

THE EMPLOYEE FREE CHOICE ACT:

Piercing the Rhetoric



LABOR, IMMIGRATION &
EMPLOYEE BENEFITS DIVISION

U.S. CHAMBER OF COMMERCE



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FOREWORD

If a business watched its market share decrease precipitously, one would expect that business to reevaluate the product it was selling or its marketing to see why consumers were less interested. Not so for organized labor. With union density falling from 35% to about 7.5% today, labor unions have mounted an all-out push for radical revision of our nation's labor laws, instead of reevaluating why American workers don't want to join unions in the same numbers as they did 50 years ago

The so-called Employee Free Choice Act (EFCA) is organized labor's proposal. All agree that enacting EFCA would increase union density, but how would it accomplish that goal? You won't get the answer from EFCA's proponents, who are trying hard not to discuss the provisions of EFCA as they push for its passage.

The purpose of this briefing book is to provide an analysis of EFCA's three provisions: card check certification for union organizing, compulsory interest arbitration of first contracts, and increased penalties on employers. No part of EFCA can be justified and it is in the best interests of employees and employers alike that this bill never be enacted.

While this briefing book is designed for readers who are not labor lawyers, appendices include bill text as well as how the National Labor Relations Act would read if amended by EFCA. Extensive endnotes also provide citations to relevant case law and other supporting materials.

As this study goes to print, it has become clear that support for EFCA has, not surprisingly, weakened. Facts do matter. As a consequence, there is now much talk of various "compromises" being discussed. These include requiring union elections to take place within only a few days; voting through mail-in ballots, over the phone, or over the internet; providing union organizers with access to the employer's workplace to meet with employees; and interest arbitration using a baseball-style "last offer" approach.

As many of these are derived from the provisions of EFCA, this analysis will remain crucial to evaluating the merits of these proposals.

(continued)

On behalf of the U.S. Chamber of Commerce, I wish to thank Martin F. Payson, Michael J. Lotito, and Harold R. Weinrich, senior partners at Jackson Lewis LLP, for their contributions to this important work. Jackson Lewis LLP is a national law firm dedicated to representing management exclusively in workplace law. Messrs. Payson, Lotito, and Weinrich wish to acknowledge Steven J. Porzio and Michael J. Passarella, associates at Jackson Lewis LLP, for their assistance.

A handwritten signature in black ink, appearing to read "Randel K. Johnson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Randel K. Johnson
Vice President, Labor, Immigration, and Employee Benefits
U.S. Chamber of Commerce

INTRODUCTION

At a time when economic stimulus legislation and financial assistance packages intended to bolster troubled industries and business entities are being considered, organized labor is hoping to line up its own assistance package by pushing for the enactment of the Employee Free Choice Act (EFCA) On March 10, 2009, labor came one step closer to this goal as EFCA was re-introduced to the Congress in the same form as it was in 2007.

With union membership down, from a high of 35% of the private workforce in the 1950s to just under 8% currently, labor has tried various strategies to add new dues-paying members to its rolls. Most have not succeeded. Labor now apparently believes that if its hoped-for unionization “renaissance” is to be achieved, the federal labor law that has served this country well for more than sixty years must be changed in its favor. Thus, labor has made passage of EFCA its top legislative priority. In this past election cycle, labor spent more than \$400 million to support candidates who agreed to favor unions, and more importantly, supported EFCA.¹

The passage of EFCA would mark the most dramatic, extensive and fundamental change to federal labor law since the 1947 passage of the Taft-Hartley amendments. EFCA has three major components designed to facilitate and expedite union organizing and first contract negotiations with the ultimate goal of increasing dues-paying union membership.

First, EFCA would prohibit the National Labor Relations Board (NLRB) from conducting private, secret ballot elections to determine union representation whenever a union procures signed cards from a simple majority of bargaining unit employees. Instead, EFCA would substitute “card check” and automatic certification for the secret ballot election.

Second, EFCA would impose mandatory interest arbitration during first contract negotiations. An arbitrator will be appointed to unilaterally dictate the terms and conditions of employment (such as wages, benefits, participation in multiemployer pension plans, and work rules) for both the employer and the employees in the work unit. The arbitrator’s decision will be binding upon all parties, regardless of whether the employer can actually afford the arbitrator-imposed terms and conditions and still remain competitive, and regardless of whether the employees find the terms acceptable.

1 Kris Maher, “Labor Wants Obama to Take on Big Fight,” *The Wall Street Journal*, November 6, 2008.

Third, EFCA would permit the NLRB to punish employers who violate the National Labor Relations Act (NLRA) by ordering payment of triple backpay. This would convert the NLRA, a traditionally remedial law, to a punitive statute. Additionally, the NLRB could also punish employers by imposing fines of up to \$20,000 for certain violations of the NLRA. No fines or penalties have been proposed for union misconduct. The new remedies provisions would also mandate that the NLRB seek interim injunctive relief requiring reinstatement pending final resolution of those matters.

I. CARD CHECK WITHOUT AN ELECTION

One of the cornerstones of any democracy is the right of its citizens to make fully informed political choices by voting in elections: in private, free from fear of retaliation, coercion, ridicule or pressure of any type, peer or otherwise. Millions of our nation’s citizens exercised this right last November in the privacy of the voting booth, electing a new President and other public officials.

Yet labor and its supporters in Congress want to effectively eradicate the right to a private vote for employees who must decide whether they want to be represented by a union in their workplace. Many have argued that an employee’s decision whether to be represented by a union has a more direct impact on the employee’s daily life than the choice of a congressman or senator. Certainly both choices deserve the electoral safeguard of the secret ballot.

The deceptively-titled Employee Free Choice Act does not seek to provide employees with “free choice.” To the contrary, EFCA actually deprives employees of the mechanism for the free and private choice which they have enjoyed under current federal labor law for more than sixty years. In 2007, when EFCA was first being considered in the United States Senate, five-term Senator Orrin Hatch noted, “[A]ll my years in the Senate, I have to say that the title of [EFCA] is the most misleading of any I can recall.”²

A. Significance of Secret Ballot Elections

When the National Labor Relations Act (NLRA), the federal law governing labor relations, was passed in 1935 as the Wagner Act, it authorized the National Labor Relations Board (NLRB)³ to conduct secret ballot elections

² Statement of Senator Hatch, 153 Cong. Record S. 8291 (June 22, 2007).

³ The federal agency charged with administering the NLRA and resolving labor relations related disputes.

to select a union as employees' exclusive bargaining agent.⁴ The Wagner Act provided that in addition to secret ballot elections the NLRB could, in its discretion, "utilize any other suitable method" for determining union representation.⁵ Therefore, the Board was permitted to "certify" or officially recognize unions that have obtained signed union cards from a majority of employees in the petitioned-for bargaining unit ("card check").

In 1939, after four years of experience under the Wagner Act, the NLRB recognized that a card check was an inherently inferior method for determining employee support. It said, "Although in the past we have certified representatives without an election upon [card check], we are persuaded by our experience that the policies of the Act will best be effectuated if the question of representation which has arisen is resolved in an election by secret ballot."⁶

In 1947, the NLRA was amended by the Labor-Management Relations Act (Taft-Hartley Act) to address concerns about the original NLRA. With an additional eight years of actual experience with union misconduct in connection with card signing, Congress demanded that the secret ballot election be the only acceptable method for the NLRB to "certify" a union.⁷ For the last 70 years, the Board has not certified unions based upon cards.

The exclusivity of the secret ballot election as a method for the NLRB to address employee representation and to sanctify the collective bargaining relationship through the issuance of a "certification" has remained unchanged for sixty-two years, and, with good reason, remains the law today. Despite this, the NLRB, while allowing employers to insist that their employees be allowed to vote in a private election, permits employers to voluntarily "recognize" a union based on card check or by other non-NLRB supervised methods.⁸

4 National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C.S. §§ 151-169).

5 *Id.*

6 *Cudahy Packing*, 13 NLRB 526 (1939).

7 Labor-Management Relations Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C.S. §§ 151-169).

8 Such alternate methods do not confer upon the union the benefits of an NLRB certification. In *Dana Corp.*, 351 NLRB 434, 438 (2007), the Board discussed the traditional benefits of certification prior to expanding those benefits by imposing a rule that delayed by forty-five days the effective date of the recognition bar doctrine while underscoring the immediacy and greater duration of the certification bar. As discussed by the Board in *Dana Corp.*:

[T]he 1947 Taft-Hartley amendments to Section 9 of the Act reflect the preference for Board elections by limiting Board certification of exclusive collective-bargaining representatives, and the benefits that inure from certification, to unions that prevail in a Board election. Those benefits include immunity from certain prohibitions in Section 8(b)

EFCA would amend the NLRA to prohibit the NLRB from holding a secret-ballot election where a majority of employees in a unit have signed union authorization cards. The bill states that if a “majority of the employees... signed valid authorization [cards], the [NLRB] shall not direct an election but shall certify” the union as the exclusive bargaining representative for an appropriate unit of employees.⁹ Thus, once a majority of employees sign union authorization cards, the bill would eliminate an employee’s ability to have a private secret-ballot election and elevate card check recognition to the same status as a certification following an NLRB-conducted election.¹⁰

Attempting to counteract the effects of EFCA, Republicans in the House of Representatives have re-introduced, for the fourth time, the Secret Ballot Protection Act (SBPA). The SBPA would amend the NLRA to make it an unfair labor practice for an employer to bargain with a union that was recognized in any manner other than a secret ballot election. The SBPA would also make it an unfair labor practice for unions to force or attempt to force an employer into recognizing a union selected in a manner other than by secret ballot elections. The SBPA has yet to be passed.

B. Superiority of Secret Ballot Elections

The NLRB, the federal Courts of Appeal, and the U.S. Supreme Court have all found that secret ballot elections are superior to card checks. In one of the last significant cases decided by the NLRB when fully constituted, the NLRB reiterated that “both the Board and courts have long recognized that the freedom of choice guaranteed employees by [the NLRA] is better realized by a secret election than a card check.”¹¹

In 1969, the U.S. Supreme Court held that union card checks are inherently unreliable and are “admittedly inferior to the election process.”¹² Further, the

(4) of the Act as well as a full 1-year period during which the certified union’s majority status cannot be challenged. In recognition of the Congressionally-approved practice of according special value to certifications, the Board has long maintained an exception to both the recognition-bar and contract-bar doctrines that permits a recognized union to file a representation petition to secure the benefits of certification. (footnote omitted). *Id.*

9 The text of the bills (H.R. 1409 and S. 560 can be found in Appendices A and B respectively. Appendix C contrasts the terms of EFCA with the existing NLRA.

10 In *Dana Corp.*, 351 NLRB 434. the Labor Board held that private elections for selecting a union are so fundamental that when a union and an employer agree to an informal process for selecting a union, like card check, the employees must be given notice of such an arrangement. The employees then have right to object to the card check arrangement and insist upon a private ballot election.

11 *Dana Corp.*, 351 NLRB 434. Since December 31, 2007 the NLRB has functioned with only two rather than five members.

12 *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

Supreme Court agreed with the NLRB that “secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support.”¹³

There is good reason for the highest court in the U.S. to think card checks are “inferior.” Card signing, unlike secret ballot elections, does not take place under conditions that are private or secret. Therefore, unions and co-workers will know which employees have agreed to sign union cards and which have not. This may subject employees to misinformation, peer pressure, humiliation and possible coercion at the hands of unions and co-workers. Whether to forgo dealing directly with an employer and, instead, rely upon a third party union’s representation in setting the terms and conditions of employment is an important decision for an employee. This decision should be made based on a full understanding of the facts, as well as in an atmosphere free of fear of retaliation, coercion, harassment, pressure or ridicule. A secret ballot, private election provides this.

Even those who consistently support and favor labor admit that loss of the right to a secret ballot election is highly problematic. Former Senator George McGovern (D-SD), who identifies himself “[a]s a longtime friend of labor,” has come out against EFCA and has noted the “many documented cases where workers have been pressured, harassed, tricked and intimidated into signing cards.”¹⁴ This is supported by numerous reported incidents of unions using coercion, misinformation and peer pressure, among other tactics, to get employees to sign cards.

C. Coercive Tactics Used by Union Organizers

Disturbing Stories of Union Tactics

In 2007, former union organizer and graduate of the AFL-CIO Organizing Institute Jen Jason, during a Congressional hearing, testified about the coercive tactics unions employ to get cards signed. Jason spoke of the “blitz” where multiple union organizers go directly to the homes of workers, using the element of surprise to get in the door, and use intimidation tactics.¹⁵ Jason also discussed how organizers engage in misrepresentations by intentionally avoiding answering employee questions about important topics such as “dues

13 *Id.*

14 George McGovern, “My Party Should Respect Secret Union Ballots,” *The Wall Street Journal*, August 8, 2008, A13. Sen. McGovern has also criticized the arbitration provisions of the bill. See George McGovern, “The ‘Free Choice’ Act is Anything But,” *The Wall Street Journal*, May 7, 2009, A15.

15 Strengthening America’s Middle Class Through the Employee Free Choice Act: Hearings Before the Subcommittee On Health, Employment, Labor and Pensions, 110th Congress (2007).

increases, strike histories, etc.”¹⁶ Jason noted that she “could always get the worker to sign the card if [she] could get inside [the employee’s] home” and that “if a worker signed a card, it had nothing to do with whether a worker was satisfied with the job or felt they were treated fairly by his or her boss.”¹⁷ Jason said, “[The] number of signed cards had less to do with support for the union and more to do with how effective an organizer was at doing their job.”¹⁸ Most alarming, Jason said, “In a card check campaign, the cards become more important than the worker.”¹⁹

Another former organizer revealed, “From the first moment contact was made with workers at the company, the deceit began.... Harassing and misleading workers is the base of all organizing campaigns.”²⁰ He went on to say, “Visits to the homes of employees who didn’t support the union were used to frustrate them and put them in fear of what might happen to them, their family, or homes if they didn’t change their minds about the union. In most cases, constant pressure at work and home was enough to make workers break and at least stop talking about the union.”²¹ The former organizer stated, “Card check organizing drives give the union more power over the employees...” and it can be “awfully hard to dissent when the union knows how you voted.... [W]e knew how to make the pressure so great that most workers would feel powerless to refuse to sign.”²²

During the same Congressional hearing, one employee gave an example of how he and other employees were lied to by union representatives in order to get them to sign cards. He said that the union told them at off-site meetings that “signing a card only certifies that they attended the meeting.”²³ Furthermore, the employee said that employees are not told that the “cards are a legally binding document, which states that the employee is pro-union.”²⁴

Another employee told a similar story of how union representatives told her and other employees “that signing a card only meant that the employee was expressing an interest in receiving more information about the union.”²⁵

16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.*
24 *Id.*
25 *Id.*

An even more outrageous example was given when an employee testified in an NLRB hearing that a fellow co-worker warned her that “the union would come and get her children and it would also slash her tires” if she did not sign a union card.²⁶

Coercive Tactics Make Cards Unreliable

It is important to note that the above examples of union coercion, lies and misrepresentations took place without EFCA. Should EFCA become law, the level and severity of union misconduct may be expected to increase dramatically—union cards would be the first, last and only method required for a union to gain certification, the “be all end all” for unions. Signed cards would be even more significant and valuable than they are now. If unions did whatever they could to get employees to sign cards before EFCA, one can only imagine the possible coercion, misinformation and misrepresentations that may take place should EFCA become law.

Unions may argue that the examples from the Congressional testimonies of former union organizers and employees are horror stories pulled out to scare the unwary.²⁷ But the simple fact is that union cards and petitions are unreliable. A recent decision by an NLRB Administrative Law Judge (ALJ), in a case where authorization cards were used as the basis to support a “Gissel” bargaining order, an extraordinary Board remedy, is instructive.²⁸ A group of non-English speaking employees were presented with and asked to sign a union petition, in lieu of individual authorization cards, written in English. The petition was presented by a Spanish-speaking union agent who did not translate the petition to the employees or otherwise explain the significance of their signatures before he persuaded them to sign. After an exhaustive hearing before the ALJ, the petition was found to be unreliable because, given the inability of the employees to read English, there was no evidence that the employees understood what the signing of the petition meant—that they were authorizing the union to represent them.²⁹ In a case like this where the union requests a bargaining order without an election, the

26 Shawnee Manor, 321 NLRB 1320 (1996).

27 In the past, much union card signing misconduct has been overlooked. The NLRB has reasoned that since employees would typically make the ultimate union representation decision in a private election, union misdeeds in card solicitation would be cured in the NLRB-conducted election process. As the Board has said, “In the final analysis, it is the election, not the Board’s showing of interest requirements [including validity of authorization cards] or its internal administrative procedures, which determines the substantive issue of whether or not [the union] actually represents a majority of employees.” General Dynamics Corp., 213 NLRB 851 (1974). Under EFCA, this becomes meaningless.

28 Flaum Appetizing Corp., JD (NY)-08-09 (Feb. 18, 2009).

29 See NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). This case involved an NLRB request for a bargaining order without election. A bargaining order is a limited procedure

Board, on a case-by-case basis, is asked to conclude that because of proven employer misconduct, traditional remedies will not allow a fair election to be conducted. The Board may decide that it has no choice but to rely on the admittedly inferior and inherently unreliable showing of majority support through union cards or a petition. In those types of cases the NLRB Administrative Law Judges and the NLRB examine with great care, as in Flaum, the circumstances in which unions procured authorization cards/petitions. A high level of scrutiny is needed because union cards and petitions are so inherently unreliable. EFCA provides for no such scrutiny.³⁰

EFCA presupposes that the current system is so tainted that in every case the holding of a free and fair private election is impossible and an admittedly inferior method such as card check should be the standard for determining the fate of employees in the workplace. This assertion is totally unwarranted and lacks any factual or statistical evidentiary foundation.

A less well-known issue with respect to EFCA's card check process is that it effectively deprives employers of their ability to communicate with their employees. Unions typically do not want employees to have important facts such as the union's constitution or bylaws and information related to the financial obligations associated with union membership during an organizing campaign. Permitting secret organizing campaigns severely impairs the ability of the employer or of employees who do not want a union to communicate facts that the union does not want employees to know.

EFCA puts a premium on secrecy rather than open and robust discussion and debate. Unions will organize surreptitiously so as to avoid employees having the opportunity to learn the real significance of their signature on a union card. Should EFCA become law, employers likely will first learn that cards were being signed only when a petition for recognition is filed with the NLRB. EFCA does not require that employers be given notice when unions seek to organize their workers. Since employers will be unaware of card signing activity, an employer's exercise of its free speech rights, as recognized in section 8(c) of the act, to inform employees about the negative aspects of unionization will be effectively eliminated. Moreover, employees who were never asked to sign a card will be represented by a union, without having had any voice in the process whatsoever! Thus, the rights of employees under

where the NLRB, with court approval, requires the employer to engage in bargaining with the union based on signed cards, as opposed to a secret ballot election.

30 Despite the high level of scrutiny in bargaining order cases like Flaum Appetizing Corp., JD (NY)-08-09 (Feb. 18, 2009), the Board has allowed unions a great deal of latitude with respect to the truth so long as the card accurately stated its purpose and there was some evidence that the employee could read the card. See Cumberland Shoe Corp., 144 NLRB 1268 (1963), enforced by 351 F.2d 917 (6th Cir. 1965).

the NLRA will be compromised because they are denied the right to exercise those rights in an informed manner.

D. EFCA Effectively Eliminates the Secret Ballot Election

Astonishingly, pro-labor advocates claim EFCA does not eliminate the secret ballot election. In a February 2009 letter to one of his constituents, Senator Richard J. Durbin (D-IL) indicated that EFCA “does not abolish the secret ballot election” and instead “allow[s] employees to freely choose to form a union by collecting the signed authorizations of a majority of employees.” Further, Mary Beth Maxwell, Executive Director of the American Rights at Work, an organization with close ties to organized labor and to the new Secretary of Labor, said it is “simply not true” that EFCA eliminates secret ballot elections. Instead, Maxwell claims EFCA “gives a choice to the workers,” so workers can decide whether to organize through card check or by secret ballot election.

While Durbin and Maxwell are technically correct when they state that EFCA does not completely eliminate secret ballot elections, their statements are misleading. Under the current NLRA, the NLRB can direct a secret ballot election upon a minimum showing of interest (based upon signed union cards) from 30% or more of employees in an appropriate unit.³¹ EFCA would amend the NLRA by prohibiting the NLRB from directing a secret ballot election any time a simple majority of employees in an appropriate unit sign union cards. Elemental concepts of union organizing dictate that a petition for representation will not be filed unless the union has the signatures of more than a majority of the unit employees. Thus EFCA effectively renders the voting process irrelevant. Maxwell’s statements illustrate the type of rhetoric used by unions to mislead employees into signing union cards and why union cards are so unreliable. Currently, employees are absolutely entitled to a private and secret ballot election to select or reject union representation.³² Under EFCA, it appears that the only way an employee will have a private ballot election is if a union has cards signed by 30% of the employees, rather than by a majority, and petition for an election. It is disingenuous to say that unions would risk rejection in a secret ballot election with less than a majority of signed cards.

31 Alternatively, the employer can voluntarily agree to recognize a union based on a showing that a majority of employees have signed. In *Dana Corp.*, 351 NLRB 434, 438 (2007), the Board held that even where a union and an employer have agreed to recognize the union through card check, employees must be given the right to petition for a private election rather than be subject to card check recognition arranged by their employer and prospective union.

32 *Id.*

On February 25, 2009, the Economic Policy Institute, in a full page advertisement in the Washington Post, issued a statement signed by 38 economists in support of EFCA. The economists felt that the “[p]assage of the Employee Free Choice Act is critical to rebuilding our economy and strengthening our democracy.” The economists posit that “the [union] election process overseen by the National Labor Relations Board has become drawn out and acrimonious....” They claim that EFCA will “better reflect worker desires than the current ‘war over representation,’” and lower the “level of acrimony and distrust that [the economists claim] often accompanies union elections in our current system.”

While claiming that EFCA will strengthen our economy, the economists offer rhetoric but no rationale as to how it would achieve this. It is axiomatic that unions do not create jobs; businesses do. These academics might be better served by listening to Warren Buffett, a uniquely successful investor and ‘practicing economist,’ who has come out flatly against EFCA. On March 9, 2009 during an appearance on CNBC Buffett stated: “I think the secret ballot’s pretty important in the country. I’m against card check to make a perfectly flat statement.”

While the phrase “streamlining our democracy” may make good copy for supporters of EFCA, there is no basis for asserting that eliminating the secret ballot, and the right to vote in private, furthers our democracy or helps our economy. EFCA will not “better reflect worker desires,” as supporters maintain. EFCA’s card check provision will lead to increased union misinformation. Assuming the current election process should be improved, one does not accomplish democratic enhancement by eliminating workplace democracy.

E. The NLRB Election Process Is Extremely Efficient

The NLRB has determined that it is reasonable to aim to hold an election 42 days after a union’s filing of a petition for recognition. In the NLRB’s fiscal year 2008, actual median time from the filing of a petition to the election was 38 days.³³ In fact, in that same fiscal year, 95.1% of first elections were held within 56 days of the filing of a petition.³⁴ Accordingly, there is no factual information to show the NLRB election machinery is inefficient.

Certainly, the claim the 38 economists make about the NLRB election process may be equally true of any election process. For example, the recent

³³ National Labor Relations Board, General Counsel, *Summary of Operations: Fiscal year 2008*, Memorandum GC 09-03, p. 6, available at www.nlrb.gov.

³⁴ *Id.*

campaign for President of the United States was the longest and most drawn out in our country's history and there was a fair share of acrimony. However, no one is advocating that we "streamline" our democracy by choosing our President, Senators or Representatives based upon solicited signature cards rather than a private ballot.³⁵

F. The Union's Argument that EFCA Is Needed to Protect Employees from Employers Is Baseless

Unions assert that elections cannot be fair because employers intimidate employees by unlawfully terminating at least one employee who supports unionization in 25% of all union campaigns. This claim is dependent on an eight-year-old report, by a former union organizer now teaching at Cornell University, based on questionable research methodologies.³⁶ Anecdotal reports of employer misconduct from union organizers who had themselves heard the reports from employees are evidence of nothing.

Under current labor law, private, secret ballot elections are conducted by the NLRB under conditions that ensure fairness. Where a union presents sufficient evidence to the NLRB of objectionable conduct or election misconduct which makes a fair election impossible, a trial or hearing occurs. Testimony and documentary evidence is presented to an impartial NLRB judge or hearing officer. If objectionable conduct or misconduct by the employer is found, such as the unlawful termination of an employee because of his/her support for a union, the election results are set aside.

Thus, if the Cornell report's finding that at least one union supporter was fired in one out of every four organizing campaigns was accurate, then at least 25% of all elections would have been set aside. However, from the "representative sample" selected in the Cornell study, the union alleged misconduct with respect to 33% of elections, but the NLRB ruled in the union's favor only 6% of the time.

35 Indeed, legislation is being considered by Congress to require that all Senators be elected by secret ballot rather than appointed. .See H.J.Res. 21 and S.J.Res 7.

36 Kate Bronfenbrenner, "Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing," New York State School of Industrial and Labor Relations, September 6, 2000. An analysis of the Case Activity Tracking System (CATS) database, the repository for all NLRB data, showed that Bronfenbrenner's statistic that 25% of all organizing campaigns result in at least one union supporter being fired was highly exaggerated. Instead this analysis found that in the years 2007-2008 at best 3.75% of union organizing campaigns included an unlawful termination. Jackson Lewis analysis of NLRB statistics. While even one unlawful termination is one too many, the facts show that the current system is not so inherently flawed that employees are unable to obtain a fair election.

In the NLRB's fiscal year 2007, there were a total of 1,981 NLRB elections. Of those, allegations of election misconduct (or "Objections") were filed by unions and investigated by the NLRB in only 108 cases, or 5.5% of the elections. The NLRB found a basis for unions' claimed Objections in merely 11 cases. Thus, labor's allegation that misconduct occurs in 25% of all election cases is not supported by the NLRB election statistics. Objectionable conduct was found to occur in less than one percent (0.56%) of election cases. This comes from official NLRB data, filed with Congress—certainly more credible than hearsay from union organizers. The conclusions of the Cornell "study" are factually unfounded and fundamentally flawed.³⁷

Additionally, unions claim that employers today engage in so much unlawful activity fair elections are prevented. Therefore, EFCA is needed to level the playing field and provide employees and unions with the opportunity for a fair selection process. However, in 2008, unions won 66.8% of all elections held.³⁸ If employers engaged in the widespread unlawful activity labor claimed occurred, then unions should not be able to win elections even half the time. Obviously, this is refuted by unions' winning over two-thirds of elections held.

Ariella Bernstein, a former high-ranking official at both the NLRB and Federal Mediation and Conciliation Service, does not accept labor's data as sufficient proof that EFCA is needed to protect employees from illegal employer actions. Instead, Bernstein feels that "the underlying concerns that EFCA supposedly addresses have not been sufficiently examined," and that the government needs "a better understanding of the problems before signing onto [EFCA] as the solution."³⁹ We agree.

II. "INTEREST" ARBITRATION IS IN NO ONE'S INTEREST

A. Compulsory Interest Arbitration

The card check provision of EFCA that would effectively end private secret ballot elections has been the primary focus of the media and the public when discussing EFCA's ramifications. However, the compulsory interest arbitration provision would have an even greater impact on the business community, employees, and labor relations in general. Interest arbitration would completely alter the fundamental concepts which form the basis for

³⁷ Seventy-Second Annual Report, National Labor Relations Board, October 16, 2008.

³⁸ Michelle Amber, "2008 Union Win Rate Rises to 66.8 Percent As Number of NLRB Elections Also Increases," *Daily Labor Report*, May 5, 2009.

³⁹ Ariella Bernstein, "Democrats Should not Rush on Labor Legislation," *The Wall Street Journal*, November 17, 2008.

the legalization of labor unions and the concepts of collective bargaining within our private sector free enterprise system.

It is important to distinguish interest arbitration from what, in the context of a unionized work place where a collective bargaining agreement has been negotiated by the parties, is known as grievance arbitration. In a grievance arbitration matter an arbitrator applies the parties' agreement to a dispute arising under that agreement. In grievance arbitration proceedings the arbitrator often is called upon to interpret the meaning of the agreement. By contrast, in an interest arbitration matter the parties have not agreed upon a contract and instead of applying or interpreting the agreement of the parties the arbitrator is imposing terms and conditions of employment upon the employer and the employees. Dispute arbitration arising in the nonunion setting is similarly distinguishable from interest arbitration.

B. EFCA Would Insert Government into Collective Bargaining, Radically Altering its Historic Role

NLRA Since 1935

In 1935, Congress passed the National Labor Relations Act (NLRA) (the Wagner Act) and created the National Labor Relations Board (NLRB) to enforce the NLRA. The Wagner Act included Section 8(5), a good-faith bargaining requirement, prohibiting the employer from refusing to bargain and demanding the employer approach negotiations with “a sincere purpose to find the basis of agreement.” The Supreme Court, in finding the NLRA constitutional, articulated a key aspect of this law when it reasoned “that free opportunity for negotiation...is likely to promote industrial peace and may bring about the adjustment and agreements *which the [NLRA] itself does not attempt to compel.*”⁴⁰

In 1947, Congress amended the NLRA with its passage of the Taft-Hartley Act. The amended version modified Section 8(5) of the Wagner Act (it became Section 8(a) (5)) and included Section 8(d), further defining the nature and extent of the parties' obligation to bargain. Section 8(d) was included out of Congress' concern that the NLRB was overreaching its purpose “in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions in employer must make and of the proposals and counterproposals that he may or may not make. . . .”⁴¹

40 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937) (emphasis added).

41 NLRB v. American National Insurance, 343 U.S. 395, 403 (1952), citing H.R. Rep. No. 245, 80th Cong. 1st Sess. 19 (1947).

Section 8(d) provides that when a union is certified as the exclusive bargaining representative for a unit of employees, it is 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.”⁴² The NLRA does not set a time limit for reaching an agreement. It does not even provide that the two parties must reach an agreement at all because the “obligation [to bargain] does not compel either party to agree to a proposal or require the making of a concession.”⁴³ In interpreting the obligation to bargain in good faith, the Supreme Court has concluded that the NLRA “does not compel any agreement whatsoever between employees and employers.”⁴⁴ Further, the Court stated that “the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.”⁴⁵

The Supreme Court has consistently emphasized that the NLRB’s role is limited to determining whether the parties are bargaining in good faith and does not extend to evaluating the merits of each party’s substantive proposals:

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.**⁴⁶

The NLRB has followed this approach. It examines proposals “only for the purpose of evaluating whether they were clearly designed to frustrate agreement.”⁴⁷ Where the parties are unable to reach an agreement through good-faith bargaining, “**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.**”⁴⁸

42 Section 8(d) of the Act.

43 Id.

44 American National Insurance, 343 U.S. at 402.

45 Id. at 404.

46 H.K. Porter v. NLRB, 397 U.S. 99, 108 (1970) (emphasis added).

47 Oklahoma Fixture Co., 331 NLRB 1116, 1117 (2000). See also Reichold Chemicals, 288 NLRB 69 (1988).

48 Oklahoma Fixture Co., 331 NLRB 1116, 1117 (2000) (emphasis added).

EFCA Unnecessarily Inserts Government in Collective Bargaining

The mandatory first contract mediation and interest arbitration provisions of EFCA would alter the fundamental principles of collective bargaining upon which the NLRA is premised. EFCA would require employers and unions to begin first contract bargaining within 10 days of union certification. Realistically, it takes both parties several weeks to even put together a negotiating committee and formulate initial demands.

Should the parties fail to reach agreement after only 90 days, EFCA requires that the parties use the Federal Mediation and Conciliation Service (“FMCS”) to mediate bargaining disputes if one party requests such assistance. In first contract negotiations, the parties must craft each and every word of a contract where no contract existed before. It is not realistic to believe that the parties would be anywhere close to the point where a mediator might be helpful in a mere 90 days.

Should the parties fail to reach agreement on a first contract after only 30 days of mediation, EFCA mandates that the parties enter binding interest arbitration. An arbitrator would then impose terms and conditions of employment that would be binding on the parties for two years. Rather than a collective bargaining agreement resulting from what the parties, the union, the employees and the company decide is best for each of them, EFCA takes away the free choice of the parties and puts in its place a mandatory proclamation from a third party agent of the government. It is worth emphasizing that EFCA’s interest arbitration provisions apply to good faith bargaining as well as bad faith. In other words, a union and an employer could be working with the best of intentions toward reaching agreement, but still be subject to the interest arbitration provisions.

Clearly, this is inapposite to the historical role of the NLRB and the concept of private sector collective bargaining as envisioned by Congress and interpreted by the Supreme Court. The concepts thoughtfully created in 1935, prudently modified in 1947 and which have stood the test of time, are being fundamentally altered without reason.

Under EFCA, from the time a union is certified, an employer and the union may have only 130 days to reach an agreement before an arbitrator will intervene, determine, and impose all terms and conditions of employment, including all economic terms. Even when an employer and a union negotiate quickly and in good faith (as the NLRA requires), reaching agreement on every term and condition of employment in a first contract in 130 days is

extremely difficult if not impossible. Under EFCA, the speed with which the parties must prepare for their initial bargaining session and compulsory interest arbitration after 130 days of certification will have dramatic economic and practical effect on employers, unions, and employees.

EFCA Would Make Once Equal Parties Unequal

Prior to the enactment of the NLRA, employers wielded virtually all the power in the employer/employee relationship. The employer, as the owner of capital, was solely responsible for setting the terms and conditions of employment. The NLRA equalized the power between employers and employees by allowing employees to join together in forming labor organizations for the purpose of bargaining and other mutual aid and protection. Further, unions were given the extraordinary right to withhold its members' labor by striking, to set up confrontational picket lines to communicate with those doing business with their employer and apply other pressures to assert leverage over the employer. As quid pro quo, the employer was also given rights, particularly the right to continue to operate its business during union strikes and/or picketing. The NLRA, by establishing the equality of the parties and permitting the use of their respective economic tactics, was thoughtfully designed to ensure the collective bargaining process would provide positive results, without government intrusion, within the context of our democracy and free enterprise system.

The type of interest arbitration called for by EFCA was not designed for our private sector free enterprise system. It was originally developed for the public sector because the playing field was uneven, and the public interest outweighed the interests of either party. In the public sector, unions typically do not have the right to strike. This right is among a labor organization's most effective economic weapons. In an attempt to restore balance in the public sector, the possibility of interest arbitration was imposed on the employer. Fear of a third party imposing terms and conditions of employment on an employer was believed to compensate for the union's inability to strike.⁴⁹

Unlike the public sector, the playing field in the private sector is not skewed in favor of any one party; private sector unions have a full and equal arsenal of economic tactics. Imposing mandatory interest arbitration on private sector employers would skew the once-leveled playing field of collective

⁴⁹ It should be noted that interest arbitration in the public sector is not without its own significant problems. For a more complete discussion see letter by R. Theodore Clark, Jr. sent on behalf of the U.S. Chamber of Commerce to Sens. Edward M. Kennedy and Michael B. Enzi and Reps. George Miller and Howard P. McKeon (Feb. 13, 2009), available at: <http://www.uschamber.com/issues/letters/2009/090213efca.htm>.

bargaining in unions' favor. Thus, with great stealth, EFCA destroys the well thought out underlying premise of the NLRA collective bargaining process, which takes place in an atmosphere of minimal government intrusion. It would directly enmesh the government in determining the appropriateness of the terms and conditions of employment imposed upon the parties. Collective bargaining among equals would be replaced by arbitration panels that may not understand employees' workplace needs and employers' business needs while imposing terms and conditions of employment.⁵⁰

It was never the intent of the drafters of the NLRA that the government would play any role in the delicate collective bargaining process, other than to ensure that the parties bargained in good faith. It is no coincidence that neither the NLRB nor the FMCS has any control as to the substance and positions taken by unions and employers in negotiations. EFCA's interest arbitration changes private sector collective bargaining at its core. When employees select a union, they would no longer select a voice or a representative. Instead, they would be potentially choosing to have their terms and conditions of employment legislatively imposed by the government.

Nothing supports or justifies this sea change to private sector collective bargaining. Consider Andy Stern, President of SEIU, the fastest growing union in the country. Stern has become successful with running corporate campaigns against employers to force them to enter into neutrality-based card check agreements. Stern is very proud of the power he wields. With respect to the use of power, Stern notes he uses "the power of persuasion first...and if that doesn't work, we try the persuasion of power."⁵¹ Stern and his union are admittedly politically powerful and have successfully mastered the political process through the use of people and money. He takes great pride in his efforts as evidenced by the results of the 2008 election process. Stern was not afraid to look legislators in the eye and tell them that they will be held accountable to deliver upon the union's agenda.⁵² However, for all this power, Stern and the SEIU claim to be powerless at the first contract bargaining table. They claim they need Congress to "tilt" the now-leveled playing field in the union's favor. They claim they need interest arbitration to legislate the terms and conditions of employment that they cannot achieve through traditional private sector collective bargaining.

50 This point was recently articulated by Senator George McGovern, "The 'Free Choice' Act Is Anything But," *The Wall Street Journal*, May 7, 2009, A15.

51 Matthew Kaminski, "Let's 'Share the Wealth,'" *The Wall Street Journal*, December 6, 2008.

52 Jesse J. Holland, "SEIU Taking on Unfaithful Democrats After Election," *USA Today*, August 26, 2008.

C. The Detrimental Economic Impact of Interest Arbitration

The Process Is Expensive

The process of preparing for collective bargaining is extensive. Employers and unions must determine their bargaining strategy by evaluating current terms and conditions of employment, judging which terms they like and which they would like to see changed. They must consult wage survey data and determine how their employees' wages compare generally with wages of employees in a similar industry or geography. In a second or third contract, the parties build off the expiring contract. Employers and unions are able to evaluate which sections of the initial contract were successful and which they would like to see revised. An employer is also in a better position to determine the economic impact of administering a contract.

In a first contract, the preparation is significantly more extensive. Employers and unions try to gather as much information as possible about practices at comparable companies. Unions must evaluate the current wages, hours, and terms and conditions of employment. They will make wide-ranging information requests with which the employer must comply. In order to make meaningful proposals, the union will want (and rightly so) to review the employer's handbook, wage structure, schedules, policies, benefit plans, alternative dispute resolution, and informal policies and customs. These are just a few examples. Gathering the information which the union requests can be onerous and time-consuming by itself. While the employer is gathering information for the union, the employer must also evaluate its current policies and analyze its cost structure to determine how movement in wages one way or another will affect its profitability or even viability.

In a first contract, the parties literally start with a blank piece of paper. Contracts often exceed 50, 80, and even 100 pages. Smaller companies could be severely disadvantaged as they would have only 10 days to assemble information with limited resources. They may not routinely engage in wage analysis. They may not have other unionized locations which undertook similar analysis in preparing for its negotiations. They may not have the staff to assemble the requisite information in a 10-day period, leaving them severely disadvantaged as they prepare their initial proposals.

Initial proposals take on particular importance when interest arbitration looms in 130 days. First, an employer and union might not realistically have the opportunity to meet more than twice a month to bargain. This would limit the parties to seven or eight sessions before arbitration, which places added importance on the initial positions of both parties. Second, an interest

arbitrator must determine which party's proposals are more reasonable and will often review the whole negotiations process to determine reasonableness. With interest arbitration looming in 130 days and the possibility of agreeing to an initial contract in that time doubtful, both the company and the union will have to prepare for a battle in front of the arbitrator from day one. Employers—especially smaller employers—that are unable to expend either significant financial or human resources to prepare in great detail from the moment of certification will be disadvantaged. This could have devastating effects on the future of a company, as the binding contract will serve as a comparator for future negotiations and arbitrations involving that company.

Beyond the time and cost of preparing so rapidly to engage in bargaining, interest arbitration is an expensive process. Both parties will spend significant time and money preparing for a hearing. Parties will call fact witnesses and expert witnesses; they will prepare reports; they will prepare exhibits; they will draft pre- and post-hearing briefs which will detail why their proposals are more reasonable than the other party's. The real winners in this process will be lawyers and consultants who will assist in the preparation and handling of the arbitration.

The expense of preparation for expedited negotiations and the arbitration itself is the tip of the iceberg in analyzing the economic effects of EFCA. The outcome of compulsory interest arbitration is fraught with economic danger for employers. There is no question that, under EFCA, an arbitrator can impose expenses and burdens upon employers that prohibit continued competitiveness, much less profitability. Potential economic unfairness in an interest arbitration scheme is vast. Consider two competing employers who go to interest arbitration somewhat contemporaneously. Two arbitrators set considerably different wages for their employees. Or one arbitrator allows a company to retain the right to subcontract its operations while the other limits such right. Companies might be inclined to release confidential economic information or proprietary information about expansion or contraction to an arbitrator to strengthen their position and avoid such a result. An employer would not be required to disclose this type of information in bargaining or during grievance arbitration as it typically is not relevant. However, when an arbitrator has the power to impose wages and other terms and conditions of employment, this information could become very important. Lack of control over such information could be disastrous for a company, especially in a contentious labor dispute.

The Agreement Can Be Expensive

Unions often propose that employees enter a multiemployer pension plan as part of their benefits package.⁵³ Frequently, employers, based upon the dynamics of bargaining, accept such a proposal as the cost of entering such a plan is low; but they do not do so without trepidation. Employers may fear that multiemployer pension plans are often underfunded, or withdrawal liability in the future can far exceed any initial cost savings. EFCA does not address an arbitrator's authority to impose upon an employer participation in a multiemployer pension plan. The imposition of such terms by an arbitrator could be potentially disastrous for a company.

While unions support EFCA, they often do not generally support government intervention into the terms of collective bargaining agreements. The Congressional hearings concerning the financial plight of the auto industry is a recent example. In the wake of the initial failed attempt to provide assistance to General Motors and Chrysler, UAW president Ron Gettelfinger agreed to make certain concessions imposed by the Senate. However, he “refused to yield completely to Congress; yielding would allow lawmakers to tell UAW members what they could earn or what the terms of their contract would be.”⁵⁴ Gettelfinger's concern is that the government is intruding in an area—private collective bargaining and concessions therein—which is not traditionally within their authority. With EFCA, employers share this concern.

Compulsory arbitration has been tried in various countries around the world at different times. Codified mandatory arbitration dates back to 1904 in Australia's Conciliation and Arbitration Act. This law imposed mandatory arbitration on employers for setting terms and conditions of employment as opposed to permitting negotiations through collective bargaining. Mandatory arbitration was believed to be effective in Australia until a 1989 report by Professor John Niland recommended that Australia replace its compulsory arbitration paradigm with a collective bargaining model based on the United States' system.⁵⁵ Niland's report indicated that compulsory arbitration should be abandoned in an attempt to preserve the competitiveness of Australian

53 There is a strong case to be made that multiemployer benefit plans cannot be imposed by an interest arbitrator because contributions to such plans can only be made pursuant to a contract – but we believe the economic consequence should be considered.

54 Michael Maynard and Carl Hulse, “U.A.W. Chief and Senator Gain from Face-Off,” *The New York Times*, December 12, 2008, at A-12.

55 Ron McCallum, “Convergences and/or Divergences of Labor Law Systems: The View From Australia,” 28 *Comp. Labor. L. & Pol'y J.* 455 (2007).

products in an increasing global economy.⁵⁶ By 2005, with the passage of Workplace Relations Amendment Act, compulsory arbitration in Australia was a thing of the past.

EFCA's Impact on the Unemployment Rate

On March 3, 2009, Anne Layne-Farrar published a report addressing the “potential unintended consequences of EFCA” by analyzing the correlation between increasing unionization rates and higher unemployment rates.⁵⁷ Layne-Farrar agreed with organized labor’s assertion that the card check and interest arbitration provisions of EFCA would increase the overall union density rate in the U.S.

However, during her testimony to Congress discussing her findings, she indicated that “EFCA is unlikely to achieve its primary goal of improving social welfare.”⁵⁸ Layne-Farrar’s report is based on empirical data from Canada. The author asserts this dataset is very reliable for projecting EFCA’s impact in the U.S. not only because the U.S. and Canada share similar cultural and industrial compositions, but also because Canada provides a “natural experiment for studying and quantifying the effects of the changes proposed in EFCA.”⁵⁹

The reason the Canadian experience is so helpful is because since the 1970s they have both used and rejected card check and interest arbitration. Starting in the 1970s all Canadian provinces enacted labor laws permitting card check. Over the next 4 decades, and through today, several provinces have reverted back to secret ballot elections and jettisoned card check laws. Further, during that same time, many of those provinces also implemented mandatory arbitration.

Layne-Farrar’s report indicated that for every 3 percentage points EFCA raised union membership in any given year, one could expect the unemployment rate to increase by about one percentage point the following year. Therefore, based on organized labor’s own projections that EFCA would increase the union density rate in the U.S. from somewhere between 5 and 10 percentage points, this would result in an increase in the

56 John Niland, “Enterprise-based Bargaining Units: A Better Way of Working,” Report to the Business Council of Australia by the Industrial Relations Study Commission (1989).

57 Dr. Layne-Farrar, Anne, “An Empirical Assessment of the Employee Free Choice Act: The Economic Implications,” (March 3, 2009). Available at SSRN: <http://ssrn.com/abstract=1353305>.

58 Rebuilding Economic Security: Empowering Workers to Restore the Middle Class: Hearings Before the Comm. On Health, Education, Labor and Pensions, 111th Congress (2009).

59 *Id.*

unemployment rate of 1.5 to 3 percentage points.⁶⁰ This translates into the loss of 1.5 to 3.5 million jobs one year after the passage of EFCA.⁶¹ Based on the statistical findings of her analysis, Layne-Farrar concluded that “the costs of passing [EFCA] could very well outweigh the benefits.”⁶²

To give Layne-Farrar’s study even more credibility, Lawrence Summers, advisor to President Obama, Director of the National Economic Council, and Former Secretary of the U.S. Treasury noted in his treatise on economics, that a “cause of long-term unemployment is unionization.”⁶³ Specifically, Summers concluded that high union wages which exceed competitive market rates tend to cause job losses, and therefore increase the unemployment rate.

III. ENHANCED PENALTIES—BUT JUST FOR EMPLOYERS

The NLRA was designed to be a remedial statute, as opposed to a punitive one. The NLRA expressly provides for two different types of relief, the first designed to prohibit ongoing unfair labor practices and the second to require employers, employees, or unions to take affirmative steps, including reinstatement and back pay, as will effectuate the purposes of the NLRA. The Supreme Court has interpreted these provisions broadly.

Some have claimed that Board’s remedial power has no teeth. This is not true. The Board can order relocated operations returned to their original locations and the employees made whole for the loss of wages suffered during the relocation. The Board can order employers that bargain in bad faith to continue bargaining for specified periods after the obligation to bargain would normally terminate. In first contract situations as well as other bargaining situations, the Board can order that bargaining take place at specified times, specified intervals and for specified hours and the Board can order the Employer to reimburse the union for its bargaining expenses during the period of time the employer bargained in bad faith. With respect to all of its remedies the Board has the discretion to seek injunctive relief where an injunction can provide a remedy pending the final resolution of the Board case.

The Board may also seek the judgment of a court in enforcing its orders and has the authority and discretion to seek contempt of such a judgment.

60 *Id.*

61 *Id.*

62 *Id.*

63 Lawrence H. Summers, “Unemployment.” *The Concise Encyclopedia of Economics*, 2008, Library of Economics and Liberty, available at: <http://www.econlib.org/library/Enc/Unemployment.html>.

Civil contempt can include substantial fines to compel compliance with the judgment as well as body attachment, civil incarceration for an unspecified duration to compel compliance with the court’s judgment. . .

EFCA seeks to change the fundamental nature of the Act by converting a remedial statute into a punitive one. The purpose of punitive sanctions is not to coerce compliance, but to stifle the exercise of the lawful rights of employees and employers. The simple fact is the current statute and its adjudicatory process and the potential for the NLRB to more consistently exercise its discretion to seek and obtain interim injunctive relief and to use the extant contempt power of the federal courts is more than sufficient to accomplish the Act’s goals.

A. \$20,000 Monetary Penalties

EFCA adds a provision to the NLRA which states “[a]ny *employer* who willfully or repeatedly commits any unfair labor practice...” during an organizing drive or before an initial collective bargaining agreement is reached will be “subject to a civil penalty of not to exceed \$20,000 for each violation” (emphasis added). The NLRA, as amended, was drafted to be a neutral law that did not favor employers over unions, but one that conferred certain rights to employees. EFCA will modify the NLRA so that, for the first time, it will become a punitive statute rather than a remedial statute.

The civil penalties can be awarded against employers who interfere with a worker’s right to unionize or discriminate in hiring or tenure based on union status. However, these penalties are not evenhanded, they apply only to employers who violate the law, not to unions who can and do also violate the law. This provision is not designed to achieve compliance with the Act. Rather, its purpose is to have the effect of “chilling” an employer’s free speech right for fear of being subjected to \$20,000 fines for each alleged violation. If the employer does not speak out for fear of monetary penalty, it is the employee who suffers. The employee is denied vital information. The employee will only hear one side of the argument, the side the union wants the employee to hear.

Again, the union, through legislation, seeks to achieve what it cannot by either the power of persuasion or the persuasion of power – employer neutrality.

B. Potentially Devastating One-Sided Awards

Similarly, EFCA calls for providing employees with triple backpay awards when employers discriminate against union employees in hiring or tenure

during organizing activities. Again, there is no reciprocal provision subjecting unions to monetary penalties for unlawfully causing the termination of an employee or otherwise discriminating against an employee during the same period of time. Nothing has shown that existing remedies are inadequate to deal with this limited issue.

C. Mandatory Injunctive Relief

Finally, EFCA seeks to impose a mandatory duty on the Board to seek interim injunctive relief requiring reinstatement of workers discharged during organizing or while a fist contract is being negotiated. Employers are loathe to discharge workers during an organizing campaign, but many times an employee’s conduct requires that they take such action. The Board currently has the unfettered discretion to seek injunctive relief for reinstatement. Taking away the Board’s discretion will add nothing to the Board’s remedial power and will only clutter the courts with cases lacking in merit.

CONCLUSION

The U.S. Supreme Court, interpreting not only the legislative intent but also the plain language of the NLRA, held that “the NLRA confers rights only on employees, not on unions.”⁶⁴ Thus, the protections conferred by the NLRA should be conferred upon employees and not on unions. Therefore, the Employee Free Choice Act, by amending the NLRA with provisions that provide protection only to unions as opposed to employees, that in fact, strip longstanding protections from employees, is not in harmony with the spirit of the NLRA nor the U.S. Supreme Court’s interpretation of the NLRA.

It is, at its core, an effort to increase union density at the expense of economic and democratic freedoms. We welcome a full and honest debate on this legislation. We are confident that the more that policymakers understand what this bill really does, the less likely they will be to support it, and, in the end, the Employee Free Choice Act will not be signed into law.

64 *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

APPENDIX A

Employee Free Choice Act of 2009

111th CONGRESS

1st Session

H. R. 1409

A BILL

To amend the National Labor Relations Act to establish an efficient system to enable employees to form, join, or assist labor organizations, to provide for mandatory injunctions for unfair labor practices during organizing efforts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ‘Employee Free Choice Act of 2009’.

SEC. 2. STREAMLINING UNION CERTIFICATION.

(a) In General- Section 9(c) of the National Labor Relations Act (29 U.S.C. 159(c)) is amended by adding at the end the following:

‘(6) Notwithstanding any other provision of this section, whenever a petition shall have been filed by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wish to be represented by an individual or labor organization for such purposes, the Board shall investigate the petition. If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the Board shall not direct an election but shall certify the individual or labor organization as the representative described in subsection (a).

(7) The Board shall develop guidelines and procedures for the designation by employees of a bargaining representative in the manner described in paragraph (6). Such guidelines and procedures shall include--

- (A) model collective bargaining authorization language that may be used for purposes of making the designations described in paragraph (6); and
- (B) procedures to be used by the Board to establish the validity of signed authorizations designating bargaining representatives.’.

(b) Conforming Amendments-

(1) NATIONAL LABOR RELATIONS BOARD- Section 3(b) of the National Labor Relations Act (29 U.S.C. 153(b)) is amended, in the second sentence--

(A) by striking ‘and to’ and inserting ‘to’; and

(B) by striking ‘and certify the results thereof,’ and inserting ‘, and to issue certifications as provided for in that section,’.

(2) UNFAIR LABOR PRACTICES- Section 8(b) of the National Labor Relations Act (29 U.S.C. 158(b)) is amended--

(A) in paragraph (7)(B) by striking ‘, or’ and inserting ‘or a petition has been filed under section 9(c)(6), or’; and

(B) in paragraph (7)(C) by striking ‘when such a petition has been filed’ and inserting ‘when such a petition other than a petition under section 9(c)(6) has been filed’.

SEC. 3. FACILITATING INITIAL COLLECTIVE BARGAINING AGREEMENTS.

Section 8 of the National Labor Relations Act (29 U.S.C. 158) is amended by adding at the end the following:

(h) Whenever collective bargaining is for the purpose of establishing an initial agreement following certification or recognition, the provisions of subsection (d) shall be modified as follows:

(1) Not later than 10 days after receiving a written request for collective bargaining from an individual or labor organization that has been newly organized or certified as a representative as defined in section 9(a), or within such further period as the parties agree upon, the parties shall meet and commence to bargain collectively and shall make every reasonable effort to conclude and sign a collective bargaining agreement.

(2) If after the expiration of the 90-day period beginning on the date on which bargaining is commenced, or such additional period as the parties may agree upon, the parties have failed to reach an agreement, either party may notify the Federal Mediation and Conciliation Service of the existence of a dispute and request mediation. Whenever such a request is received, it shall be the duty of the Service promptly to put itself in communication

with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

`(3) If after the expiration of the 30-day period beginning on the date on which the request for mediation is made under paragraph (2), or such additional period as the parties may agree upon, the Service is not able to bring the parties to agreement by conciliation, the Service shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service. The arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties.’.

SEC. 4. STRENGTHENING ENFORCEMENT.

(a) Injunctions Against Unfair Labor Practices During Organizing Drives-

(1) IN GENERAL- Section 10(l) of the National Labor Relations Act (29 U.S.C. 160(l)) is amended--

(A) in the second sentence, by striking ‘If, after such’ and inserting the following:

`(2) If, after such’; and

(B) by striking the first sentence and inserting the following:

`(1) Whenever it is charged--

`(A) that any employer--

`(i) discharged or otherwise discriminated against an employee in violation of subsection (a)(3) of section 8;

`(ii) threatened to discharge or to otherwise discriminate against an employee in violation of subsection (a)(1) of section 8; or

`(iii) engaged in any other unfair labor practice within the meaning of subsection (a)(1) that significantly interferes with, restrains, or coerces employees in the exercise of the rights guaranteed in section 7;

while employees of that employer were seeking representation by a labor organization or during the period after a labor organization was recognized as a representative defined in section 9(a) until the first collective bargaining contract is entered into between the employer and the representative; or

`(B) that any person has engaged in an unfair labor practice within the meaning of subparagraph (A), (B), or (C) of section 8(b)(4), section 8(e), or section 8(b)(7);

the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred.’.

(2) CONFORMING AMENDMENT- Section 10(m) of the National Labor Relations Act (29 U.S.C. 160(m)) is amended by inserting `under circumstances not subject to section 10(l)' after `section 8'.

(b) Remedies for Violations-

(1) BACKPAY- Section 10(c) of the National Labor Relations Act (29 U.S.C. 160(c)) is amended by striking `And provided further,' and inserting `Provided further, That if the Board finds that an employer has discriminated against an employee in violation of subsection (a)(3) of section 8 while employees of the employer were seeking representation by a labor organization, or during the period after a labor organization was recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract was entered into between the employer and the representative, the Board in such order shall award the employee back pay and, in addition, 2 times that amount as liquidated damages: Provided further,'.

(2) CIVIL PENALTIES- Section 12 of the National Labor Relations Act (29 U.S.C. 162) is amended--

(A) by striking `Any' and inserting `(a) Any'; and

(B) by adding at the end the following:

`(b) Any employer who willfully or repeatedly commits any unfair labor practice within the meaning of subsections (a)(1) or (a)(3) of section 8 while employees of the employer are seeking representation by a labor organization or during the period after a labor organization has been recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract is entered into between the employer and the representative shall, in addition to any make-whole remedy ordered, be subject to a civil penalty of not to exceed \$20,000 for each violation. In determining the amount of any penalty under this section, the Board shall consider the gravity of the unfair labor practice and the impact of the unfair labor practice on the charging party, on other persons seeking to exercise rights guaranteed by this Act, or on the public interest.'.

APPENDIX B

Employee Free Choice Act of 2009

111th CONGRESS

1st Session

S. 560

A BILL

To amend the National Labor Relations Act to establish an efficient system to enable employees to form, join, or assist labor organizations, to provide for mandatory injunctions for unfair labor practices during organizing efforts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ‘Employee Free Choice Act of 2009’.

SEC. 2. STREAMLINING UNION CERTIFICATION.

(a) In General- Section 9(c) of the National Labor Relations Act (29 U.S.C. 159(c)) is amended by adding at the end the following:

“(6) Notwithstanding any other provision of this section, whenever a petition shall have been filed by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wish to be represented by an individual or labor organization for such purposes, the Board shall investigate the petition. If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the Board shall not direct an election but shall certify the individual or labor organization as the representative described in subsection (a).

“(7) The Board shall develop guidelines and procedures for the designation by employees of a bargaining representative in the manner described in paragraph (6). Such guidelines and procedures shall include--

`(A) model collective bargaining authorization language that may be used for purposes of making the designations described in paragraph (6); and
`(B) procedures to be used by the Board to establish the validity of signed authorizations designating bargaining representatives.’.

(b) Conforming Amendments-

(1) NATIONAL LABOR RELATIONS BOARD- Section 3(b) of the National Labor Relations Act (29 U.S.C. 153(b)) is amended, in the second sentence--

(A) by striking `and to’ and inserting `to’; and

(B) by striking `and certify the results thereof,’ and inserting `, and to issue certifications as provided for in that section,’.

(2) UNFAIR LABOR PRACTICES- Section 8(b) of the National Labor Relations Act (29 U.S.C. 158(b)) is amended--

(A) in paragraph (7)(B) by striking `, or’ and inserting `or a petition has been filed under section 9(c)(6), or’; and

(B) in paragraph (7)(C) by striking `when such a petition has been filed’ and inserting `when such a petition other than a petition under section 9(c)(6) has been filed’.

SEC. 3. FACILITATING INITIAL COLLECTIVE BARGAINING AGREEMENTS.

Section 8 of the National Labor Relations Act (29 U.S.C. 158) is amended by adding at the end the following:

`(h) Whenever collective bargaining is for the purpose of establishing an initial agreement following certification or recognition, the provisions of subsection (d) shall be modified as follows:

`(1) Not later than 10 days after receiving a written request for collective bargaining from an individual or labor organization that has been newly organized or certified as a representative as defined in section 9(a), or within such further period as the parties agree upon, the parties shall meet and commence to bargain collectively and shall make every reasonable effort to conclude and sign a collective bargaining agreement.

`(2) If after the expiration of the 90-day period beginning on the date on which bargaining is commenced, or such additional period as the parties may agree upon, the parties have failed to reach an agreement, either party may notify the Federal Mediation and Conciliation Service of the existence of a dispute and request mediation. Whenever such a request is received, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

`(3) If after the expiration of the 30-day period beginning on the date on which the request for mediation is made under paragraph (2), or such

additional period as the parties may agree upon, the Service is not able to bring the parties to agreement by conciliation, the Service shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service. The arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties.’.

SEC. 4. STRENGTHENING ENFORCEMENT.

- (a) Injunctions Against Unfair Labor Practices During Organizing Drives-
- (1) IN GENERAL- Section 10(l) of the National Labor Relations Act (29 U.S.C. 160(l)) is amended--
- (A) in the second sentence, by striking ‘If, after such’ and inserting the following:
- (2) If, after such’; and
- (B) by striking the first sentence and inserting the following:
- (1) Whenever it is charged--
- (A) that any employer--
- (i) discharged or otherwise discriminated against an employee in violation of subsection (a)(3) of section 8;
- (ii) threatened to discharge or to otherwise discriminate against an employee in violation of subsection (a)(1) of section 8; or
- (iii) engaged in any other unfair labor practice within the meaning of subsection (a)(1) that significantly interferes with, restrains, or coerces employees in the exercise of the rights guaranteed in section 7; while employees of that employer were seeking representation by a labor organization or during the period after a labor organization was recognized as a representative defined in section 9(a) until the first collective bargaining contract is entered into between the employer and the representative; or
- (B) that any person has engaged in an unfair labor practice within the meaning of subparagraph (A), (B), or (C) of section 8(b)(4), section 8(e), or section 8(b)(7);
- the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred.’.
- (2) CONFORMING AMENDMENT- Section 10(m) of the National Labor Relations Act (29 U.S.C. 160(m)) is amended by inserting ‘under circumstances not subject to section 10(l)’ after ‘section 8’.
- (b) Remedies for Violations-
- (1) BACKPAY- Section 10(c) of the National Labor Relations Act (29 U.S.C. 160(c)) is amended by striking ‘And provided further,’ and

inserting 'Provided further, That if the Board finds that an employer has discriminated against an employee in violation of subsection (a)(3) of section 8 while employees of the employer were seeking representation by a labor organization, or during the period after a labor organization was recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract was entered into between the employer and the representative, the Board in such order shall award the employee back pay and, in addition, 2 times that amount as liquidated damages: Provided further,'.

(2) CIVIL PENALTIES- Section 12 of the National Labor Relations Act (29 U.S.C. 162) is amended--

(A) by striking 'Any' and inserting '(a) Any'; and

(B) by adding at the end the following:

'(b) Any employer who willfully or repeatedly commits any unfair labor practice within the meaning of subsections (a)(1) or (a)(3) of section 8 while employees of the employer are seeking representation by a labor organization or during the period after a labor organization has been recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract is entered into between the employer and the representative shall, in addition to any make-whole remedy ordered, be subject to a civil penalty of not to exceed \$20,000 for each violation. In determining the amount of any penalty under this section, the Board shall consider the gravity of the unfair labor practice and the impact of the unfair labor practice on the charging party, on other persons seeking to exercise rights guaranteed by this Act, or on the public interest.'.

APPENDIX C

The NLRA, as Amended by EFCA, with Commentary

<p>This column shows the NLRA as it would be modified by The Employee Free Choice Act of 2009 (EFCA) if EFCA were passed into law.</p> <p>New text is shown <u>underlined</u>. Deleted text is shown in strikeout.</p>	COMMENTS
SEC. 1. FINDINGS AND POLICIES	Unchanged.
SEC. 2. DEFINITIONS.	Unchanged.
<p>SEC. 3. NATIONAL LABOR RELATIONS BOARD.</p> <p>(a) [Creation, composition, appointment, and tenure; Chairman; removal of members]</p>	Unchanged.
<p>(b) [Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal] The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 [section 159 of this title] to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to to direct an election or take a secret ballot under subsection (c) or (e) of section 9 [section 159 of this title] and certify the results thereof, and to issue certifications as provided for in that section, except that upon the filing of a request therefore with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.</p>	EFCA adds this provision to allow a certification of union representation without an election.
(c) [Annual reports to Congress and the President]	Unchanged.
(d) [General Counsel; appointment and tenure; powers and duties; vacancy]	Unchanged.
SEC. 4. Eligibility for reappointment; officers and employees; payment of expenses]	Unchanged.
Sec. 5. [§ 155. Principal office, conducting inquiries throughout country; participation in decisions or inquiries conducted by member]	Unchanged.
Sec. 6. [§ 156. Rules and regulations]	Unchanged.
Sec. 7. Rights of Employees	Unchanged.

<p>Sec. 8. [§ 158.] (a) [Unfair labor practices by employer]</p>	<p>Unchanged.</p>
<p>(b) [Unfair labor practices by labor organization] It shall be an unfair labor practice for a labor organization or its agents—</p> <p>Sections 8(b)(1) to 8(b)(6) are not changed by EFCA</p> <p>(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective- bargaining representative, unless such labor organization is currently certified as the representative of such employees:</p> <p>(A) where the employer has lawfully recognized in accordance with this Act [subchapter] any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act [section 159(c) of this title],</p> <p>(B) where within the preceding twelve months a valid election under section 9(c) of this Act [section 159(c) of this title] has been conducted, or or a petition has been filed under section 9(c) (6), or</p> <p>(C) where such picketing has been conducted without a petition under section 9(c) [section 159(c) of this title] being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: <i>Provided</i>, That when such a petition when such a petition other than a petition under section 9(c)(6) has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) [section 159(c)(1) of this title] or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: <i>Provided further</i>, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.</p> <p>Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b) [this subsection].</p>	<p>This section of the NLRA specifies the unfair labor practices of a union.</p> <p>Section 8(b)(7) provides that it is an unfair labor practice to picket or threaten to picket an employer if the object is to force bargaining with a union except in the circumstances specified by Sections 8(b)(7)(A)-(C) below.</p> <p>Unchanged</p> <p>EFCA would not allow picketing if a union files a petition under the card check authorization provisions of EFCA.</p> <p>EFCA's card check authorization provisions prohibit the requirement to hold a NLRB certified election.</p>
<p>(c) [Expression of views without threat of reprisal or force or promise of benefit]</p>	<p>Unchanged.</p>
<p>(d) [Obligation to bargain collectively]</p>	<p>Unchanged.</p>
<p>(e) [Enforceability of contract or agreement to boycott any other employer; exception]</p>	<p>Unchanged.</p>
<p>(f) [Agreements covering employees in the building and construction industry]</p>	<p>Unchanged.</p>
<p>(g) [Notification of intention to strike or picket at any health care institution]</p>	<p>Unchanged.</p>

<p><u>(h) Whenever collective bargaining is for the purpose of establishing an initial agreement following certification or recognition, the provisions of subsection (d) shall be modified as follows:</u></p> <p>(1) <u>Not later than 10 days after receiving a written request for collective bargaining from an individual or labor organization that has been newly organized or certified as a representative as defined in section 9(a), or within such further period as the parties agree upon, the parties shall meet and commence to bargain collectively and shall make every reasonable effort to conclude and sign a collective bargaining agreement.</u></p> <p>(2) <u>If after the expiration of the 90-day period beginning on the date on which bargaining is commenced, or such additional period as the parties may agree upon, the parties have failed to reach an agreement, either party may notify the Federal Mediation and Conciliation Service of the existence of a dispute and request mediation. Whenever such a request is received, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.</u></p> <p>(3) <u>If after the expiration of the 30-day period beginning on the date on which the request for mediation is made under paragraph (2), or such additional period as the parties may agree upon, the Service is not able to bring the parties to agreement by conciliation, the Service shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service. The arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties.</u></p>	<p>EFCA overrides the long-established provisions in the NLRA regarding bargaining for an initial agreement:</p> <p>Instead of a mutual obligation to meet at “reasonable times” to bargain, EFCA provides a 10-day period for an initial bargaining meeting after a union demand for bargaining. Although this 10-day period may be extended by mutual agreement, either party could refuse to allow an extension and thus a union could force an employer into bargaining meetings within 10 days.</p> <p>Instead of an obligation to “confer in good faith” and that no party can be compelled to agree or make a concession, EFCA allows a union (or employer) to force the initial contract negotiations into mandatory mediation after 90 days of bargaining.</p> <p>EFCA provides for binding arbitration if agreement cannot be reached after a 30-day period <i>which starts on the date of the mediation request</i>. Thus, EFCA provides a union with the power to force what should be a mutual negotiation of a collective bargaining agreement into a binding adjudication that can obligate an employer (and its employees) to an initial contract of 2 years.</p>
<p>Sec. 9 [§ 159.] Representatives and elections</p> <p>(a) [Exclusive representatives; employees’ adjustment of grievances directly with employer]</p>	<p>Unchanged.</p>
<p>(b) [Determination of bargaining unit by Board]</p>	<p>Unchanged.</p>

<p>(c) [Hearings on questions affecting commerce; rules and regulations] (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—</p> <p>Sections 9(c)(1) to 9(c)(5) are not changed by EFCA</p> <p><u>(6) Notwithstanding any other provision of this section, whenever a petition shall have been filed by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wish to be represented by an individual or labor organization for such purposes, the Board shall investigate the petition. If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the Board shall not direct an election but shall certify the individual or labor organization as the representative described in subsection (a).</u></p> <p><u>(7) The Board shall develop guidelines and procedures for the designation by employees of a bargaining representative in the manner described in paragraph (6). Such guidelines and procedures shall include--</u></p> <p><u>(A) model collective bargaining authorization language that may be used for purposes of making the designations described in paragraph (6); and</u></p> <p><u>(B) procedures to be used by the Board to establish the validity of signed authorizations designating bargaining representatives.</u></p>	<p>Section 9(c) of the NLRA provides the rules for holding representation elections to determine if a union is to be selected as the exclusive bargaining representative.</p> <p>EFCA adds a provision prohibiting the NLRB from holding an election where 50% of the employees plus one in an appropriate bargaining unit sign authorization cards, even if other employees or the employer would like to have an election. There is no discretion; the certification of the union is mandatory.</p> <p>EFCA adds a provision whereby the NLRB specifies model language for setting guidelines and procedures for obtaining union recognition through the card check process and</p> <p>procedures for validating a claim that greater than 50% of employees in an appropriate bargaining unit lawfully, knowingly and voluntarily signed authorization cards (which may be obtained without employer knowledge).</p>
<p>(d) [Petition for enforcement or review; transcript]</p>	<p>Unchanged.</p>
<p>(e) [Secret ballot; limitation of elections]</p>	<p>Unchanged.</p>
<p>Sec. 10. [§ 160.] (a) [Powers of Board generally]</p>	<p>Unchanged.</p>
<p>(b) [Complaint and notice of hearing; six-month limitation; answer; court rules of evidence inapplicable]</p>	<p>Unchanged.</p>

<p>(c) [Reduction of testimony to writing; findings and orders of Board] The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act [subchapter]: <i>Provided</i>, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further; <i>Provided further</i>, <u>That if the Board finds that an employer has discriminated against an employee in violation of subsection (a)(3) of section 8 while employees of the employer were seeking representation by a labor organization, or during the period after a labor organization was recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract was entered into between the employer and the representative, the Board in such order shall award the employee back pay and, in addition, 2 times that amount as liquidated damages: <i>Provided further</i></u>, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [subsection (a)(1) or (a) (2) of section 158 of this title], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.</p> <p>[The title “administrative law judge” was adopted in 5 U.S.C. § 3105.]</p>	<p>EFCA adds a provision whereby a Section 8(a)(3) unfair labor practice (discrimination in hiring or tenure) by an employer subjects the employer to increased penalties (triple backpay damages) during organizing activities (even if unknown to the employer) or before an initial CBA is reached further pressuring an employer to agree to an initial CBA in haste.</p> <p>NOTE: There is no increased penalty for a union engaging in unfair labor practices during the same period.</p>
<p>(d) [Modification of findings or orders prior to filing record in court]</p>	<p>Unchanged.</p>
<p>(e) [Petition to court for enforcement of order; proceedings; review of judgment]</p>	<p>Unchanged.</p>

(f) [Review of final order of Board on petition to court]	Unchanged.
(g) [Institution of court proceedings as stay of Board's order]	Unchanged.
(h) [Jurisdiction of courts unaffected by limitations prescribed in chapter 6 of this title]	Unchanged.
(i) Repealed.	Unchanged.
(j) [Injunctions]	Unchanged.
(k) [Hearings on jurisdictional strikes]	Unchanged.
<p>(l) [Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process] Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b) [section 158(b) of this title], or section 8(e) [section 158(e) of this title] or section 8(b)(7) [section 158(b)(7) of this title], the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred.</p> <p>(1) Whenever it is charged--</p> <p style="padding-left: 40px;"><u>(A) that any employer--</u></p> <p style="padding-left: 80px;"><u>(i) discharged or otherwise discriminated against an employee in violation of subsection (a)(3) of section 8;</u></p> <p style="padding-left: 80px;"><u>(ii) threatened to discharge or to otherwise discriminate against an employee in violation of subsection (a)(1) of section 8;</u> <u>or</u></p> <p style="padding-left: 80px;"><u>(iii) engaged in any other unfair labor practice within the meaning of subsection (a)(1) that significantly interferes with, restrains, or coerces employees in the exercise of the rights guaranteed in section 7;</u></p> <p style="padding-left: 40px;"><u>while employees of that employer were seeking representation by a labor organization or during the period after a labor organization was recognized as a representative defined in section 9(a) until the first collective bargaining contract is entered into between the employer and the representative; or</u></p> <p>(B) that any person has engaged in an unfair labor practice within the meaning of subparagraph (A), (B) or (C) of section 8(b)(4), section 8(e), section 8(b)(7);</p> <p>the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred.</p>	<p>EFCA adds a provision <i>whereby any allegation</i> of employer interference with a worker's right to unionize, or discrimination in hiring or tenure by an employer receives priority processing by the NLRB.</p> <p>NOTE: Allegations of union violations are not given the same priority.</p> <p>The section was simply renumbered to accommodate the new provision above added by EFCA.</p>

<p>If after such(2) If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: <i>Provided further</i>, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: <i>Provided further</i>, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) [section 158(b)(7) of this title] if a charge against the employer under section 8(a)(2) [section 158(a)(2) of this title] has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: <i>Provided further</i>, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D) [section 158(b)(4)(D) of this title].</p>	
<p>(m) [Priority of cases] Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 8 [section 158 of this title] under circumstances not subject to 10(l), such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (l) [of this section].</p>	<p>This change solidifies EFCA's provision giving priority processing to <i>any allegation</i> of employer interference with a worker's right to unionize or discrimination in hiring or tenure by an employer.</p>
<p>Sec. 11 Investigatory Powers.</p>	<p>Unchanged.</p>

<p>Sec. 12. [§ 162. Offenses and penalties]</p> <p>(a) Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act [subchapter] shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than one year, or both.</p> <p>(b) <u>Any employer who willfully or repeatedly commits any unfair labor practice within the meaning of subsections (a)(1) or (a)(3) of section 8 while employees of the employer are seeking representation by a labor organization or during the period after a labor organization has been recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract is entered into between the employer and the representative shall, in addition to any make-whole remedy ordered, be subject to a civil penalty of not to exceed \$20,000 for each violation. In determining the amount of any penalty under this section, the Board shall consider the gravity of the unfair labor practice and the impact of the unfair labor practice on the charging party, on other persons seeking to exercise rights guaranteed by this Act, or on the public interest.</u></p>	<p>EFCA adds a provision whereby employer interference with a worker's right to unionize, or discrimination in hiring or tenure by an employer subjects the employer to a penalty of up to \$20,000 per violation during organizing activities (even if organizing is unknown to the employer) or before an initial collective bargaining agreement is reached, further pressuring an employer to agree to an initial collective bargaining agreement in haste.</p> <p>NOTE: There is no such penalty for union unfair labor practices during the same period.</p>
<p>Sec. 13. [Right to strike preserved]</p>	<p>Unchanged.</p>
<p>Sec. 14. [Construction of provisions]</p>	<p>Unchanged.</p>
<p>Sec. 15. [Omitted.] [Reference to repealed provisions of bankruptcy statute.]</p>	<p>Unchanged.</p>
<p>Sec. 16. [Separability of provisions]</p>	<p>Unchanged.</p>
<p>Sec. 17. [Short title] This Act [subchapter] may be cited as the "National Labor Relations Act."</p>	<p>Unchanged.</p>
<p>Sec. 18. Omitted. [Reference to former sec. 9(f), (g), and (h).]</p>	<p>Unchanged.</p>
<p>Sec. 19. [INDIVIDUALS WITH RELIGIOUS CONVICTIONS]</p>	<p>Unchanged.</p>



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