

The Employee Free Choice Act

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Hailed by organized labor as its top legislative priority, the Employee Free Choice Act (“EFCA”) would amend the National Labor Relations Act to make it significantly easier for unions to organize employees, to require binding arbitration of first contracts after 120 days, and to stiffen penalties for certain unfair labor practices.

I. An Overview of EFCA

If enacted, EFCA would require certification of a union as the exclusive bargaining representative for a group of employees if the National Labor Relations Board (the “NLRB” or the “Board”) finds that a majority of employees in an appropriate unit has signed authorizations designating the union as its bargaining representative. The bill would require the Board to develop model authorization language and procedures for establishing the validity of signed authorizations. Under current law, an employer is generally not required to recognize a union as a bargaining representative unless the union prevails in an NLRB-conducted secret ballot election.

EFCA would also provide that if an employer and a union are engaged in bargaining for their first contract and are unable to reach agreement within 90 days, either party may refer the dispute to the Federal Mediation and Conciliation Service (FMCS) for mediation. If the FMCS has been unable to bring the parties to agreement after 30 days of mediation the dispute will be referred to arbitration and the results of the arbitration shall be binding on the parties for two years. Time limits may be extended by mutual agreement of the parties.

Finally, EFCA would stiffen remedial measures for certain employer unfair labor practices. Just as the NLRB is currently required to seek a federal court

injunction against a union whenever there is reasonable cause to believe that the union has violated the secondary boycott prohibitions in the Act, EFCA would require the NLRB to seek a federal court injunction against an employer whenever there is reasonable cause to believe that the employer has discharged or discriminated against employees, threatened to discharge or discriminate against employees, or engaged in conduct that significantly interferes with employee rights during an organizing drive or first contract negotiations. EFCA would authorize federal courts to grant temporary restraining orders or other appropriate injunctive relief. Additionally, EFCA would increase the amount an employer is required to pay when an employee is discharged or discriminated against during an organizing campaign or first contract negotiations to three times back pay. Finally, the Act would provide for civil fines of up to \$20,000 per violation against employers found to have willfully or repeatedly violated employees' rights during an organizing campaign or first contract negotiations.

II. EFCA Legislative History

EFCA was first introduced in the 108th Congress on November 21, 2003 by Rep. George Miller (D-CA) and Sen. Edward Kennedy (D-MA). The bill died in committees in both the House and Senate. Re-introduced by the same sponsors in the 109th Congress on April 19, 2005, the bill suffered the same fate. With Democrats winning majorities in both houses of Congress in the 2006 elections, the bills backers had grounds for renewed optimism. Indeed, on December 7, 2006, newly-elected House Speaker Nancy Pelosi told the *New York Times*: "We certainly will be passing the card check, the Employee Free Choice Act."¹

On February 5, 2007, in the early days of the 100th Congress, Rep. Miller re-introduced EFCA as H.R. 800, this time with 232 co-sponsors. In his introductory remarks, Rep. Miller said:

¹ Stephen Greenhouse, *Labor Presses for Measure to Ease Unionizing*, N.Y. TIMES, Dec. 8, 2006, available at <http://www.nytimes.com/2006/12/08/washington/08labor.html>.

The current process for forming unions is badly broken and so skewed in favor of those who oppose unions, that workers must literally risk their jobs in order form a union. Although it is illegal, one quarter of employers facing an organizing drive have been found to fire at least one worker who supports a union. In fact, employees who are active union supporters have a one-in-five chance of being fired for legal union activities. Sadly, many employers resort to spying, threats, intimidation, harassment and other illegal activity in their campaigns to oppose unions. The penalty for illegal activity, including firing workers for engaging in protected activity, is so weak that it does little to deter law breakers.

Even when employers don't break the law, the process itself stacks the deck against union supporters. The employer has all the power; they control the information workers can receive, can force workers to attend anti-union meetings during work hours, can force workers to meet with supervisors who deliver anti-union messages, and can even imply that the business will close if the union wins. Union supporters' access to employees, on the other hand, is heavily restricted.

The Employee Free Choice Act would add some fairness to the system²

On February 8, 2007 – just three days after the bill's re-introduction – the House Subcommittee on Health, Employment, Labor and Pensions held a one-day hearing on EFCA. Less than a week later, the full Committee on Education and Labor held a mark-up session. During the mark-up session, Committee Republicans offered thirteen amendments, none of which received majority support. The Committee approved the original bill by a vote of 26-19 and reported it to the full House for a floor vote.³

On February 28, 2007, the House Rules Committee considered the extent to which floor amendments, including many similar to those rejected during the mark-up session, would be permitted. The following chart, reproduced from the

² 153 Cong. Rec. E260 (Feb. 5, 2007) (statement of Rep. Miller).

³ House Committee on Education and Labor, Roll Call No. 14, Feb. 14, 2007, *available at* <http://edlabor.house.gov/markups/pdfs/20070214HR800vote.pdf>.

Rules Committee's website,⁴ indicates the floor amendments proposed by members:

- Blunt (MO)** #6 The amendment strikes section 2 of the bill (provisions relating to mandatory recognition by way of card check).
- Boustany (LA)** #10 The amendment makes it an unfair labor practice under the National Labor Relations Act for a union to fail to return a previously signed authorization card within five days of an employee's request.
- Brown-Waite (FL)** #2 This amendment would prevent labor unions from collecting any membership fees from a particular individual without first verifying that the employee is a citizen or lawful resident permitted to work in the United States. The verification process must be independent of that utilized by employers.
- Chabot (OH)** #11 The amendment would exempt small businesses (as defined by the Small Business Administration) from the union certification process described in the bill.
- Davis, David (TN)** #9 This amendment would amend section 4 of H.R. 800 to make the bill's civil penalty and liquidated damages provisions (which the bill applies to employers) also apply to unions that coerce an employee during a card check campaign or first

⁴ House Rules Committee, Summary of Amendments Submitted to the Rules Committee for H.R. 800, February 27, 2007, *available at* http://www.rules.house.gov/amendment_details.aspx?NewsID=2518.

contract negotiation.

Emerson (MO) #12 This amendment would exempt businesses employing 50 individuals or less from the legislation.

Emerson (MO) #16 **(LATE)** Amendment would change initial negotiation period from 90 days to 120 days, then change mediation period from 30 days to 120 days.

Foxx (NC) #7 The amendment requires the National Labor Relations Board to promulgate standards and a model notice for an employee to put him- or herself on a “do not call or contact” list to avoid union solicitation.

King, Steve (IA) #13 An amendment allowing for provisions under HR 800 giving exemptions to businesses employing 50 persons or smaller, similar to the enforcement clause of the Family Medical Leave Act.

King, Steve (IA) #14 **Amendment in the Nature of a Substitute.** The amendment would allow business to hire only workers who seek bona fide employment with a company. This bill would also allow employers to fire an employee who engages in a "salting campaign" instead of doing his or her job.

King, Steve (IA) #15 This amendment would allow for rescinding authorization of a private person wishing to withdraw support for a labor organization. A worker's right to withdraw in writing to the NLRB from a union will be 1) held in confidence and 2) publicly posted in places of employment. A fine of up to \$5,000 can be levied in the event of breach of privacy to labor organizations or employees.

Kline (MN) #5 This amendment would allow employees to present a majority of signed cards to decertify a union, rather than the required use of secret ballot election under current law (which is unchanged by H.R. 800). Upon a showing of a valid majority of cards seeking decertification, the National Labor Relations Board would be required to decertify a union.

McKeon (CA) #4 **Amendment in the Nature of a Substitute.** This amendment in the nature of a substitute would strike the underlying text and insert in its place the text of H.R. 866, the Secret Ballot Protection Act. The amendment would prohibit the recognition of unions via card check, and provide that a union may only be recognized and certified after a secret ballot election conducted by the National Labor Relations Board.

Musgrave (CO) #3 This amendment would amend the National Labor Relations Act to repeal those provisions that permit employers, pursuant to a collective bargaining

agreement that includes a union security agreement, to require employees to join or pay dues or fees to a union as a condition of employment.

Price, Tom (GA) #8 The amendment would require that in order to be considered valid, a signed authorization card must be accompanied by an attestation that the signer is a U.S. citizen or lawful resident alien, and be accompanied by documentary evidence showing same.

Shays (CT) #1 The amendment gives the NLRB a six month deadline to issue decisions for less difficult cases and a one year deadline for more difficult cases (those that "present novel questions of the law.")

Should the NLRB not reach a decision within six months, they must report to Congress on why such a deadline was not met and what steps it is taking to reach a decision.

The Rules Committee permitted consideration only of the amendments proposed by Rep. Fox (#6 above), Rep. McKeon (#4 above), and the anti-salting amendment offered by Rep. King (#14 above).⁵

On March 1, 2007, after about two and one-half hours of debate, the House of Representatives passed EFCA without any amendments to the original

⁵ H.R. Rep. No. 110-23 (2007) (Conf. Rep.).

text by a vote of 241 - 185. Thirteen Republicans voted in favor of the measure, while only two Democrats voted against it.⁶

EFCA encountered an almost immediate “silent filibuster” in the Senate. In the debate over a Motion to Invoke Cloture (which would have permitted a Senate vote on EFCA), Sen. Mike Enzi (R-WY), addressed the above-quoted arguments from Rep. Miller’s introductory remarks in the House of Representatives:

Yesterday, we heard this same myth repeated, and it is based on three phony analyses by stridently prounion researchers, who often make a series of wholly unfounded assumptions and routinely misuse statistical data.

The first analysis arrives at its conclusions by taking the number of National Labor Relations Board reinstatements offered each year, assuming that half occur in the context of an organizing campaign, and then dividing that number into some completely mythical and arbitrary number of "union supporters". Now, even if the first assumption was right, it is the number of supporters that matters. The lower the number, the more dramatic it looks. This number, however, is completely made up. There is no factual basis for determining this number.

Here are the facts. In 2004, for example, nearly 150,000 employees were eligible voters in National Labor Relations Board elections. Using their assumptions, there were only about 1,000 reinstatement offers that year. That is not 1 in 5; that is 1 in 150. Even that is likely very high since the vast majority of these offers are settlements which do not account for the fact that many of these terminations may have been perfectly lawful. Moreover, since unions won over 61 percent of these elections, their supporters amounted to at least 90,000.

Now, the second "analysis" uses the National Labor Relations Board's backpay figures as the basis for this claim. Here is the problem. The vast majority of those backpay claims do not arise in the context of an organizing campaign. They do not involve union employee terminations. And they do not single out union supporters. Most involve bargaining violations with already-established unions. In 2000, for example, two-thirds of the backpay

⁶ 153 Cong. Rec. H2078 (Mar. 1, 2007) (Passed by recorded vote: 241 – 185, Roll no. 118).

number involved a single case that had absolutely nothing to do with an organizing campaign.

The third study consisted of stridently prounion researchers calling union organizers about campaigns they conducted over a short period of time in an isolated geographic area. The "statistics" relied on were nothing more than untested anecdotes.

So as this discussion continues, we are not going to allow incorrect and distorted numbers, and misused and misinterpreted data to obscure what is really at issue here. This is about taking away the right for people to have a secret ballot. Again, I want to reiterate that while this bill may be grossly misnamed as the Employee Free Choice Act, it has absolutely nothing to do with preserving free choice. In fact, it's just the opposite. How would you like to have someone come into your house with two or three people--one of them being very big--and pressuring you to sign a union card? Would you feel a little intimidated? Most people certainly would. Would you sign because you felt pressured, because you just wanted to have people stop bothering you, or because you didn't want to offend a co-worker or friend? Most people would. However, under this bill all a union would have to do is obtain 51 percent this way and it is automatic.⁷

On June 26, 2007, the Motion to Invoke Cloture garnered 51 votes, nine shy of the number required to end the filibuster.⁸

III. Criticisms of EFCA

A. Unreliability of Authorization Cards

Currently, when faced with a claim that a majority of employees in a workplace desires union representation, the NLRB conducts a secret-ballot election to resolve the issue.⁹ The secret-ballot election is a hallmark of

⁷ 153 Cong. Rec. S8288 (June 22, 2007).

⁸ 153 Cong. Rec. S8398 (June 26, 2007).

⁹ Currently, the law also allows employers and unions the option of bypassing Board elections and voluntarily agreeing to union recognition upon presentation of authorization cards signed by a majority of employees. Dana Corp., 351 NLRB No. 28 (2007). Still, the secret ballot process remains the preferable method of determining representation issues.

American democracy: it has long been the method by which we elect our political leaders, and for decades it has been the primary way employees demonstrate whether or not they wish to be represented by a union. Whether to opt for union representation is one of the most significant decisions of an employee's working life. Voting privately by secret-ballot, outside the observation of the union, the employer or the government, ensures that the employee may cast a vote according to his or her conscience – free of coercion or intimidation by either management or the union.

To obtain a Board-run representation (or “RC”) election, a union and/or group of employees may file a petition with the Board. The petition must simply be submitted with a sufficient “showing of interest” – i.e., objective proof that at least 30% of the employees wish to be represented by a union. This proof most often comes in the form of signed authorization cards prepared, distributed and collected by union organizers. Although the Board only requires cards signed by 30% of the employees to *start* the process toward an election, it is widely acknowledged by union organizers that they generally do not file a petition unless and until they have signed cards from as many as 60-80% of the employees -- well more than the majority required to win the election.¹⁰

During the weeks leading up to an election, the affected employees currently have the opportunity to receive as much information as possible about all the potential consequences of union representation. The union and its professional organizers have the opportunity to communicate with the

¹⁰ See, e.g., Teamsters Airline Division webpage, <http://www.teamster.org/divisions/Airline/airlineorganizing.htm> (“the general policy of the Airline Division is to file for a representation election only after receiving a 65-percent card return from the eligible voters in a group”); Motion Picture Editors Guild website, http://www.editorsguild.com/v2/getting_started.htm (“While not a hard and fast rule, ideally, we like to see between 70 and 80 percent of the crew sign”); New England Nurses Association website, http://www.nenurses.org/your_rights.htm (“Have 70–75 percent of members sign cards; if unable to reach this goal, review plan”); Steven H. Lopez, *Reorganizing the Rust Belt: An Inside Study of the American Labor Movement* 38 (2004), (“...the rule of thumb in the SEIU is that it's unwise to file for an election when fewer than 70 percent of the workforce have signed interest cards.”)

employees,¹¹ to state what the union believes it can accomplish, and to explain why they think employees should choose union representation. The employer also has protected free speech rights to communicate its views and preferences with employees in a non-coercive manner.¹²

On the day of an NLRB election, an agent of the Board conducts the balloting in private. He or she brings to the polling site official ballots, a secure ballot box and a voting booth, designed and constructed to protect each voter from all observation by others while marking his or her ballot. The voting area itself is completely off-limits to all of the employer's supervisory personnel. The only people allowed in the area are the eligible voters, the Board agent, and one employee representative for each party – present to ensure a fair, properly run voting process.

All eligible voters have an opportunity to cast a ballot to determine the binding results – away from the prying eyes and potentially intimidating pressure of either the union or the employer. If a majority of valid ballots cast in this secure process demonstrates a desire for union representation, and there are no valid legal objections,¹³ the union is certified as the employees' exclusive bargaining representative. Conversely, if a majority is not cast in the union's favor, the union is not certified. Current law thus assures democracy for all

¹¹ A union organizer working in tandem with pro-union employees has almost always already amassed contact information about all the targeted employees long before a petition is ever filed. Still, in order to guarantee the ability of *both* sides to communicate with *all* employees, pursuant to the Board's decision in Excelsior Underwear, Inc. 156 NLRB 1236 (1966), within seven (7) days after the scheduling of an election, the employer must provide the union with the names and addresses of all eligible voters in the unit.

¹² Section 8(c) of the National Labor Relations Act guarantees *all* parties the right to communicate with employees regarding the issue of union representation:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this [Act] subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 158(c).

¹³ Either party may file objections within seven (7) days of an election. 29 C.F.R. § 102.69(a).

employees in the workplace. It is ultimately the protected, free and democratic expression of the employees' true desires, after an opportunity for fully-informed exploration of the relevant issues, which determines the outcome.

EFCA would dispose of the guarantee of a secret-ballot election and require the Board to certify a union as the exclusive bargaining representative of all employees in a bargaining unit as soon as it receives authorization cards signed by a majority of the employees.¹⁴ Most courts that have considered the issue have found that the card-check process is a “notoriously unreliable method of determining majority status of a union.”¹⁵ For decades, the NLRB, United States Supreme Court, and the various federal courts have all recognized that card-check is “admittedly inferior to the election process.”¹⁶ Acknowledging the overt influence of the person presenting the card to employees for signature, numerous courts have held: “[I]t is beyond dispute that secret election is a more accurate reflection of the employees' true desires than a check of authorization cards collected at the behest of a union organizer.”¹⁷

EFCA ignores the widely understood reality that an employee may sign a card -- at the “behest of a union organizer” or co-worker -- for numerous reasons other than the employee's genuine desire for union representation. The Court of Appeals for the Seventh Circuit recognized years ago:

¹⁴ “If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed authorizations designating the individual labor organization specified in the petition as their bargaining representative... **the Board shall not direct an election but shall certify the individual or labor organization as the representative** described in subsection (a).” H.R. 800, 110th Cong., 1st Sess. § 2 (2007) (emphasis supplied). The legislation further directs the Board to draft model authorization language to be used by union organizers, and to devise procedures for confirming the authenticity of signatures. Id.

¹⁵ NLRB v. Flomatic Corp., 347 F.2d 74, 78 (2d Cir. 1965).

¹⁶ NLRB v. Gissel Packing Co., 395 U.S. 575, 603 (1969). See also United Services for the Handicapped v. NLRB, 678 F.2d 661, 664 (6th Cir. 1982) (“An election is the preferred method of determining the choice by employees of a collective bargaining representative.”); NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 565 (4th Cir. 1967) (“It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a ‘card check’....”).

¹⁷ Flomatic, 347 F.2d at 78. See also Pizza Products Corp. v. NLRB, 369 F.2d 431 (6th Cir. 1966); NLRB v. C. J. Glasgow Co., 356 F.2d 476, 481 (7th Cir. 1966).

Workers sometimes sign authorization cards not because they intend to vote for the union in an election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back....¹⁸

Employees who sign cards under such circumstances are currently protected by their ability to vote their true desires in private, without fear of retaliation by co-workers or union representatives. Even if an employee signed an authorization card because he or she was threatened, or misled by a union representative – or for that matter, if an employee refused to sign a card for fear of management reprisal -- that employee has the opportunity to vote his or her own conscience behind the curtain, with the full confidence that neither the union representative, nor his or her co-workers nor his or her boss will ever know how he or she voted. EFCA will discard that important employee protection and force an employee to make a critical decision about his or her future on the basis of a face-to-face confrontation with a union organizer – and any corresponding pressure it may bring to bear.

B. Potential Denial of a Voice to Nearly Half of the Affected Employees

Under EFCA's proposed card-check system, a significant decision about working lives of all employees in a bargaining unit may to be made by a select fraction of the unit without other affected workers even being aware that such a decision is on the table. A union organizer need approach only the employees he or she ascertains to support the union, in an effort to quickly and quietly gather signatures from the 50% (plus one) needed to bind everyone. Thus, the employer may be forced to recognize a union as the exclusive representative of a large contingent of its employees who never had an opportunity to voice their opinion on the issue. While it is true that a simple majority can also bind an

¹⁸ *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1371 (7th Cir. 1983). The A.F.L.-C.I.O. has admitted as much in prior editions of its *Guidebooks for Organizers*, noting that cards are “at best a signifying of an intention at a given moment,” and that they may be signed by an employee “to get the union off [his] back.” See Woodrow J. Sandler, Another Worry for Employers, U.S. News & World Report, March 15, 1965 (quoting A.F.L.-C.I.O., *Guidebook for Union Organizers* (1961)).

entire workforce in a secret ballot election, NLRB election rules provide detail notice procedures. Those procedures ensure that each and every employee has the opportunity not only to vote in the election but also to discuss the issue with his or her co-workers and to attempt to persuade them on the issue.

In a 2007 voluntary card-check recognition case involving nurses at Kaiser Permanente in Orange County, California, some nurses complained that: "Many of us were not even aware the vote was actually taking place."¹⁹ NLRB Assistant Regional Director James Small told the *Orange County Register* that such complaints were common after a union gains recognition through a card check: "Many times individuals call us and ... say we never had a chance to vote on this or they will say we never understood that signing this card would result in the union getting in."²⁰

EFCA's potential disenfranchisement of minority voices undermines their rights not to be represented by a union, currently protected by Section 7 of the Act.²¹

C. Curtailment of Free Speech

"Informed consent" is a fundamental principle in many areas of the American legal system. We generally recognize and respect the importance of an individual's consent to a particular act based upon a full appreciation and understanding of the facts and implications of that act. Under the current system, the "free speech" rights guaranteed by Section 8(c) of the National Labor Relations Act ensure that all parties to an election have the opportunity to present facts, opinions and information regarding the issue of union

¹⁹ Andrew Galvin, *Kaiser Midwives Strike Back*, ORANGE COUNTY REGISTER, May 23, 2007, available at http://www.ocregister.com/ocregister/money/homepage/article_1703303.php.

²⁰ *Id.*

²¹ The fundamental protections of the National Labor Relations Act currently provide: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, **and shall also have the right to refrain from any or all such activities....**" 29 U.S.C. §157 (emphasis added).

representation. This provides employees with a chance to hear all sides of the story – both the “pro’s” and the possible “con’s” of union representation. Moreover, it allows employees to assess the credibility of the parties’ claims, and protects them against misrepresentation by either side. EFCA seeks to impede employee receipt of all this useful information by curtailing the “free speech” rights of the opponents of union representation.

As a practical matter, under EFCA, union organizers will not file a petition with the Board until they already have the signed authorization cards sealing the employees’ fate. In many cases, the employer and employees may not even know that some of the employees are considering union representation until recognition is a fait accompli. This deprives employees of an invaluable source of information about the significance of the cards -- namely, the facts, opinions, and experiences of the employer. Management’s communication with employees undoubtedly helps paint a more complete picture for the employees’ consideration when placed alongside the unabashedly rosy, pro-union “sales pitch” the professional union organizer is sure to provide. Thus, EFCA seeks to restrain severely, if not eliminate altogether, the employees’ ability to receive this information, critical of union representation, before the employees are forced to make a binding decision.

In a recent case, the Board observed:

Even if no misrepresentations are made, employees may not have the same degree of information about the pros and cons of unionization that they would in a contested Board election.... Employees uninterested in, or opposed to, union representation may not even understand the consequences of ...recognition until after it has been extended.²²

Later in the decision, the Board explained further:

The election-notice requirement provides critical assurance that all employees in the voting bargaining unit will have adequate information about their electoral rights and an opportunity, prior to voting, to discuss

²² Dana Corp., 351 NLRB No. 28, at 6 (Sept. 29, 2007).

and weigh the pros and cons of choosing collective bargaining representation.²³

Yet EFCA seeks to eliminate any and all notice of organizing – to potential voters and employers alike.

In testimony before the Senate Committee on Health, Education, Labor & Pensions on March 27, 2007, NYU law professor Cynthia Estlund admitted that this, as much as anything, was the intent of EFCA:

EFCA meets these concerns not by regulating what employers can say about unions any more than current law does, but by seeking to limit the employer's opportunity to mount this aggressive campaign – that is, by narrowing the time period during which the employer is aware of the organizing drive and can mount its counter-campaign. ...

Opponents argue that, without a formal campaign, employees will be deprived of essential information about unions. Information is good. But employers who are committed to avoiding unionization are not especially reliable sources of such information. The best way to learn what it is like to have a union is having a union.²⁴

D. Violation of Free-Market Principles

American business is based predominantly on the free-market philosophies of capitalism and democracy. The NLRA was not intended to violate those foundations. Indeed, liberty of contract was central to the formulation of the Act and the collective-bargaining framework at the heart of our labor laws. Government regulation of the actual terms and conditions of employment in private-sector workplaces was always seen as inimical to these basic American principles. The United States Supreme Court has explained:

The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be

²³ *Id.* at 9.

²⁴ *The Employee Free Choice Act: Restoring Economic Opportunity for Working Families Before the Sen. Comm. On Health, Educ., Labor & Pensions*, 110th Cong. (2007) (testimony of Cynthia L. Estlund, Prof. Of Law, N.Y. Univ. Law Sch.), available at http://help.senate.gov/Hearings/2007_03_27_a/Estlund.pdf.

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. This fundamental limitation was made abundantly clear in the legislative reports accompanying the 1935 Act. 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 that the duty to bargain collectively 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 whether proposals made to it are satisfactory.²⁵

Currently, when a union is certified as the exclusive bargaining representative for a unit of employees, the employer has an obligation to bargain in good faith with that union representative regarding the employees' wages, hours and other terms and conditions of employment. This duty to bargain in good faith is further defined as:

...the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party...²⁶

This negotiation, however, was always intended as a balancing of power amongst free actors (i.e., capital/management on the one side, and labor on the other) in a free economic market. Section 8(d) of the Act expressly cautions that the obligation to bargain in good faith “does not compel either party to agree to a proposal or require the making of a concession....” At all times during the good faith bargaining process, the employees and/or their union representative retain the right to engage in economic pressure – to withhold their labor by means of a

²⁵ H.K. Porter v. NLRB, 397 U.S. 99, 103-104 (1970) (quoting S. Rep. No. 74-573 (1935)) (emphasis supplied).

²⁶ 29 U.S.C. §158(d).

strike – in an effort to persuade the employer to modify its positions. But it is always fundamental voluntary agreement between the parties, in light of their respective priorities and obligations, that drives and governs the process. Indeed, Samuel Gompers, founder of the American Federation of Labor and a father of the American labor movement, said: “The whole gospel of the labor movement is summed up in one phrase... **freedom of contract** -- organized labor not only accepts, but, insists upon, equality of rights and of freedom.”²⁷ EFCA would represent a significant departure from those principles. EFCA would require collective-bargaining to commence within ten days after a written request for bargaining from a newly certified union. If the parties have not reached agreement within ninety days after the commencement of negotiations, either party may enlist the aid of a government agency, the Federal Mediation and Conciliation Service (FMCS), to serve as a mediator to the parties. Under EFCA, if the parties have not reached an agreement within thirty (30) days after FMCS notification, the parties will be referred to an arbitration panel. That panel – and not the voluntary agreement of the parties – will, in turn, set the terms of the parties’ contract for a period of two (2) years.²⁸

Such a system is unlikely to lend itself to free-market compromises. If the employer and the union know that, after just four months of collective-bargaining, they face the prospect of terms and conditions of employment being imposed upon them by government arbitrators, there is an incentive for each to try to maintain as much of its bargaining position as possible. Indeed, if the union knows that it ultimately stands to exact more from the employer via arbitration, without having to assume the risk and responsibility of a strike, it has almost no incentive to compromise its positions during the first 120 days of negotiations. Rather than bringing the parties closer toward agreement, this is likely to force the parties to take more extreme and intransigent positions on the most critical issues. Each party is likely to focus less on explaining its respective position to

²⁷ William E. Forbath, *The New Deal Constitution in Exile*, 51 Duke L. J. 165, 185 n.95 (2001) (emphasis added).

²⁸ H.R. 800, 110th Cong. § 3 (2007).

the other in an effort to achieve mutual understanding; and rather, to focus more on being able to convince a third party that its position is the more reasonable, compelling or appropriate one.

The ripple effects on the U.S. economy of a disinterested arbitrator setting terms and conditions of employment are potentially serious. Businesses, after all, must factor the cost of producing goods into consumer prices. Any wage gains for workers would likely be offset by the decreased purchasing power of those wages. Moreover, any injury to an employer's free market competitiveness puts at risk the very jobs EFCA seeks to enhance. If employers are going to be told by the government what level of wages and benefits they are required to provide, and what work rules they may enforce, and how they are to run operations to produce goods or provide services, fewer actors with capital at their disposal are bound to want to risk starting – or remaining in – business ventures.

EFCA proponents complain that failure to reach an agreement after the first year of bargaining results in the union's loss of presumed majority status, leaving it vulnerable to decertification efforts. According to the AFL-CIO, this "creates a powerful incentive for employers not to bargain in good faith and to delay the process in hopes that...employees will become discouraged and decertify the union."²⁹ The current law specifically protects unions against this possibility, however, as the NLRB has held that the remedies ordered for an employer's refusal to bargain in good faith are to "assure at least a year of good-faith bargaining [and] include an extension of the certification year."³⁰ Moreover, the filing of an Unfair Labor Practice charge by a union "blocks" the processing of a decertification effort until there has been a full investigation and resolution of the charge. Thus, an employer who refuses to bargain does so at its own peril, while constrained for prolonged periods of time from unilaterally making significant changes to its operations.

²⁹ See AFL-CIO, *The Employee Free Choice Act: Facilitating Initial Labor Agreements through Mediation and Arbitration 1* (July 2006), http://www.aflcio.org/joinaunion/voicework/efca/upload/Facilitating_Initial_Agreements.pdf.

³⁰ *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004) (extending the certification year by a full twelve months), *enforced*, 156 F. App'x 331 (D.C. Cir. 2005).

EFCA's proponents claim that the current system results in too few collective-bargaining agreements being reached, citing a 2000 Cornell study that shows workers are denied a first contract during the first year in "32 percent of cases where workers vote for union representation."³¹ This particular study, however, obtained nearly all its information about the negotiations in its sample group exclusively from surveys and interviews with the union organizers and negotiators involved.³² Company negotiators were not similarly surveyed or interviewed. Not surprisingly, the study (which specifically focuses on the effects of plant closures on union organizing) does not identify many of the various possible reasons that parties might not quickly come to an agreement. Union delay, legal challenges to the certification, reluctance of the employees to strike in furtherance of their demands, unreasonable union demands, incompetence of union negotiators, and unfair labor practices committed by unions are all possible obstacles to a prompt contract settlement. Unless and until EFCA pushes the government and third-party arbitrators into the equation, it "takes two to tango," after all. Thus, the current law properly recognizes that sometimes, notwithstanding diligent, continued and good faith efforts by both parties to negotiations, the parties simply cannot find the common ground to agree on certain issues.

Finally, the 2001 supplement to the above-mentioned Cornell study indicated that 74% was likely a more reliable estimate of the "first contract rate" during the periods studied.³³ Either way, 68% or 74% is still a significant majority, and indicates that under the current framework, most union-employer negotiations ultimately result in a contract.

³¹ See AFL-CIO, http://www.aflcio.org/joinaunion/voiceatwork/efca/upload/Facilitating_Initial_Agreements.pdf (citing Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing*, (Sept. 6, 2000) (Study commissioned by U.S. Trade Deficit Review Commission), available at http://www.citizenstrade.org/pdf/nafta_uneasy_terrain.pdf).

³² Bronfenbrenner (2000), *supra*, at 20 n.18.

³³ Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing, Part II: First Contract Supplement*, 13 (2001) (study commissioned by U.S. Trade Deficit Review Commission), available at <http://digitalcommons.ilr.edu>.

E. Existing Remedies are Adequate

In his opening remarks at the February 8, 2007 Hearing on the Employee Free Choice Act, Rep. Robert Andrews (D-NJ), chairman of the House Subcommittee on Health, Employment, Labor, and Pensions, stated:

Most employers are not bad actors; however, I do believe the current structure of the representation process perpetuates the ability of a few employers to coerce employees without consequence.³⁴

Setting aside for the moment the questionable wisdom of enacting sweeping changes to long-established labor policy as a result of the actions of “a few” “bad actors,” Rep. Andrews’ assertions of the absence of consequences for those bad actors is not at all accurate. In addition to the traditional remedies provided for in the statute, there are a number of rather serious consequences that a recalcitrant employer can face.

Where an employer’s unlawful actions have undermined the union’s majority and made a fair election an unlikely possibility, the Board has the authority to order the employer to recognize and bargain with the union even where there has been no secret ballot election or where the union has lost an election. This authority was upheld in the U.S. Supreme Court’s 1969 decision in NLRB v. Gissel Packing Co.³⁵

With respect to the unlawful discharge of union supporters, Section 10(j) of the National Labor Relations Act already gives the National Labor Relations Board the authority to seek to petition any U.S. district court for “such temporary

³⁴ *Strengthening America’s Middle Class through The Employee Free Choice Act Before The House Subcommittee on Health, Employment, Labor and Pensions*, 110th Cong. (2007) Statement of Rep. Robert Andrews, available at http://www.house.gov/apps/list/speech/edlabor_dem/AndrewsStatementFeb8.html

³⁵ 395 U.S. 575 (1969).

relief or restraining order as it deems just and proper.”³⁶ This can include the immediate reinstatement of a discharged union supporter while unfair labor practice proceedings are pending.

Civil penalties are also already available under appropriate circumstances. Where a party refuses to comply with a Circuit Court’s order enforcing an NLRB decision, the NLRB’s Contempt Litigation and Compliance Branch can seek civil penalties, criminal sanctions, and extraordinary injunctive relief.³⁷

The September 21, 2006 case of *Evergreen America Corp.*³⁸ illustrates the application of the first of these measures. In that case, the Board found that the Union possessed signed cards from 62 of 115 bargaining unit employees, yet lost the election by a vote of 61 to 52. Even though there were no allegations that the employer had discharged union supporters, the Board held that it had engaged in unlawful activity that undermined the employees’ free choice. For example:

- Approximately 27 employees received threats of job loss and plant closure;
- 13 employees were unlawfully instructed not to attend union meetings, not to read the Union’s literature and to throw the material away;
- 9 employees were unlawfully interrogated;
- 7 employees were subjected to the impression that their union activities were under surveillance;
- On 23 occasions, managers made express or implied promises to remedy solicited grievances;
- The company granted unprecedented and excessive across-the-board wage increases to bargaining unit employees;

³⁶ 29 U.S.C. §160(j).

³⁷ See *NLRB v. Local 3, IBEW*, 471 F.3d 399 (2d Cir. 2006).

³⁸ 348 NLRB No. 12 (2006)

- Managers manipulated the promotion process in order to promote more unit employees than in past years; and
- The company made other workplace changes designed to undermine union support, including liberalizing the attendance policy, expanding its casual dress policy, improving its sick leave policy, lowering the age for early retirement eligibility, and awarding employees \$400 Christmas gift certificates.

Far from being “without consequence,” the Board ordered the employer to recognize the union on the basis of the card majority, noting:

[S]imply requiring the Respondent to refrain from unlawful conduct will neither eradicate the lingering effect of the violations it committed nor deter their recurrence. Rather, we find that the employees’ representational desires, expressed through authorization cards, would be better protected by a bargaining order than by traditional or special remedies that the Respondent asserts were not considered by the judge. Accordingly, because we conclude that it is unlikely that a fair rerun election can be held because of the lasting effects of the Respondent’s violations, we affirm the judge’s finding that a *Gissel* bargaining order is appropriate.³⁹

Finally, current law also provides mechanisms for dealing with bad faith bargaining by employers. In a series of Memoranda issued to Regional Offices,⁴⁰ NLRB General Counsel Ronald Meisburg provided clear instructions to agency officials to pursue injunctions and special remedies in “first contract” bargaining cases. The specific remedies authorized by the General Counsel include:

- extensions of the certification period (which would prohibit decertification elections) by 6 to 12 months;
- requiring bargaining on a prescribed or compressed schedule;

³⁹ Id.

⁴⁰ NLRB Gen. Couns. Mem. 06-05 (Apr. 19, 2006); NLRB Gen-Couns Mem. 07-08 (May 29, 2007); NLRB Gen. Couns. Mem. 08-08 (May 15, 2008); and NLRB Gen.Couns. Mem. 08-09 (July 1, 2008).

- requiring periodic reports to the NLRB on the status of negotiations;
- ordering reimbursement of bargaining costs;
- multi-facility postings; and
- union access to employer bulletin boards.

EFCA proponents argue that the extraordinary remedies discussed in this section are rarely sought by the NLRB. This is true. There are numerous cases reported each year that would seem to be ideal candidates for injunctive relief, bargaining orders, and civil contempt penalties. However, the NLRB has historically suffered from very tight budgetary constraints, and this is likely the reason that more cases are not aggressively pursued. Because EFCA would undoubtedly require significant increases in agency funding, one wonders why Congress would not simply provide that funding now and allow the existing remedial options to function in the way that they were intended.