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The Employee Free Choice Act Is Anything But

A Comparison of Labor Organizing Today vs. under EFCA

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The Employee Free Choice Act (EFCA, H.R.1409, S.560), also known as the "card check" bill, is the most significant and contentious piece of labor legislation of recent years.[1] Organized labor leaders designated it as their top priority for the 2008 election and devoted considerable money, time, and resources on behalf of Democratic candidates supportive of the Act. On the other hand, the business community—including the U.S. Chamber of Commerce and other large industry groups—have pushed back against EFCA with vigor unusual for established companies. Clearly, there is a lot at stake here.

EFCA consists of three components. This paper provides an overview of each provision and compares it to today's organizing methods. EFCA is designed to dramatically increase union membership, which is at an all time low of around 12 percent—and only 7.6 percent in the private sector.[2] It would do this by effectively eliminating secret ballot organizing elections and replacing them with a procedure known as "card check," whereby union organizers approach employees to sign union cards out in the open. This allows for an open atmosphere of coercion, which secret ballots are designed to avoid.

In addition, EFCA guarantees a first contract through binding arbitration. This means that, if an employer and a newly recognized union cannot agree on a contract after a specific period, then a federally appointed arbitrator can impose a contract.

Finally, EFCA would increase penalties for "unfair labor practices" (ULP) against employers only, which would give unions a new tool for browbeating employers. Unfair labor practices, a category of offense created under the National Labor Relations Act, includes actions by employers which are intended to discourage unionization.

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Unions argue that EFCA is necessary because secret ballot elections, the method by which most workplaces are organized today, are time consuming and cumbersome. In reality, organized labor sees this bill as a powerful tool with which to revive its decades of membership decline. EFCA would allow unions to undertake more aggressive organizing campaigns—at the expense of individual workers' privacy and freedom of association, as well as employers' freedom of contract.

The Employee Free Choice Act is anything but. It takes away an employee's free choice, is detrimental to American businesses, and will further stifle the U.S. economy. The following survey of EFCA's provisions explains how.

Card Check

Today, when a union wants to organize a company, a union organizer will approach employees who may or may not be interested in joining. Each employee will be asked—often pressured—to sign an authorization card. When more than 30 percent of employees at a place of employment—known in labor law parlance as a bargaining unit—have signed cards, the union can petition the National Labor Relations Board (NLRB) to run and supervise an election. As a matter of custom, unions will not normally submit the authorization cards to the NLRB until they have collected them from 65 percent of employees.

At no time is the union required to notify the employer that an organizing campaign is under way. Often the company's management does not find out until it is notified by the NLRB. Once the NLRB accepts the authorization cards a secret ballot election date is set, approximately 42 days later.[3] The 42 days is a campaign period during which the union and employer will each make its case to the employees.

During this time, the employer's conduct is severely restricted—it may not promise or make changes in work conditions or threaten or coerce employees. Unions, on the other hand, can and do make promises about what they hope to accomplish during bargaining with employers.[4]

Under the current rules the secret ballot election takes place at a neutral location, typically the workplace in question. The NLRB, which oversees the process, has successfully conducted over 400,000 elections.[5] It should be noted that the NLRB has a long history of running elections competently, and that this part of the process has received little criticism from any party. The party with the majority of votes cast wins the election. A tie results in the status quo being maintained.[6]

Under EFCA, a card check procedure is all that is necessary for a union to become recognized as the exclusive bargaining agent for all employees at a company. Under card check, when a union organizer has collected a majority of signatures from the employees at a particular workplace, the union is then automatically certified as the bargaining representative without an election.

EFCA supporters promote the misconception that the bill will give employees a choice to decide on unionization either through a secret ballot election or a card check procedure. Nothing could be further from the truth. EFCA explicitly states that once a union collects a majority of cards in a potential bargaining unit, then the National Labor Relations Board is *required* to certify the union as exclusive bargaining agent for all employees without an election. The current version, H.R. 1409, states:

> 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). [Emphasis added.][7]

The current system already gives union organizers great latitude to use card check. Many times a union is recognized based on a card majority. Once an employee signs a union card, he exposes himself to this kind of stealth unionization, a situation which EFCA would only exacerbate.

In addition, an employer can agree to hold a card check procedure as a result of union pressure. Unions often engage in a tactic known as a "corporate campaign." Corporate campaigns are elaborate political and public relations campaigns that labor unions use to target a specific employer or group of employers. Tactics include feeding allegations of company wrongdoing to the news media, filing complaints with regulatory agencies, contacting shareholders to challenge management's competence and question the company's financial health, leveraging the union's investment power by introducing shareholder resolutions that advance union goals—and, of course, picketing. The message to the employers is simple: Let us unionize your workforce, or we'll destroy your reputation.

Ultimately, with or without employer acquiescence, it is the union—not the employee—who decides whether to organize through card check or to ask for an election.

The voting booth offers the anonymity that allows individuals to vote their conscience. By contrast, the card check process exposes employees to coercion in many different forms, which may include peer pressure, deceit, and intimidation—including visits to employees' homes. EFCA effectively will end secret ballot elections in union organizing drives. An employee who has signed an authorization card but who wishes to have it returned is at the mercy of the union, which has no obligation to give back a signed card. Card check in its current form is already bad enough. The Employee Free Choice Act would make it even worse.

Compulsory Binding Arbitration

Today, after a union is recognized as the exclusive bargaining agent for the employees at a firm, the employer is only required to bargain in good faith, and is not obligated to accept any contract that it deems to be detrimental to the company. Therefore, negotiating a first contract frequently takes a great deal of time, sometimes more than a year. The union cannot collect dues until a contract is signed.

Under EFCA, after a union is recognized through a card check procedure, an employer may not request a secret ballot election to verify the cards, and has 10 days to begin bargaining. Many card check campaigns are done covertly with no advance knowledge by the employer, which gives the employer little time to get a negotiating team together. (The exceptions to this are corporate campaigns, in which employers are strong-armed into agreeing to card check.)

Furthermore, the EFCA process only allows 90 days to agree on a contract. The union will have started collecting member dues by that point, so it would have very little incentive to agree to a contract early. Therefore, negotiations would be much less likely to result in an agreement, at which point the law mandates negotiation for an additional 30 days. Again, should an agreement not be made, then the federal government intervenes by appointing a panel of arbitrators who can then impose a contract. This gives the union an incentive not to reach an agreement with the employer, because if it finds the employer's offer not to its liking, it can wait out the 120 days, and get at least part of what it wants in arbitration. That in turn would encourage the union negotiators to make exorbitant demands—in essence, asking for 200 percent to end up with 100.

No one understands the complexities of a business better than its owners and managers. Outside arbitrators enjoy no such specialized, local knowledge. Employers will be forced to risk releasing proprietary information during the arbitration process. Employers and employees alike will be at the mercy of people who do not understand their business. Additionally, the arbitration panel will be charged with getting a contract quickly, so will need to act in haste. The question is: Who, other than the union leadership, will benefit from binding arbitration?

Increased Employer Penalties

Today, EFCA supporters argue that employers set out to commit so-called unfair labor practices (ULP) whereby employers seek to disadvantage the union during the election process. The NLRB defines unfair labor practices—broadly—as actions by employers that could discourage or otherwise influence employees' decisions on whether to join a union.[8] In cases in which misconduct is proven to have affected an election, the employer faces severe penalties. If the NLRB deems that employers have made it impossible to conduct a fair election, it can order the employer to recognize the union regardless of the election outcome. These penalties apply only to the employer.

Moreover, the number of unfair labor practice complaints does not support the claim that employers have an unfair advantage during the election process. The National Labor Relations Board has found very few unfair labor practice cases in which an employer's misconduct tainted the outcome of an election.[9]

In 2008, unions won around 64 percent of elections—a higher win percentage than in the 1970s, when union membership was greater than today.[10] Therefore, even if claims of employer interference were true, the alleged misconduct has had no discernible effect. As former NLRB Chairman Robert J. Battista has noted, the Board dismisses most of the unfair labor practice cases brought before it due to lack of evidence of misconduct.[11]

Under EFCA, the National Labor Relations Board will impose unfair labor practice penalties of $20,000 plus triple back pay, up from the current penalty of lost wages only. As noted, these penalties apply only to the employer; unions go largely unchecked. Today, during organizing campaigns, unions routinely file multiple unfair labor practice complaints against an employer. This is usually done as part of the corporate campaign strategy mentioned earlier, in order to pressure employers to step back and give the union greater access to its employees in exchange for the union stopping its filing of ULP charges and other harassment tactics. EFCA will encourage greater use of this bullying tactic by making the potential price tag for each unfair labor practice charge much costlier—and therefore more painful—for employers targeted for unionization.

Conclusion. Why do supporters of the Employee Free Choice Act say this major change in the law is necessary? They argue that unions are stifled in their organizing efforts by the election process as it currently exists. But the fact is that workers are not joining unions in the numbers they once did because of greater opportunities in an open labor market, as increased productivity has resulted in both higher wages and safer work environments. Meanwhile, today, industries with a heavy union presence are in severe trouble in part because of high labor costs.

If EFCA were to be enacted, its economic impact would be widespread and severe. It would impose enormous costs on American companies at a time when they can ill afford them. Multiple studies show lower productivity and profitability in unionized businesses relative to non-union ones. Incentives matter—unionized employees are rarely recognized for extraordinary individual achievement, which kills motivation.[12] In the current global recession, for congressional leaders to pile such a massive economic weight onto our already struggling economy would be sheer folly.

The so-called Employee Free Choice Act is anything but. By doing away with secret ballot elections in union organizing drives, it takes away employees' free choice, further hurting American workers.

Notes

[1] The bill was introduced by Rep. George Miller (D-Calif.) and Sen. Tom Harkin (D-IA) on March 10, 2008.
[2] Bureau of Labor Statistics, "Union Members in 2008," *BLS News Release,* January 28, 2009, http://www.bls.gov/news.release/union2.toc.htm.
[3] John E. Higgins, Jr., *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act,* 5th ed. Eds. John E. Higgins, Jr., et al. Vol. 2. (Edison, NJ: BNA Books, 2006), p. 2673.
[4] Another tactic unions use is known as "salting." A "salt" is a paid union organizer who gets hired at a company which a union has targeted for organizing. Once inside the company, "salts" promote and encourage support for the union. Naturally, the unions try to do this without the employer's knowledge.
[5] Robert J. Battista, "70 Years of the NLRA," Speech at New York University, May 20, 2005.
[6] 29 U.S.C. 159 (a).
[7] Employee Free Choice Act of 2009, H.R. 1409, 111th Cong., § 2(a) (2009), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1409ih.txt.pdf.
[8] The National Labor Relations Act states:
Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];
(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 [section 156 of this title], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;
(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act [subchapter];
(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].
[9] Richard Epstein, "The Case against the Employee Free Choice Act," John M. Olin Law & Economics Working Paper No. 452 (2nd Series.), January 2009, https://www.law.uchicago.edu/files/452.pdf.
[10] Labor Relations Institute, "Union Scorecard," September 2008, http://www.lrionline.com/ink/scoreboards/INK_Scoreboard_Sept_08.pdf.
[11] Battista.
[12] Brian E. Becker and Craig A. Olson, "Unionization and Shareholder Interest," *Industrial & Labor Relations Review,* Vol. 42, No. 2, January 1989.