to handle the ballots."[ix] The Board has developed numerous rules and a multifactored test to analyze objections.[x] If it deems that "laboratory conditions" have not been met, the Board will overturn the election results and order a new election. It is worth noting that this may result from conduct by either

the employer or the union that may not otherwise constitute an unfair labor practice.[xi] For example, the NLRB set aside the election results for objectionable conduct (although not an unfair labor practice) when a union demanded that an employee sign a union authorization card and if he didn't the union would take an initiation fee out of the employee's pay "like a penalty."[xii]

If a majority of the employees vote for the union, the NLRB certifies it and the employer must bargain with the union for the purpose of reaching a collective bargaining agreement, which will govern the represented workers' terms and conditions of employment. On the other hand, if a majority of the employees vote against the union or if there is a tie vote, the union is not certified and no representation election may be held for at least one year from the date of the election.

While organized labor has been critical of the election process, occasionally contrasting it unfavorably with political elections,[xiii] the process enjoys a number of advantages that are not available to employers. These advantages were described in testimony on the Employee Free Choice Act by former NLRB Member Charles Cohen, who pointedly contrasted NLRB elections with political elections:[xiv]

- "The union controls whether and when an election petition will be filed. Imagine if the challenger in a political election controlled the timing of the election."
- "The union largely controls the definition of the bargaining unit in which the election will occur, because the union need only demonstrate that the petitioned-for unit is an appropriate bargaining unit. Imagine if the challenger in a political election had almost irreversible discretion to gerrymander the voting district to its maximum advantage."
- "The union usually has obtained signed authorization cards from a majority of employees at the time the petition is filed. Thus, the union already knows the voters and has conducted a straw poll before the employer is even aware that an election will be held. Imagine if the challenger in a political election could campaign and poll the electorate without the incumbent's knowledge, wait until the polls show that the challenger has majority support, and then give the incumbent less than 60 days' notice of the election."
- "Even though the union already knows the voters well by the time the election petition is filed, the employer must give the union a list of all of the voters' names and home addresses after the petition is filed. The union, but not the employer, is permitted to visit the employees at home to campaign for their vote."
- "The union, unlike the employer, can make campaign promises to the employees to induce them to vote for the union."

These facts illustrate that, far from being unfair to unions, the NLRB's election process offers unions many unique advantages.

Historic Preference for Secret Ballot Elections. For decades, the courts and the Board (and even organized labor, when it comes to decertification) have recognized that the NLRB secret ballot election is the best and most reliable method

of deciding whether employees want union representation. As stated succinctly by Supreme Court Justice William O. Douglas in the 1974 Linden Lumber case: "[I]n terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored."[xv]

Even in the Gissel decision, which allowed the use of cards to determine majority support where a fair election is impossible, the Supreme Court stated:

> The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory — indeed the preferred — method of ascertaining whether a union has majority support.[xvi]

In doing so, the Court noted with approval a lower court's "comparison of the card procedure and the election process":

> The unreliability of the cards is not dependent upon the possible use of threats. … It is inherent, as we have noted, in the absence of secrecy and in the natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees.[xvii]

Indeed, as recently as 1998, in making the case for requiring secret ballot elections for employees to get rid of unions (i.e., decertification), the AFL-CIO, the United Auto Workers (UAW), and the United Food & Commercial Workers (UFCW) argued to the NLRB:

> a representation election "is a solemn … occasion, conducted under safeguards to voluntary choice," … other means of decision-making are "not comparable to the privacy and independence of the voting booth," and [the secret ballot] election system provides the surest means of avoiding decisions that are "the result of group pressures and not individual decision[s]." In addition … less formal means of registering majority support … are not sufficiently reliable indicia of employees' desires on the question of union representation to serve as a basis for requiring union recognition.[xviii]

Tactics in Securing Card Signatures

The history of union authorization cards has consistently undermined their credibility as a reliable mechanism for determining employee choice. Former Rep. Pat Schroeder of Colorado, a staunch labor supporter with an 86 percent AFL-CIO support rating [xix] who, prior to becoming a member of Congress, was an NLRB attorney, said: "I remember how complicated so many of these cases would be. Sometimes the cards that were turned in were found to be fraudulent because somebody got excited; sometimes employees changed their minds; and all sorts of things."[xx]

A look at the NLRB casebooks shows why any NLRB attorney would be so familiar with the problems associated with authorization cards:

- threats of violence to the worker;[xxi]
- misrepresentation of what the card means;[xxii]
- signatures on cards written in English by workers who cannot read or speak English;[xxiii]
- promises of benefits;[xxiv]
- forged signatures;[xxv]
- threats of job loss or other economic harm;[xxvi] and
- taunting and forms of blatant peer pressure.[xxvii]

The tactics used by the unions in most of these cases were ultimately exposed because the employer chose to contest the union's claims of majority representation. In situations where the employee remains silent or the employer agrees to the union's demands — as is being sought through labor's card check strategy — these tactics are rarely uncovered.

Failure of an employee to bring the case to the NLRB's attention should not be surprising. When confronted with these tactics, the employee obviously must factor in the consequences of refusing to sign. In the best of circumstances, this likely means social rejection by his or her pro-union co-workers. In the worst of circumstances, it could involve threats to personal and family safety.

Card Check Certification under The Employee Free Choice Act

The Employee Free Choice Act would short-circuit the current secret ballot election process by going directly from signed cards to union recognition.

NLRB Certification. Under the bill, if a union files a petition with the NLRB backed by authorization cards signed by a majority of employees in an "appropriate unit," the Board would certify the union as the collective bargaining representative and the employer would be required to bargain with the union without an election. The bill would not explicitly prohibit elections, but votes would only take place in those exceedingly rare instances, if any, in which a union or a group of employees filed a petition with authorization cards signed by less than a majority of the workers.

As noted, the legislation would retain the requirement that the represented employees be contained in "a unit appropriate for bargaining," which requires that the employees have a "community of interest." There is a presumption in favor of the unit submitted by the union and, with the elimination of a Board-conducted election, it is not even clear whether the employer would retain the ability to contest the union's assertion as to the specific employees and positions that should be included within the unit. Thus, it can be anticipated that unions would often seek to start with the smallest possible unit for which it could get a majority to sign cards, with hopes of later expanding the unit to include others.

Failure to Address Abuses. While eliminating elections, the bill does very little to increase the integrity and reliability of the card check process. It does direct the Board to establish "guidelines and procedures" for a new card check certification process, including model language that may be used on the authorization cards (but is not required) and procedures for verifying employee signatures. However, it fails to devise or authorize new procedures to protect against the coercive and deceptive tactics that are often used to obtain signatures on authorization cards. Furthermore, it does nothing to guarantee "laboratory conditions" in the card-signing process. As noted previously, an election may be overturned because of employer or union behavior that does not rise to the level of an unfair labor practice if that behavior thwarts employee free choice. Yet the bill would permit harassment or pressure directed toward employees that does not rise to the level of an unfair labor practice, even though, under current law, such activity may be sufficient to overturn election results.

Employees may indeed theoretically file a charge with the NLRB if they are subject to coercion or threats. If an employer engages in threats or coercion, the union will typically file a charge on the employee's behalf. But if the union is the accused, the employee must act on his or her own, thus taking a highly public stand on the issue of union representation without any assistance. Indeed, workers acting alone would bear the burden of bringing the union's coercive tactics to the attention of the NLRB.

Under current law, the election, with its strict procedures and protections (as shown in "Procedural Safeguards: Election v. Card Check"), is the final safeguard workers have against an inadequate and unreliable card authorization process. The secret ballot election provides workers who may have signed a card under duress or as a result of misinformation the opportunity to anonymously cast their ballot in a protected environment.

No Card Checks for Decertification. In a glaring omission that demonstrates the one-sided nature of the legislation, the bill fails to apply card check recognition to the decertification process. Thus, even if the employees file a decertification petition with the NLRB signed by a majority of the bargaining unit, the matter must still be resolved by a secret ballot election.[xxviii]

Yet it is inevitable that, by eliminating the secret ballot election, the number of situations in which employees will want to get rid of the union will increase. Traditional campaigns in which employees hear both sides of the union issue before making their decision would diminish, increasing the number of situations in which employees might have second thoughts after certification and wish to reverse a hasty and uninformed decision.

Not only does the legislation retain the requirement of a secret ballot election for decertification, but it also retains all of the obstacles that currently exist when a majority of the employees want to dissolve the union-employee relationship. Thus, the "contract bar" doctrine would continue to prohibit decertification elections for the duration of a collective bargaining agreement or three years, whichever is shorter.[xxix] In addition, unions would continue to be able to protect their status by filing unfair labor practice charges that block a decertification election until those charges are resolved.

Proponents of EFCA contend that employers already have the ability to withdraw recognition of a union if presented evidence, such as a signed petition, that a majority of the employees do not support the union. However, this is a rare occurrence because, in contrast to the card check certification under EFCA, it lacks the finality of an NLRB decertification. Absent the finality of a decertification election, the employer acts at its peril and the union can challenge the withdrawal with evidence indicating that majority support still exists.[xxx] If the employer is proven wrong by the union, its withdrawal of recognition is likely to be deemed an unfair labor practice. In contrast, under EFCA, the establishment of a card check majority results in an NLRB certification that automatically results in a bargaining obligation by the employer that the NLRB will enforce. If the legislation were balanced, the NLRB would similarly decertify the union based on the cards with no requirement for a secret ballot election, and it would result in a final determination that the union would no longer represent the employees under the law.

In sum, the proposed legislation provides organized labor with a powerful (and untrustworthy) tool to achieve certification — card check recognition — while retaining the more reliable secret ballot election to defend against decertification.

Procedural Safeguards: Private-Ballot Elections vs. Card Check

The following side-by-side comparison explains some of the procedural safeguards found in the NLRB election process along with any counterpart card check protections:

Private-Ballot Election	Card Check
An NLRB-approved notice that explains the workers' rights must be posted by the employer at least three days before the election.	Workers are informed of their rights only to the extent articulated by the union organizer.
"Captive audience" speeches within 24 hours of the election are prohibited.	Employees are subject to un-rebutted, pro-union speeches up until the time they sign an authorization card.
The election is conducted by an agent of the NLRB in conjunction with an equal number of observers selected by the union and employer.	Union authorization cards are solicited in the presence of union organizers.
The names of prospective voters are compared against a previously established eligibility list before they may cast their ballots.	Anyone may sign union authorization cards. Although forgery of authorization cards is prohibited, there is no safeguard that prevents forgeries before the fact.
The election ballot box is physically inspected and sealed by the NLRB agent immediately before voting.	The union maintains control over signed authorization cards.
The NLRB agent retains positive control over the ballots at all times.	The union retains control over authorization cards at all times.
The ballots are secret; no name or other identifying information appears on the ballot to indicate how an employee voted.	The union knows which employees signed authorization cards.
Employees may not be assisted in casting their votes by agents of the union or employer.	Union organizers may fill out and sign authorization cards on behalf of the workers with their express or implied permission, regardless of whether they have read the cards.
Electioneering near the polls is prohibited.	Solicitation of authorization cards may be accompanied by any pro-union propaganda that does not rise to a material misrepresentation regarding the consequences of signing the card.
Neither the employer nor the union may engage in coercive or threatening conduct prior to the election.	The union may not use threats or coercion in order to obtain signed cards nor may the employer use threats or coercion to prevent cards from being signed.

Compulsory First Contract Labor Arbitration

Organized labor seeks to fundamentally alter American labor law by undermining the foundation of the voluntary collective bargaining process. While most of the debate concerning the EFCA has focused on its "card check" provisions, the bill contains another equally, if not more, nefarious provision. Proponents of EFCA would invite arbitrators — who are strangers to the workplace — to impose contract provisions governing the workplace of extreme importance to both employers and employees. A poor decision by an arbitrator could have immediate, lasting devastating effects.

EFCA would require that wages, benefits and other terms and conditions of employment for newly organized employees be dictated by such arbitration panels appointed by the Federal Mediation and Conciliation Service (FMCS). In other words, the federal government would be in charge of a process that would set employee wages, hours and working conditions for new union members. Unions would no longer have any responsibility for negotiating sound labor agreements in first contract situations.

Collective Bargaining and the Role of Arbitration in Labor Disputes

The Government's Role in the Collective Bargaining Process. The NLRA provides employees with a federally protected right to join a union and bargain collectively through their chosen representatives regarding issues affecting their employment. A collective bargaining agreement typically covers a broad range of issues, such as wages, benefits, seniority systems, overtime, job classification, discipline rules, grievance procedures (which invariably include grievance arbitration), subcontracting restrictions, union dues check-off, etc.

One of the stated purposes of the NLRA "is to promote industrial stabilization through the collective bargaining agreement."[xxxi] To further this important purpose, the NLRA requires employers and unions to bargain in good faith.[xxxii] The Act, however, does not require the parties to reach agreement. In fact, the voluntary nature of the collective bargaining process is at the very foundation of American labor law.[xxxiii]

As the U.S. Supreme Court held in *H. K. Porter v. NLRB*,[xxxiv] our labor laws are premised on the notion that, in collective bargaining, the employer and the union, not the government, should determine the applicable terms and conditions of employment:

> The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to

> mutual agreement. *But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement*.[xxxv]

What is more, the legislative history of the NLRA makes it abundantly clear that it was not intended for the government to step in and "become a party to the negotiation and impose its own views of a desirable settlement."[xxxvi] For example, the Senate Committee on Education and Labor's report stated, "The Committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed the duty to bargain does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide if proposals made to it are satisfactory."[xxxvii]

To understand the collective bargaining process, it is important to recognize that, metaphorically, the NLRA puts the parties in a room to negotiate the terms and conditions of the workplace.[xxxviii] The government, however, does not enter the room or interfere with the negotiations. Indeed, the government plays no part in determining the terms of collective bargaining agreements.[xxxix] Congress, instead, created the NLRB to merely "supervise the collective-bargaining process."[xl] The NLRB will only step into the room when one of the parties cries foul. Even so, the NLRB is "without authority to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement."[xli]

If one party to the negotiations cannot realize its goals at the negotiating table it is free to use its economic weapons, such as the strike or lockout.[xlii] As has been noted, "collective bargaining is a process of reaching agreement; and the statutory rules of the game are that the employees may strike if dissatisfied with the terms offered by the employer and the employer may close his plant if, in his opinion, the union becomes unreasonable in its demands. The strike and the threat of strikes are thus themselves a part of the bargaining process and are, so to speak, the catalysts which make agreement possible."[xliii]

Collective bargaining agreements are more than mere contracts,[xliv] and have been portrayed by U.S. Solicitor General Archibald Cox as an instrument of government.[xlv] Indeed, the collective bargaining process "is an effort at establishing a system of industrial self-government."[xlvi] As one court noted, "the trade agreement becomes, as it were, the industrial constitution of the enterprise setting forth the broad principles upon which the relationship of employer and employee is to be conducted."[xlvii] And a grievance procedure culminating in final binding arbitration is an integral dispute resolution mechanism in virtually all collective bargaining agreements.[xlviii]

<u>Arbitration is a Voluntary Dispute Resolution Mechanism</u>. Arbitration is a non-judicial proceeding typically chosen voluntarily by parties "who want a dispute determined by an impartial judge of their own mutual selection, whose

decision, based on the merits of the case, they agree in advance to accept as final and binding."[xlix] The voluntary nature of arbitration is a key feature of the dispute resolution mechanism.[l]

In contrast, compulsory arbitration has been defined by Department of Labor to mean a "process of settlement of employer-labor disputes by a government agency (or other means provided by the government) which has power to investigate and make an award which must be accepted."[li] This type of labor arbitration is generally limited to collective bargaining agreements covering public sector safety personnel, such as police officers and firefighters, because the workers are prohibited from going on strike.

Because of the voluntary nature of arbitration, the parties must determine in advance whether the subject matter of the dispute is appropriate for arbitration. As stated by the U.S. Supreme Court: "Arbitration is a matter of contract and a party cannot be required to submit to arbitration in a dispute which he has not agreed so to submit."[lii]

Grievance and Interest Labor Arbitration. Labor arbitrations can be divided between "rights/grievance" and "interest" arbitrations.[liii] "Rights" or "grievance" arbitration involves the interpretation and application of the provisions of collective bargaining agreements, laws or customary practices.[liv] Indeed, this type of arbitration contemplates "the existence of a collective bargaining agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in the terms" or to create a new agreement. The underlying dispute relates either to the meaning or proper application of a particular contractual provision "with reference to a specific situation or to an omitted case. In the latter event the claim is found on some incident of the employment relation, or asserted one, independent of those covered by the collective agreement. … in either case the claim is to rights accrued, not merely to have new ones created for the future."[lv]

Interest arbitration, on the other hand "relates to disputes over the formation of collective bargaining agreements or efforts to secure them. They arise where there is no agreement or where it is sought to? change terms of [an existing agreement] and therefore the issue is not whether an existing agreement controls the controversy." They look to the "acquisition of rights for the future, not to assertion of rights claimed to have vested in the past."[lvi]

One interest arbitrator noted the unique task presented by writing a contract provision instead of the usual job of interpreting collective bargaining agreements. He noted, "The task placed before this Arbitrator is not the usual settlement of a grievance based upon interpretation of a contract already agreed upon by the parties. Rather the Arbitrator has been asked to write a term into the contract upon which the parties could not agree during negotiations."[lvii] Indeed, another arbitrator noted, "The task is more clearly legislative and judicial. The answers are not to be found within the four corners of a pre-existing document which the parties have agreed shall govern their relationship."[lviii]

Compulsory interest arbitration places heavy burdens on arbitrators and they must impose the most important terms and conditions of employment upon the parties. As one arbitrator noted, "In an arbitration proceeding with the present kind [interest arbitration], the arbitrator is in a much more difficult position than in the more common types

of case in which he is asked to interpret an existing Agreement. In the latter situation he has before him a standard against which to measure the dispute; a standard, however vague, arising from agreement between the parties. In the controversy now before me, I am asked to decide, not merely the 'rights' of the parties under an agreement they have themselves made, but rather to write the 'Agreement' for them. For criteria of judgment I cannot look to the parties; I must look to myself."[lix]

Because employers and, up to this time, unions have generally been wary of letting a stranger to the workplace dictate the most important terms of employment, interest arbitration is used much less frequently that grievance arbitration. Indeed, "the most popular use of labor arbitration concerns disputes involving the interpretation or application of the collective bargaining agreement. There is much less enthusiasm for its use, even on a voluntary basis, as a means of resolving disputes over terms of new or renewable contracts."[lx] Moreover, when interest arbitration is used it is generally in connection with compulsory arbitration in the public sector. While it is true that interest arbitration has been accepted in a few private sector situations, as one interest arbitrator noted, an agreement to compulsory arbitration "*is bottomed on voluntary, privately negotiated agreements — not compulsory arbitration awards*."[lxi] In other words, in the private sector even an agreement between an employer and union for compulsory interest arbitration must be *voluntary*.

Compulsory Interest Arbitration was Explicitly Excluded from the NLRA

The NLRA "in no respect regulates or even provides for supervision of wages or hours, nor does it establish any form of compulsory arbitration."[lxii] In fact, the legislators specifically rejected compulsory arbitration and compulsory interest arbitration. Senator Wagner, the original architect of the Act, declared:

> One method of approach to the problem of industrial peace would be for the Government to invoke compulsory arbitration, or to dictate the terms of settlement whenever controversy arises. Where this procedure has been tried in European nations it has met with only questionable success. *In any event, it is so alien to our American traditions of individual enterprise that it would provoke extreme resentment and constant discord*.[lxiii] … It is clear that in this country peace must be based on reason rather than force. We have cherished always the ideal of employers and workers meeting together with friendly and open minds in order that they may exchange views and *arrive at solutions based not upon compulsion but upon mutual concessions and mutual benefit*.[lxiv]

Significantly, the NLRA as introduced included a provision that would have allowed parties to voluntarily submit disputes to the NLRB. In describing the provision, Senator Wagner went out of his way to explain that even though "the board [would be] empowered also to arbitrate labor disputes upon voluntary submission…its award [would] be binding only upon parties who have agreed in advance, and there is not the slightest flavor of compulsory arbitration." [lxv] The provision, however, was ultimately eliminated from the final version of the bill.

Restrictions on Government Imposition of Contract Provisions on Labor or Employers

In 1970, the U.S. Supreme Court decided the very issue of whether the government can impose contract terms on a party. In *H. K. Porter v. NLRB*,[lxvi] the NLRB determined that a company failed to bargain in good faith by refusing to bargain about a union dues check-off provision in the first collective bargaining agreement. The Board ordered the company to "engage in further collective bargaining" including the issue of union dues check-off if the union insisted.[lxvii] The federal circuit court of appeals went further, holding that in certain circumstances a "check-off may be imposed as a remedy for bad faith bargaining."[lxviii] The Board again reviewed the case and ordered the company to "grant to the Union a contract clause providing for the check-off of union dues."[lxix] In other words, the Board ordered the company to agree to a contract provision. The federal appellate court upheld the Board's order.

The Supreme Court, however, reversed the lower court and the Board. The Court ruled that while the Board has the authority to order a company and union to negotiate, "it is without authority to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement."[lxx] Instead, the role of the Board is "to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties."[lxxi] The Court noted that "one of the fundamental policies [of the NLRA] is freedom of contract" and reasoned that by "allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based — private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract."[lxxii] EFCA undermines the "fundamental premise" of the NLRA and would dictate that government-sponsored arbitrators impose labor contract terms soon after a union is certified as the bargaining agent.

Compulsory First Contract Interest Arbitration under the Employee Free Choice Act

Under EFCA, once the NLRB certifies the union, the employer is required to meet with the union and make "every reasonable effort to conclude and sign a collective bargaining agreement" within 10 days from the time the union requests to bargain. Because labor agreements are often highly complex documents affecting the long-term economic interests of both employees and employers, collective bargaining negotiations typically take months to negotiate. Under EFCA, the process is unrealistically accelerated. If no agreement is reached within 90 days, either party can request mediation from the FMCS. If mediation fails to produce an agreement within 30 days (or a longer period agreed upon between the parties), the matter would be referred to an arbitration board "established in accordance with such regulations as may be prescribed by the Service." The arbitration panel must then "render a decision settling the dispute" (i.e., mandate the terms of the contract), which is then binding upon the parties for two years unless the parties agree by written consent to amend the contract.

It is important to recognize the fundamental change that EFCA is proposing for collective bargaining and the use of labor arbitrators. As noted above, under current practice, the employer and union negotiate a collective bargaining agreement and employees typically ratify the agreement by a majority vote. As part of the collective bargaining

agreement's grievance process, arbitration is generally used to resolve disputes that arise under the agreement between the parties. In such circumstances, labor arbitrators interpret the language of the collective bargaining agreement to resolve disputes arising under the agreement between employees/labor and management.

In contrast, EFCA would, in many circumstances, require a panel of arbitrators to actually *write* the underlying agreement and impose it on labor and management. The right to choose arbitration would no longer be available. Employers would be given no right of review, and employees, already denied the right to a secret ballot election on union representation, would further be denied the right to vote on the contract mandated by the arbitration panel.

This is contrary to the American system of free collective bargaining. Indeed, even interest arbitrators have refused to force an interest arbitration provision on a party if they did not want it. In *Pacific Neo-gravure*,[lxxiii] the arbitrator refused to force a union to be bound by a compulsory interest arbitration provision when the union argued that "a compulsory arbitration provision should not be imposed on a non-consenting party."[lxxiv] The arbitrator held that "it would seem a fair conclusion that for an Arbitrator to order mandatory arbitration of new contract terms over the objections of either party would be, as the union states, 'the equivalent of compulsory arbitration of a new contract.' In the view of many — in both labor and management — imposition of such a requirement on a non-consenting party is incompatible with our system of free collective bargaining."[lxxv]

Similarly, in *San Joaquin Baking Co*.,[lxxvi] an arbitrator refused to force a union to continue to "submit new contract negotiations" to arbitration.[lxxvii] The arbitrator decided that "to order such a clause would in effect be to order compulsory arbitration of new contract terms. *Such action would be out of accord with the system of collective bargaining which in essence is based on volunteerism and freedom of contract*."[lxxviii]

<u>Rationale for Compulsory First Contract Arbitration Provisions</u>. Proponents of EFCA assert that, under current law, employers fail to bargain in good faith with newly organized unions, their goal being to undermine the union's support among the employees. Even though such a tactic is clearly illegal, labor asserts that more than a year after being certified, unions are unable to negotiate first contracts 32 percent of the time. While there is no conclusive data on this point, the difficulties in negotiating a first contract where there is a good faith effort to reach agreement cannot be understated. Newly certified unions often bear a heavy burden to make good on promises made to employees by union organizers to gain recognition. In a card check situation, where there may have been little or no opportunity for the other side to be heard, expectations are likely to be even higher. But 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 competitive wages and benefits to its employees. When this reality is combined with a lack of any historic track record between the parties, especially when 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.

Compulsory Labor Arbitration Would Undermine Collective Bargaining. The imposition of compulsory first contract arbitration would effectively eliminate good faith bargaining for a first contract.

In testimony on the Employee Free Choice Act, former NLRB Chairman Peter J. Hurtgen, who also served as Director of the FMCS, stated:

> I spent 20 years of my practice in Florida where I represented many public employers in the negotiation of their collective bargaining agreements. That process, under state law, ended in non-binding interest arbitration. More often than not, the parties bargained simply to set the issues up for the arbitrator which resulted in days and weeks of hearings. The process led to hearings and imposed legislative body decisions — not agreements. Any process which ends with an imposed contract will perforce put the parties into their positioning and arbitrating shoes, not their bargaining shoes.[lxxix]

As one arbitrator noted, "Indeed, as some who have the basis for judgment urged, the availability of a procedure yielding compulsory awards tends to demoralize the bargaining process. Such procedures, it is widely believed, inhibit normal bargaining by inviting unreasonable offers and demands designed to compel arbitration… by deterring bargainers from assuming responsibility for a settlement when they believe that are terms might be arrived at terminal arbitration, and in various other ways."[lxxx] For the same reasons, another arbitrator agreed with a union's argument that forcing arbitration of new contract terms "operates to prevent the parties from really attempting to settle their differences by negotiation."[lxxxi]

Either party to negotiations may easily succumb to the "narcotic effect" of compulsory arbitration. A panel of interest arbitrators recognized the parties came to over-rely on interest arbitration and failed to fully utilize collective bargaining. The panel stated, "Arbitration should be a last resort and not an easy pillow on which to fall just because difficulties are encountered. There is some evidence that in the transit industry there has not been the fullest utilization of collective bargaining just because there has existed a ready alternative."[lxxxii] Moreover, in *Asplundh Tree Expert Co.*,[lxxxiii] an employer opted to eliminate interest arbitration provisions from future collective bargaining agreements because "the Union did not negotiate in good faith because of the safety net supplied by interest arbitration."[lxxxiv]

Proponents, however, will say that EFCA does not prevent the parties from negotiating their own contracts. But the reality is that to persuade employees to sign authorization cards, unions will promise employees what they want to hear even if the employer is not in an economic position to make good on the union's promise. Similarly, the union might think it can get more from arbitration than through collective bargaining. Under EFCA, the union can simply wait until the negotiation period ends, because the arbitration panel will have the power to write those promises into a contract that will bind the employer. Moreover, EFCA eliminates labor's accountability to deliver on those unrealistic campaign promises, because if the panel does not give the union everything it promised the employees,

the union can simply blame it on the arbitrators. And even though the employees may not get what they were promised by the union, the union will still get to collect its dues from those workers. In sum, it is a win-win-win for the union even though it may be a devastating defeat for the employees and the employer.

Arbitration was never intended to supplant collective bargaining. As one arbitral panel put it, "It is certainly a fundamental rule of law, having particular reference to labor law, that whatever either party does not get in negotiation sessions, they cannot get in arbitration proceedings."[lxxxv] Yet this is exactly what EFCA would provide.

New Role for Labor Arbitrators — Writing the "Contract." It should also be recognized that EFCA will significantly change the relationships among arbitrators, unions, employees and companies. Today, labor arbitrations are based on the mutual desire by labor and management to have their disagreements over the application of contract language settled by a third party. Arbitrations, therefore, are voluntary. Both sides agree to submit their dispute to arbitration, and they mutually agree to be bound by the arbitrator's decision. In contrast, EFCA would, in many circumstances, require a panel of arbitrators to actually *write* the underlying agreement and impose it on labor and management.

Moreover, it is a misrepresentation to refer to the end result of the so-called "first contract arbitration" procedure as an "agreement" or "contract." The reality is that because neither party has agreed to the arbitrators' decision, there will be none of the traditional elements of a binding contract such as offer, acceptance or a "meeting of the minds." Rather, the labor arbitrator will have made a unilateral decision instead of the parties arriving at a traditionally negotiated collective bargaining agreement. Passage of EFCA would signal the end of collective bargaining agreements in first contract situations and the beginning of labor arbitrator mandates.

Many labor arbitrators have refused to take such action. For example, one arbitrator refused to adopt a union's broad reading of an arbitration provision so as to incorporate interest arbitration, which would have effectively permitted the arbitrator to write in new contract terms. In *Junior House Collectibles*,[lxxxvi] the arbitrator noted that "interest disputes are not readily adaptable to settlement by arbitration" and "parties to a contract do not normally abdicate to arbitrators the responsibilities of writing a collective bargaining agreement."[lxxxvii] Indeed, he stated, "It should not be an arbitrator's responsibility to determine what the parties should have voluntarily agreed to or accept the function to impose contract terms which they clearly did not agree to. The give and take process of collective bargaining should determine the terms of a contract rather than a party imposing his individual interests."[lxxxviii] Accordingly, the arbitrator ruled that "absent contract language which indicates a clear intent of the parties to arbitrate these types [interest] of disputes, this arbitrator is unwilling to allow grievances which permit the union to obtain through arbitration what they could not contain through collective bargaining."[lxxxix]

Similarly, in *Clean Coverall Supply Co.*,[xc] an arbitrator refused to write new terms into an agreement. He declined to impose upon a company a new contractual provision regarding vacation rights for female employees during maternity. The arbitrator stated, "In the last analysis, the Union requests that the Arbitrator ignore clear language, the intent of the parties, and write a new provision into the Labor Agreement. As we all know, such conduct on the part of

the arbitrator would be indefensible. After all, the authority of an arbitrator is limited to the construction of contractual language as agreed to by the parties. He may not legislate new language, since to do so would usurp the role of the labor organization and employer."[xci] Therefore, he noted, "If the union believes that denial of vacation benefits to employees who take a maternity leave of absence is in equitable, the proper forum to seek a remedy is it the bargaining table and not in arbitration."[xcii]

Under EFCA, arbitrations will become compulsory. If an agreement is not reached within the relatively short time period prescribed by EFCA, both sides will be compelled by law to submit their dispute to arbitration, and both sides will be compelled by law to be bound by whatever the arbitration panel decides should be in the contract. In other words, for first contracts the arbitration is not voluntary, it is compulsory.

Are Arbitrators Qualified to Write First Contracts? A fundamental issue is whether arbitrators are qualified to decide essential issues of the labor market and general marketplace. For example, would an arbitral panel have the expertise to decide whether an employer must begin contributing to a union's defined benefit plan?

In *Employer and Union Trustees*,[xciii] an arbitrator refused to write a provision into the contract dealing with the number of hours required for vested benefits under the company's pension plan, let alone decide whether the employer must begin contributing. Indeed, the arbitrator ruled that the parties should decide such matters based on expert information, not his decision. He noted, "I believe that the proposed change in the vesting requirement should be decided on in collective bargaining negotiations where a complete opportunity to gather and study all relevant facts and to properly interpret their meaning and importance with the assistance of actuaries and other experts available to the parties would be possible and feasible."[xciv]

As former Chairman Hurtgen has stated:

> No outside agency, whether arbitration, courts, or government entity has the skill, knowledge, or expertise to create a collective bargaining agreement. If it is not a creature of the parties' creation it likely will fail of its purpose. The negotiation of a collective bargaining agreement is the search for mutually resolving each side's interests. It must be done with tradeoffs and separate prioritizing. Only the parties can do that. There are no standards for arbitrators to apply. There is no skill set for arbitrators to use. Solomon is simply unavailable.[xcv]

What if an arbitral panel dictated that an employer must begin contributing to a union's underfunded pension plan or make any one of numerous blunders that could dramatically impact a business and the employment of workers? The panel would simply get paid and go on its merry way. There is no recourse from such a decision. As one court noted, "Unlike a judge, an arbitrator is neither publicly chosen nor publicly accountable."[xcvi] Indeed, this raises a number of unanswered questions related to EFCA's first contract arbitration provision.

Unresolved Issues Concerning Compulsory Arbitration

Notwithstanding the philosophical and policy objections to EFCA's compulsory arbitration provisions, there are a number of issues raised by the bill's brief 300-word provision that in many instances would be left to the FMCS to fill in the blanks.

Composition of the Arbitration Panel. Given the enormous responsibilities of the arbitration panels created by EFCA, a number of important questions will need to be answered:

- How will FMCS determine the field of arbitrators from which the panels will be drawn?
- Will arbitrators be required to have any special expertise in the business or industry in which the employer and employees operate?
- Will arbitrators be required to have any experience in running a business and making significant economic decisions affecting the long-term interests of the company and its employees?
- Will the performance of arbitrators be monitored and scored to help in determining future assignments in order to ensure sound outcomes?
- What input, if any, will the employer and union have in the selection of the panel?
- Will employers or unions be able to challenge the selection of a particular panelist based upon previous performance, conflict of interest, or any other potentially disqualifying factor?

Procedures in Deciding the Imposed Contract. Because the FMCS does not now have any comparable function forcing labor contracts on employers, employees, and unions, it will be necessary for the Service to develop procedural standards for the creation of contracts. Among the issues that must be addressed are:

- Where do the arbitrators begin in writing a new labor contract?
- Will the arbitrators ask the parties for their positions on all of the issues?
- Will arbitrators be required or permitted to ask each party to submit a proposed contract?
- Will FMCS develop a set of model contracts for arbitration panels to use?
- In issuing the first contract, can the arbitrators consider the behavior of the parties during the 90-day and 30-day negotiation and mediation periods?
- What standards will be in place to govern how arbitrators will consider information submitted to them by the parties for their consideration? In other words, what safeguards will be in place to ensure that arbitrators have given appropriate consideration of the information submitted to the panel?
- Will the arbitrators be able to force the parties to disclose proprietary information to the panel or the other party? If so, will that information be held confidential, provided to the other party, or simply made public?
- What happens if an arbitrator discloses highly confidential information?
- What types of information will the arbitrators be able to demand and what powers will they have to require the parties to submit requested information?

- Will the parties be able to appear before the panel?
- Will the parties be able to present witnesses?
- Will the arbitration panels have subpoena power?
- Will the arbitration panels be required to follow any rules of evidence or civil procedure?
- Will arbitrators have the authority to issue injunctions to stop one or both parties from taking action during the time the panel is writing the first contract?
- Will the arbitration panels have to justify and explain in writing the rationale underlying the contract's provisions?
- Will the panel be required to consider information about the employer's business and the industry within which it operates?
- If the NLRB has issued a complaint against a party for failing to bargain in good faith, must the panel wait until that complaint has been adjudicated to impose the first contract?
- What is the time frame for issuance of the panel's decision and how will the parties be protected against a decision that is either too hasty or too protracted?
- Will the panel's decision have to be unanimous or can it be issued by majority vote? If so, can the minority file a dissent?

Scope of the Imposed Contract. Under current practice, labor arbitrators issue decisions based on provisions in a labor agreement. Under EFCA, in contrast, panels of labor arbitrators will be required to write the labor contract in the first instance. Indeed, the legislation simply states that the arbitration panel is to "render a decision." This so-called "decision" will be the actual first labor contract between the parties, and it will bind the workplace for two years. This raises a number of issues about the terms of the contract:

- Is there any limit on the issues a panel may consider and terms it may use in writing the first contract?
- Will the first labor agreement be limited to mandatory subjects of bargaining such as wages, benefits, shift schedules, job classifications, seniority rules, job bidding, etc., or will it also cover permissive subjects of bargaining like retiree health insurance?
- If there is a dispute as to whether a subject is mandatory or permissive, how will it be decided?
- Will the panel have the authority to write in "no strike" or "no lockout" clauses in the contract?"
- If the panel considers the parties' information, will it be prohibited from imposing terms on issues that were not raised by the parties?
- Will the arbitrators be able to write in a provision that all subsequent labor contracts between the parties be decided by compulsory interest arbitration?
- Will the panel have the power to impose new financial obligations on employees such as mandatory union dues, initiation fees, or special assessments? Will there be any limits on the financial obligations that the panel can impose on employees?

- Will the panel have the power to require the employer to pay into union-controlled trust funds (e.g., benefit plans) and be subject to withdrawal liability if the employer later is dissociated from the plan?

Challenges to the Imposed Contract. If challenged, arbitration awards are currently granted significant deference by courts and are very rarely overturned. Those awards, however, are made in proceedings in which the parties submit their dispute to arbitration voluntarily. Under EFCA, the process is involuntary. At the same time, the decisions by arbitration panels will have significant economic repercussions for employers, employees, and unions, yet EFCA fails to provide any clarification as to whether there will be any meaningful appellate review. Further, because the parties did not negotiate the imposed labor contract, it is highly likely that in many instances, one or more of the parties will wish to challenge a contract mandated by the FMCS panel, either on procedural or substantive grounds. This raises several questions:

- Will there be a way for the employer, the union, or the employees to appeal the panel-written contract?
- If so, will the challenge have to go first to a federal agency — the NLRB or FMCS — or can it go directly to a federal court?
- What will be the standard of review for challenging a panel's contract?
- If no challenges are allowed and an employer suffers serious economic injury from an economically unrealistic panel decision, will any other recourse be available to the employer?

Employee Rights. Employees have a number of rights under the National Labor Relations Act that are not addressed by EFCA's terms. Several questions about those rights will need to be resolved:

- Will employees still have a right to strike during negotiations and after the matter has been submitted to the arbitration panel?
- Will employees be able to file a decertification petition at any point during the bargaining, while the arbitration panel is deliberating, and for the two-year life of the contract, or will the traditional "bars" to such petitions continue to apply?
- Absent the ability to decertify the union, what protections would be available to the employees if a majority is unhappy with the contract imposed by the arbitration panel?

During and After the Contract Expires. EFCA only addresses the first two years of the contract but fails to indicate the parties' obligations thereafter:

- If, during the life of the contract, the employer wishes to implement a change in terms and conditions of employment that is not addressed by the contract, is the employer required to bargain with the union and, if impasse is reached, may the employer implement the change, or will it have to be referred to the arbitration panel?

- Upon expiration of the imposed contract, is the employer required to maintain its terms until it has either bargained to impasse with the union or a new contract has been agreed upon?

The Compulsory Arbitration Provision Runs Afoul of the Constitution and Supreme Court Precedent

If enacted, it is highly likely that the compulsory arbitration provision in EFCA will be challenged as an unconstitutional delegation of legislative authority. Experience among the states is instructive. Several states have adopted compulsory interest arbitration schemes to resolve contract negotiation disputes between the state or municipalities and essential public personnel such as firefighters, police officers, transportation workers, etc. Such personnel are often prohibited from striking because of the harmful impact it would have on the public interest. Several state supreme courts, however, have ruled that compulsory interest arbitration statutes are unconstitutional delegations of legislative authority.[xcvii]

EFCA's 300-word first contract compulsory arbitration provision fails to provide any statutory standards or guidelines for the FMCS, arbitrators, arbitral procedures, or proceedings. The absence of such legislative guidance and standards would likely render the compulsory arbitration provision unconstitutional. For example, in *Salt Lake City v. International Ass'n of Firefighters, Local 1645*,[xcviii] the court found that a state compulsory interest arbitration provision was unconstitutional, in part, because "the legislature failed to provide any statutory standards in the act or any protection against arbitrariness, such as hearings with procedural safeguards, legislative supervision, and judicial review."[xcix]

Moreover, the compulsory arbitration provision runs afoul of the rationale the U.S. Supreme Court used to uphold the constitutionality of the NLRA. In 1937, the Supreme Court ruled (in a 5 to 4 decision) that the NLRA was not unconstitutional because it "does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contact and hiring individuals on whatever terms' the employer 'may by unilateral action determine.' The Act expressly provides in § 9(a) that individual employees shall have the right at any time to present grievances to their employer. The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about adjustments and agreements which the Act in itself does not attempt to compel."[c]

Increased Penalties Against Employers Only

The Employee Free Choice Act would abandon the traditional "make whole" approach of the NLRA by adding new and enhanced enforcement provisions and penalties in situations where employees are being organized or where first contract negotiations are taking place.

Despite the criticism by organized labor of NLRB procedures and penalties, the fact remains that in contrast to most other employment laws, enforcement is far more accessible to an aggrieved employee because of the existence of the NLRB. In contrast to most other employment laws, [ci] employees do not need to hire an attorney, who often take the case only if significant awards are available or if the party's case is a "slam dunk." Instead, under the NLRA, employees need only file a charge with the NLRB General Counsel, who then effectively becomes their attorney and prosecutes the case at least to the Board level. If the Board decides in favor of the employee, the General Counsel will continue to represent them if the decision is appealed in the federal courts.

The make-whole remedies of the NLRA are closely interwoven with this scheme. Rather than try to obtain a huge monetary reward or impose severe penalties on labor law violators, the Board's goal is to obtain quick relief through reinstatement with back pay. In more than 90 percent of all meritorious cases, this is achieved through a settlement,[cii] typically within a very short time frame. Employers, faced with the prospect of engaging in a lengthy and expensive legal battle with the federal government, will often simply settle the case with or without an admission of guilt, resulting in a quick reinstatement of the employee. The cases that take longer to resolve typically involve more complicated or ambiguous factual or legal determinations that are left to an administrative law judge and the Board to resolve.

The Employee Free Choice Act would disrupt this orderly resolution of disputes by creating new penalties for employer violations only, including triple back pay and civil penalties of $20,000 per violation. Currently, the law strikes a balance between quick resolution of disputes and ensuring the availability of fair procedures for the minority of complicated cases requiring third-party adjudication. By raising the stakes for both the employer and the aggrieved party, the legislation threatens to disrupt this balance.

Meanwhile, the lack of balance in the bill is further underscored by failing to apply these new penalties to union violations, even though the increased use of authorization cards would clearly warrant stepped-up protection against union coercion in obtaining signatures.

Fast Track Enforcement. Under current law, the NLRB has the discretion to issue injunctions under Section 10(j) against unfair labor practices when there is reasonable cause to believe they have occurred. These are generally sought when the alleged unfair labor practices are widespread, the public interest is at stake, the Board's procedures are interfered with, or the ultimate remedies are inadequate and the conduct is clear-cut and flagrant.

The card check bill expands the use of injunctions through an existing provision in the law — Section 10(l) — designed to provide enhanced protections for neutral parties during a labor dispute. The bill would apply these to unfair labor practice charges arising during organizing or first contract negotiations.

Under current law, section 10(l) of the NLRA protects third-party employers and their employees from being dragged into an ongoing dispute between another employer and a union — a so-called "secondary boycott." The secondary boycott provisions of the Act prohibit unions from picketing or calling a strike against a supplier, customer, or other employer doing business with the original or "primary" employer with whom the real dispute exists. Section 10(l) requires the NLRB General Counsel to give such cases, which constitute a small percentage of the charges filed with the Board, [ciii] top priority in investigating the charges. If the General Counsel finds there is reasonable cause to believe a violation exists, it must seek an injunction against the activity. In considering any expansion of section 10(l), it is worth noting that it is extremely rare for the General Counsel to seek a §10(l) injunction; the Office of the General Counsel filed only three such injunctions in FY 2007.[civ]

In short, the unlawful secondary boycott protections under Section 10(l) are not primarily aimed at protecting the employer who has a dispute with the union, but those neutral employers — and their employees — who could otherwise suffer economic harm from a dispute in which they have no involvement. Ultimately, these provisions were intended to benefit the American economy. But to expand these seldom-invoked provisions to include the many unfair labor practice charges that arise during organizing efforts would distort their original intent while imposing an enormous burden on the General Counsel and the federal courts.

Conclusion

Throughout the 70-year history of the National Labor Relations Act, both management and labor have had various complaints about how the Act works and have proposed changes to it. Yet for all of its flaws, at its centerpiece is the ability of employees to register their votes in private, with government supervision to ensure that privacy and the absence of coercion or other activities that would taint that vote. Moreover, once that preference has been expressed, if the union is selected, it has been left to the parties to negotiate the agreement that will decide "mutually satisfactory conditions" in the workplace. With a few brief provisions, the Employee Free Choice Act would fundamentally alter these basic tenets while soundly contradicting the very title of the legislation.

Notes

[i] Jarol B. Manheim, TRENDS IN UNION CORPORATE CAMPAIGNS, 7.
[ii] *MGM Grand Hotel, Inc.,* 329 NLRB 464 (1999).
[iii] 351 NLRB No. 28 (Sept. 29, 2007).
[iv] Seventieth Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 2005, at 14.
[v] Office of General Counsel, Summary of Operations (Fiscal Year 2007) at 1.
[vi] *Id*.
[vii] "In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled… Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice. An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative." *General Shoe Corp*., 77 NLRB 124, 126-27 (1948).
[viii] NLRB Case Handling Manual, § 11304.3.
[ix] *Id*. at § 11306.
[x] In *Harsco Corp*., 336 NLRB 157, 158 (2001) the Board set forth the objective test for evaluating objectionable party misconduct. The test includes weighing several factors including: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party.
[xi] *General Shoe Corp*., 77 NLRB 124, 126-26 (1948).
[xii] *Connecticut Health Care Partners*, 325 NLRB 351, 368 (1998).
[xiii] See testimony of Dr. Gordon Lafer before the House Education and Labor Subcommittee on Health, Employment, Labor and Pensions (Feb. 8, 2007), available at http://edlabor.house.gov/testimony/020807GordonLafertestimony.pdf.
[xiv] Testimony of Charles I. Cohen before House Education and Labor Subcommittee on Health, Employment, Labor and Pensions at 12-13 (Feb. 8, 2007), available at http://edlabor.house.gov/testimony/020807ChuckCohentestimony.pdf.
[xv] *Linden Lumber v. NLRB*, 419 U.S. 301, 307 (1974).
[xvi] *NLRB v. Gissel Packing Co*., 395 U.S.575, 602 (1969).
[xvii] *Id*. at 602 n. 20 (citation omitted).
[xviii] Joint Brief of the United Automobile, Aerospace, and Agricultural Implement Workers of America, the United Food and Commercial Workers, and the AFL-CIO in *Chelsea Industries and Levitz Furniture Co. of the Pacific, Inc.*, Nos. 7-CA-36846, 7-CA-37016 and 20-CA-26596 (NLRB) at 13 (May 18, 1998), *quoting NLRB v. Gissel Packing Co*., 395 U.S. 575, 602 (1969) and *Brooks v. NLRB*, 348 U.S. 96, 99, 100 (1954).
[xix] Philip Duncan and Christine Lawrence, POLITICS IN AMERICA 1996, (1995) (average of AFL-CIO ratings 1989-94).
[xx] 139 Cong. Rec. H3556 (daily ed. June 15, 1993) (Statement of Rep. Schroeder).
[xxi] *American Beauty Baking* 198 NLRB 327, 328 n. 12 (1972).
[xxii] *Medline Industries, Inc. v. NLRB*, 593 F. 2d 788, 793-5 (7th Cir. 1979).
[xxiii] *Brancato Iron Works, Inc.*, 170 NLRB 75 (1968).
[xxiv] *Gaylord Bag Co*., 313 NLRB 306, 306 (1993).
[xxv] *Imco Container Co.*, 148 NLRB 312, 312-13 (1964).
[xxvi] *The Rowand Co., Inc.*, 210 NLRB 95, 95 (1974).
[xxvii] *City Welding & Mfg. Co*., 191 NLRB 124, 135 (1971).
[xxviii] Under current Board doctrine, a union may also lose its representation rights if an employer withdraws recognition and is able to objectively prove that the union has indeed lost majority support. *Levitz Furniture Co.*, 333 NLRB 717 (2001). However, the employer does so at its peril. It may not solicit the employees' views with a poll or by circulating a petition and if it is ultimately determined by the Board that majority support has not been lost, the employer's withdrawal of recognition is an unfair labor practice. Thus, except in instances where a union truly has no further interest in representing the employees, employer withdrawal of recognition is rare.

[xxix] The legislation does not address the situation raised by the pending *Dana/Metaldyne* case where a petition is filed during the initial bargaining period after the union has been certified.

[xxx] *Levitz Furniture Co.*, 333 NLRB 717 (2001).

[xxxi] *Steelworkers v. Warrior & Navigation Co.*, 363 U.S. 574, 578 (1960) (citations omitted); *see also*, S. REP. NO. 74-573, at 2 (1935) (after noting that maintaining industrial peace was the primary purpose of the NLRA, the committee report stated, "Prudence forbids any attempt by the Government to remove all the causes of labor disputes. Disputes about wages, hours of work, and other working conditions should continue to be resolved by the play of competitive forces, so far as the provisions of the codes of fair competition are not controlling. This bill in no respect regulates or even provides for supervision of wages or hours, nor does it establish any form of compulsory arbitration.").

[xxxii] NLRA § 8(a)(5).

[xxxiii] 79 Cong. Rec. S. 7571 (May 15, 1935) (Senator Wagner) ("Most emphatically this provision [duty to bargain] does not imply governmental supervision of wage or hour agreements. It does not compel anyone to make a compact of any kind if no terms are arrived at that are satisfactory to him. The very essence of collective bargaining is that either party shall be free to withdraw if its conditions are not met."); 79 Cong. Rec. S. 7659 (1935) (remarks of Senator Walsh) ("Let me say that the bill requires no employer to sign any contract, to make any agreement, to reach any understanding with any employee or group of employees… Nothing in this bill allows the Federal Government or any agency to fix wages, to regulate rates of pay, to limit, or to effect or govern any working condition in any establishment place or place of employment….").

[xxxiv] 397 U.S. 99 (1970).

[xxxv] *Id.* at 103-104 (emphasis added).

[xxxvi] *H.K. Porter Co., Disston Divison-Danville Works v. NLRB*, 397 U.S. 99, 104 (1970).

[xxxvii] S. Rep. No. 573, at 12 (1935).

[xxxviii] Senator Walsh provided an apt example. "A crude illustration is this: The bill indicates the method and manner in which employees may organize, the method and manner of selecting their representatives or spokesmen, and leads them to the office door of their employer with the legal authority to negotiate for their fellow employees. The bill does not go beyond the office door. It leaves the discussion between the employer and the employee, and the agreements which they may or may not make, voluntarily and with that sacredness and solemnity to a voluntary agreement with which both parties to an agreement should he enshrouded." 79 Cong. Rec. S. 7659 (1935) (Senator Walsh); *see also*, 79 Cong. Rec. S. 7672 (1935) (Senator Walsh) (remarking that the NLRA "only leads the employees to the door of the employer and states, 'These are the representatives chose by a majority of the workers and you should bargain with them.' That us all it does.").

[xxxix] 79 Cong. Rec. S. 7659 (1935) (Senator David Walsh); 79 Cong. Rec. S. 7672 (1935) (Senator Walsh).

[xl] *H.K. Porter Co., Disston Divison-Danville Works v. NLRB*, 397 U.S. 99, 103 (1970).

[xli] *H.K. Porter Co., Disston Divison-Danville Works v. NLRB*, 397 U.S. 99, 102 (1970)

[xlii] *Pacific Neo-gravure*, 51 LA 14, 24 (Platt, 1968) (citing *NLRB v. Insurance Agents Union*, 361 US 490 (1960) ("While government has provided the statutory framework for bargaining through the enactment of the National Labor Relations Act, the issues — the substantive wages, hours, and working conditions, as well as agreement on procedures for disputes settlement and no strike pledges — are, in the main, for the parties to agree upon. Collective bargaining is a process of reaching agreement; and the statutory rules of the game are that the employees may strike if dissatisfied with the terms offered by the employer and the employer may close his plant if, in his opinion, the union becomes unreasonable in its demands. The strike and the threat of strikes are thus themselves a part of the bargaining process and are, so to speak, the catalysts which make agreement possible.").

[xliii] *Pacific Neo-gravure*, 51 LA 14, 24 (Platt, 1968) (citing *NLRB v. Insurance Agents Union*, 361 US 490 (1960).

[xliv] *Steelworkers v. Warrior & Navigation Co.*, 363 U.S. 574, 580 (1960); *Cole v. Int'l Security Services*, 105 F.3d 1465,1473-74 (D.C. Cir. 1997).

[xlv] Archibald Cox, *Arbitration in the Light of the Lincoln Mills Case*, ARBITRATION AND THE LAW, 36 (1959); *NLRB v. Highland Park Mfg. Co.*, 110 F.2d 632, 638 (4th Cir. 1940).

[xlvi] *Steelworkers v. Warrior & Navigation Co.*, 363 U.S. 574, 580 (1960).

[xlvii] *NLRB v. Highland Park Mfg. Co.*, 110 F.2d 632, 638 (4th Cir. 1940).

[xlviii] *Steelworkers v. Warrior & Navigation Co.*, 363 U.S. 574, 578 (1960) (noting that federal labor policy "is to promote industrial stabilization through the collective bargaining agreement. A major function in achieving industrial peace is the inclusion of a provision for arbitration agreements is in the collective bargaining agreement.") (citations omitted); *see also*, Ray, Sharpe, Strassfeld, UNDERSTANDING LABOR LAW, 337 (2003).

[xlix] Elkouri & Elkouri, HOW ARBITRATION WORKS, 3 (6 ed. Alan Miles Rubin Editor-in-Chief); Thomas E. Carbonneau, EMPLOYMENT ARBITRATION, 11 (2 ed. 2006) (Arbitration is a private, voluntary, and non-judicial trial procedure for deciding disputes. The parties to the dispute confer on an

arbitrator or arbitral panel the authority to adjudicate a specific dispute or type of dispute. The arbitrator's decision is binding (i.e., the arbitrator's order can be enforced in courts)).

[l] Thomas E. Carbonneau, EMPLOYMENT ARBITRATION, 11 (2 ed. 2006); *Volt Info Sciences, Inc. v. Leland Standford Junior University*, 489 U.S. 468, 474 (1989).

[li] *Should the Federal Government Require Arbitration of Labor Disputes in American industries?*, 26 Cong. Dig. 193, 195 (1947).

[lii] *Steelworkers v. Warrior & Navigation Co.*, 363 U.S. 574, 582 (1960).

[liii] Elkouri & Elkouri, HOW ARBITRATION WORKS, 108 (6 ed. Alan Miles Rubin Editor-in-Chief)..

[liv] Elkouri & Elkouri, HOW ARBITRATION WORKS, 108 (6 ed. Alan Miles Rubin Editor-in-Chief).

[lv] *Elgin, Joilet & E. Ry. v. Burley*, 325 US 711, 723 (1945).

[lvi] *Elgin, Joilet & E. Ry. v. Burley*, 325 US 711, 723 (1945).

[lvii] *Zia Company*, 72 LA 383, 386 (Johannes, 1979).

[lviii] *New York Shipping Assn*., 36 LA 44, 45 (Stein, 1960).

[lix] *Billings Contractors' Council*, 33 LA 451, 455 (Heliker, 1959).

[lx] Elkouri & Elkouri, HOW ARBITRATION WORKS, 105 (6 ed. Alan Miles Rubin Editor-in-Chief

[lxi] *Pacific Neo-gravure*, 51 LA 14, 25 (Platt, 1968) (emphasis added).

[lxii] S. Rep. No. 74-573, at 2 (1935).

[lxiii] 79 Cong. Rec. S. 7573 (May 15, 1935) (Senator Wagner) (emphasis added).

[lxiv] 79 Cong. Rec. S. 7573 (May 15, 1935) (Senator Wagner) (emphasis added).

[lxv] Hearings before the Committee on Labor, House of Representatives, H.R. 6288, 74th Cong. 1st Sess., Testimony of Senator Robert F. Wagner (D-NY), at 21(emphasis added).

[lxvi] 397 U.S. 99 (1970).

[lxvii] *H.K. Porter Co., Disston Divison-Danville Works v. NLRB*, 397 U.S. 99, 101 (1970)

[lxviii] *United Steel Workers v. NLRB*, 389 F.2d 295, 298 (D.C. Cir. 1967).

[lxix] *H.K. Porter Co., Disston Divison-Danville Works v. NLRB*, 397 U.S. 99, 102 (1970).

[lxx] *H.K. Porter Co., Disston Divison-Danville Works v. NLRB*, 397 U.S. 99, 102 (1970)

[lxxi] *H.K. Porter Co., Disston Divison-Danville Works v. NLRB*, 397 U.S. 99, 108 (1970).

[lxxii] *H.K. Porter Co., Disston Divison-Danville Works v. NLRB*, 397 U.S. 99, 108 (1970).

[lxxiii] 51 LA 14, 25 (Platt, 1968).

[lxxiv] *Id*. at 22.

[lxxv] *Pacific Neo-gravure*, 51 LA 14, 25 (Platt, 1968) (emphasis added).

[lxxvi] 13 LA 115, 125 (Haughton, 1949).

[lxxvii] *San Joaquin Baking Co.*, 13 LA 115, 125 (Haughton, 1949).

[lxxviii] *San Joaquin Baking Co.*, 13 LA 115, 125 (Haughton, 1949) (emphasis added).

[lxxix] Testimony of Peter J. Hurtgen before Senate Health, Education, Labor and Pensions Committee, at 16 (March 27, 2007), available at http://help.senate.gov/Hearings/2007_03_27_a/Hurtgen.pdf..

[lxxx] *Pacific Neo-gravure*, 51 LA 14, 25 (Platt, 1968); *see also*, *Asplundh Tree Expert Co.*, 89 LA 183, 187 (Allen, Jr., 1987) (employer opted to eliminate interest arbitration provisions from future collective bargaining agreements because "the Union did not negotiate in good faith because of the safety net supplied by interest arbitration.").

[lxxxi] *San Joaquin Baking Co.*, 13 LA 115, 125 (Haughton, 1949).

[lxxxii] *Reading St. Ry.*, 6 LA 860, 871 (Simkin, 1947). In *United Traction Company*, 27 LA 309 (Scheiber, 1956), the terms and conditions of a collective bargaining agreement had been submitted to an Arbitration Board and the company sought to have the interest arbitration provision eliminated from future contracts. The Board of Arbitration noted, "the Company is understandably reluctant to give a Board of Arbitration a 'blank check' because in some instances unhappy or dissidents in the arbitration process have described its results '*as a one-way street to bankruptcy*,' thereby ignoring the numerous instances where arbitration brought industrial peace with due regard for what was justly due to all concern. Also, sight should not be lost of the many transit properties which have ended in bankruptcy through no fault of arbitration nor for that matter of unionization." *Id*. at 318 (emphasis added). The Board of Arbitration pointed out that the company had agreed to the interest arbitration provision in the original contract. In first contract interest arbitration under the Employee Free Choice Act, however, the parties will not have the option of agreeing to interest arbitration. It will be thrust on them by statute.

[lxxxiii] 89 LA 183 (Allen, Jr., 1987).

[lxxxiv] *Id*. at 187.

[lxxxv] *Laclede Gas Co.*, 49 LA 1270, 1273 (Erbs, Brazil, and White, 1967). Another arbitrator rejected the invitation to "substitute himself for the collective bargaining process and amend the contract in conformance with his own view of industrial justice." Indeed, he noted, "This I am without power to do." *Libby McNeill & Libby*, 54 LA 1295, 1298 (Marshall, 1970).

[lxxxvi] *Junior House Collectibles*, 94 LA 673 (Redel, 1990).

[lxxxvii] *Junior House Collectibles*, 94 LA 673, 675 (Redel, 1990).

[lxxxviii] *Junior House Collectibles*, 94 LA 673, 675 (Redel, 1990).

[lxxxix] *Junior House Collectibles*, 94 LA 673, 676 (Redel, 1990).

[xc] *Clean Coverall Supply Co.*, 47 LA 272 (Witney, 1966).

[xci] *Clean Coverall Supply Co.*, 47 LA 272, 277 (Witney, 1966).

[xcii] *Clean Coverall Supply Co.*, 47 LA 272, 277 (Witney, 1966).

[xciii] 57 LA 796 (Karasick, 1971).

[xciv] *Employer and Union Trustees*, 57 LA 796, 801 (Karasick, 1971).

[xcv] Testimony of Peter J. Hurtgen before Senate Health, Education, Labor and Pensions Committee, at 15 (March 27, 2007), available at http://help.senate.gov/Hearings/2007_03_27_a/Hurtgen.pdf.

[xcvi] *Cole v. Int'l Security Services*, 105 F.3d 1465, 1476 (D.C. Cir. 1997).

[xcvii] *City of Biddeford v. Biddeford Teachers Ass'n*, 304 A.2d 387, 400 (Me. 1973) (holding that the law failed to provide sufficient standards necessary to protect the parties from a "possible arbitrary and irresponsible exercise of this delegated power"); *Erie Firefighters Local No. 293 v. Gardner*, 178 A.2d 691 (Pa. 1962); *State v. Traffic Tel. Workers' Fed. of N.J.*, 66 A.2d 616, 625 (N.J. 1949). *See also*, *Transit Auth. Lexington-Fayette Urban Cty. Gov't v. ATU*, 698 S.W.2d 520 (Ky. 1985); *Salt Lake City v. International Ass'n of Firefighters*, Local 1645, 563 P.2d 786, (Utah 1977); *City of Sioux Falls v. Sioux Falls Firefighters' Local 814*, 234 N.W. 2d 35, 37-38 (S.D. 1975).

[xcviii] 563 P.2d 786, 789 (Utah 1977).

[xcix] *Id*. (citation omitted).

[c] *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

[ci] Under Title VII and other discrimination laws, the employee must file a charge with the Equal Employment Opportunity Commission or a state agency. However, unlike the NLRB, which must proceed in a case where a charge has merit and is not settled, those agencies have the discretion as to whether to proceed or issue a so-called "right to sue" letter to the individual.

[cii] Office of General Counsel, Summary of Operations (Fiscal Year 2006) at 1.

[ciii] In FY 2005, 7.3 percent of all charges filed were 8(b)(4) cases, which involve secondary activity. See Seventieth Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 2005, at (Table2).

[civ] Office of General Counsel, Summary of Operations (Fiscal Year 2007) at 6.

Section 10
Sample Letters to Congress

Make Your Voice Heard: Sample Letters to Congress

The following are sample letters for you to send to your Senators or Congressmen and women. Feel free to use the text as is, supplement it with your own personal story, or write your own letter telling Washington why EFCA would hurt you, your town, and the American economy.

I. I am an EMPLOYEE, who is not represented by a union

Dear Member of Congress:

I am against the Employee Free Choice Act. As an employee who is not represented by a union, I have a lot at stake. EFCA would take away my right to a private ballot vote, the ability to get information from my employer and the union – and hear arguments from both sides. If my coworkers and I were to decide to have a union, it would be so that our employer and our union could decide the terms of our contract. I certainly would not want the company or the union knowing how I voted nor do I want to have government-appointed bureaucrats deciding my contract terms and intervening in my workplace. I do not believe EFCA or more labor laws that give more power to the unions would help the Middle Class. We can't afford EFCA. Please vote against it and any other labor laws that could hurt workers and cost jobs. Thank you.

II. I am an EMPLOYEE, who is represented by a union

Dear Member of Congress:

I am a member of a union and I do not support the Employee Free Choice Act. Under existing labor laws, employees like me can decide whether to have a union by casting our votes privately. Employees have access to information from both the union and the company so they can make the decision that is best for themselves. I want these rights protected. Also, I worry that any new labor laws that give more power to unions and government-appointed arbitrators could hurt my company financially and, by extension, cost me my job. We can't afford EFCA. Our labor laws our working. Please vote against EFCA and any other labor legislation that would take away rights from workers, hurt businesses and cost jobs. Thank you.

III. I am a SMALL BUSINESS OWNER, with more than $500,000 in annual revenue

Dear Member of Congress:

As a small business owner, I am opposed to the Employee Free Choice Act and any other labor laws that would interfere with my relationship with my workers and my ability to grow my business and continue to provide good jobs. The fact is, I can't afford EFCA. The costs associated with the mandatory first contract arbitration process – a process that is vague and without defined standards – would be crippling. And pay, benefit, and work rule provisions decided by government-appointed arbitrators unfamiliar with my business would likely be unsustainable. I'm aware of economic studies that estimate EFCA would result in 600,000 jobs lost in the first year of enactment alone. Greater power for unions and more government intervention in the workplace won't help Main Street and those of us who are working hard to make a living and provide good jobs. Over the past 50 years, Congress has passed more than 30 significant changes in our workplace laws. We do not need unnecessary legislation that will hurt my business and, by extension, by ability to provide and create jobs. We need less bureaucracy, not more. Please vote against EFCA and any other labor laws that could hurt business owners like me. Thank you for your careful consideration.

IV. I am a BUSINESS EXECUTIVE, of either a union or a non-union workforce

Dear Member of Congress:

I am writing to express my opposition to the Employee Free Choice Act and any other labor laws that would negatively impact my company and its ability to compete, generate profits and, by extension, provide good jobs and benefits to our employees – both union and non-union – who depend on a financially strong enterprise for their economic well-being.

The fact is, EFCA's provisions – particularly those associated with the mandatory first contract arbitration provision – are intrusive, unrealistic, vague and unfair. With increased competition in today's global economy, we simply can't afford to have government-appointed arbitrators unfamiliar with our business strategy intrude in and make final decisions about the terms of our labor agreements - one of our most significant costs. Moreover, we know from experience that the 120-day deadline is unrealistic; first contracts are simply too complex to be responsibly developed within that artificial timeframe. The process's lack of guidelines and standards is vague and therefore fraught with risk.

Finally, the legislation, considered in its entirety, is unfair and undemocratic for the following reasons:

- Imposing additional penalties on companies, but not unions;
- Limiting employees' ability to hear from all sides of the issue as to whether to form a union; and
- Replacing employees' right to a private vote with the card check process unfairly upsets the balance of power between a company and a union to the detriment of our workers and our ability to compete in the global marketplace. Our current laws are working, as evidenced by the fact that unions win well over half of NLRB-conducted elections.

To be clear, we are not anti-union. We have enjoyed constructive relations with our unions for many years and we respect and support our employees' right to determine for themselves – through the free and fair election process currently stipulated by federal labor laws – whether or not they want to be represented.

What we cannot support are any new labor laws that would fundamentally change the way we do business and will most assuredly result in the unintended consequence of damaging our company, our ability to compete and provide jobs, and ultimately, our economy. We cannot afford EFCA and urge you to oppose it.

Thank you in advance for your most careful consideration of this matter.

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