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Card Check Creates Government-Run Workplaces

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The misnamed Employee Free Choice Act (EFCA) does more than effectively eliminate workers' rights to a secret ballot vote on joining a union. Section 3 of EFCA gives government officials the power to impose contracts on workers and firms. Government bureaucrats would set compensation and make most major business decisions at newly unionized companies. The bureaucrats writing these proposals would have no expertise in the company's operations or business model and would be unaccountable if their decisions drove the company into bankruptcy. Workers would lose all say over working conditions. EFCA would effectively create government-run workplaces.

Mutual Consent and Good Faith Bargaining. Mutual consent and good faith negotiating form the foundation of the collective bargaining process: The parties negotiate in good faith until they settle on terms. If both sides cannot reach an agreement, the union may call a strike and the employer may implement its last offer or even lock out workers. Both sides use their bargaining power to win concessions, but neither side must accept terms that they find unacceptable. Section 8(d) of the National Labor Relations Act specifies that the law "does not compel either party to agree to a proposal or require the making of a concession."

The end result is a contract that both sides can live with, even if they would have preferred different terms. No contract takes effect unless workers believe they get a fair deal and management believes the contract will not bankrupt the firm. If negotiations break down, the workers can strike or management can lock them out, but neither side must work under an unsatisfactory contract.

EFCA Imposes Contracts. EFCA replaces good faith bargaining with government imposed contracts. Under Section 3 of the act (misleadingly titled "Facilitating Initial Collective Bargaining Agreements"), EFCA provides that—after unions organize a business—the company has 10 days to meet with union officials to begin collective bargaining. After 90 days of bargaining, either party may request mediation by the Federal Mediation and Conciliation Service (FMCS). Thirty days later, if the parties have not settled on a contract or agreed to extend negotiations, the FMCS

> 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 two years, unless amended during such period by written consent of the parties.[1]

This government-imposed arbitration radically departs from the foundation of the collective bargaining process: the principle of mutual consent. In

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place of the agreement of both parties, government arbitrators would simply impose working conditions on both employers and employees, whether such conditions are workable or not.

Bureaucrats Dictate Workplace Conditions. In practice, EFCA will effectively eliminate good faith bargaining for initial contracts because the system provides no reason for unions not to hold out for a government contract. Unions would have strong incentives to make extreme demands and hope the arbitrator splits the difference between these demands and management's position.[2]

Granting such a radical amount of power to an arbitrator puts control of workplaces in the hands of unaccountable government bureaucrats. Labor contracts do not simply set wage and benefit levels but cover many aspects of how businesses operate. Under EFCA government bureaucrats would dictate:

- Wages and bonuses,
- Employment levels,
- Retirement and health care plans,
- Changes in business operations,
- Promotions procedures,
- Work assignments,
- Subcontracting,
- Closure, sale, or merger of a business.[3]

The government would decide how many employees a firm hired, how much it paid them, how it promotes them, and what retirement and health benefits they receive.

Additionally, the government would also be empowered to make critical decisions regarding business operations. Any business operation that significantly affects workers' jobs or working conditions would be set by arbitrators—even the equipment employees use.[4] The government would determine what tasks a firm subcontracts out for and what work gets performed in-house. It would even decide whether businesses could merge or whether they could relocate operations. Government bureaucrats would set most major business decisions for newly organized businesses for two years. Given the power the government would now wield over the private sector, EFCA effectively allows the government to run newly organized workplaces.

Unaccountable for Mistakes. Government arbitrators do not have expertise in the business whose operations they will dictate. Instead, they will prescribe the terms and conditions of employment to employees and employers without having any practical experience in the company, its operations, or its business strategy. The EFCA gives arbitrators sole discretion in imposing contracts with no risk that their rulings will be overturned. And unlike employees and employers, these arbitrators will not be affected by the consequences of their decisions.

Competition means that if an arbitrator miscalculates and forces a company to adopt uncompetitive business procedures, that same company cannot raise its prices to compensate without the risk of losing customers. A poor decision could easily lead to bankruptcy and layoffs. Yet arbitrators face no penalty if a miscalculation costs workers their jobs. Government-imposed contracts have all the downsides of bureaucratic central planning without the benefit of a coherent central plan.

Workers Have No Say. Under current law, workers can vote down a contract they do not support. Workers also have the right to honor a strike or to refrain from striking. All of these rights give workers some degree of autonomy and control over the union and their workplace.

1. The Employee Free Choice Act, S. 1041, 110th Cong., 1st Sess., Section 3.
2. Homer Deakins, "Consequences of the Employee Free Choice Act," speech at the Heritage Foundation, Washington, D.C., February 23, 2009, at *http://www.heritage.org/press/events/ev022309b.cfm*.
3. Patrick Hardin and John Higgens, Jr., eds, *The Developing Labor Law*, 4th ed., vol. 1 (Arlington, Va.: BNA Books, 2001), Chap.16.
4. *Ibid.*, p. 225. Employers may not change business operations if that decision significantly affects the jobs of workers at the company without modifications to a collective bargaining agreement. Courts have determined that changing the type of machinery businesses use is such a change in business operations.

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With imposed contracts in place, however, these rights disappear. EFCA does not allow workers to terminate the binding arbitration process. No matter how long arbitration drags on, the workers will remain stuck with it. And an arbitrator's word will be final, so a vote to reject the contract is out of the question. With a government-imposed contract, workers would lose all say in the workplace. They could not even ask their supervisors for a raise for good performance beyond what the contract specified. EFCA deprives workers of all choice regarding employment issues.

Putting the Government in Charge. EFCA does more than take away workers rights to vote in privacy. It also gives control of the workplace to government bureaucrats. Government officials would write the collective bargaining agreements of most newly organized companies. The government would set not just wages and benefits but all business operations that significantly affect workers, such as promotion procedures, retirement plans, health benefits, subcontracting, mergers, work assignments, even the machines used to run a plant. Employers would lose the ability to pursue their business strategies, and workers would lose all say about their workplace for two years. EFCA effectively constitutes a government takeover of America's workplaces.

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