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EFCA Authorizes Government Control of 4 Million Small Businesses

James Sherk

The Employee Free Choice Act (EFCA, H.R. 1409, S. 560) does more than take away secret ballot elections: It empowers the federal government to impose contracts on newly organized companies. The government would set wages, benefits, work assignments, promotion procedures, and any major changes to business operations. Because EFCA has no meaningful small businesses exemption, it would authorize federal control of up to 4 million small businesses employing 39 million Americans. Consequently, bureaucrats with no management experience would effectively control these small businesses.

Four Million Small Businesses Affected. The misnamed Employee Free Choice Act affects both large and small businesses. The National Labor Relations Act (NLRA) has a small business exception. However, this exemption has not been updated for inflation since 1959.¹ It covers all non-retail businesses with gross revenues of \$50,000 a year and retail businesses with gross revenues over \$500,000 a year.²

To put those figures into perspective, the average private-sector worker costs his or her employer \$56,000 a year in wages and benefits—before the cost of any capital needed to do the job.³ A business with one worker earning average pay would not qualify. Consequently, the law has no meaningful small businesses exemption.

The Heritage Foundation used Census Bureau data to calculate how many small businesses EFCA would affect: The act covers 4,180,000 businesses employing 38,934,000 workers.⁴

EFCA's Other Provision. EFCA takes away these workers' right to a secret ballot vote on joining a union—a consequence that has attracted considerable controversy. However, the bill has a second provision of equal if not greater significance to small businesses that has attracted much less attention: EFCA replaces collective bargaining with government-imposed contracts for newly organized companies. Section 3 of the act 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.⁵

In place of collective bargaining, the government would impose a contract for two years. In practice, EFCA will effectively eliminate collective bargaining

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(202) 546-4400 • heritage.org

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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 FMCS appointed arbitrator splits the difference between these demands and management's position.⁶

Bureaucrats Control the Workplace. Granting such a radical amount of power to the FMCS 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 impose:

- Wages and bonuses;
- Employment levels;
- Retirement and health care plans;
- Changes in business operations;
- Promotions procedures;
- Work assignments;
- Subcontracting; and
- Closure, sale, or merger of a business.⁷

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.⁸ The government would determine what tasks a firm subcontracts out for and what work gets performed in-house. For two years, government bureaucrats would set most major business decisions for newly organized businesses. Given the power the government would now wield over the private sector, EFCA effectively allows the government to run these companies.

Businesses at Risk. Government control would harm any company, but it would be particularly hard for small businesses to recover from government mistakes because they have less money with which to absorb losses. Consider a small car-repair shop that employs five mechanics. Teamster organizers take three of the mechanics out for beer after work and persuade them to sign union cards before hearing opposing arguments. The Teamsters—under EFCA's card check recognition requirements—then represent all five workers in the shop. If, after four

1. National Labor Relations Act, 29 U.S.C. § 151, 164 (1935).
2. National Labor Relations Board, *National Labor Relations Board Case Casehandling Manual*, Part I: Unfair Labor Practice Proceedings, Section 11700 Jurisdictional Standards, May 2008, at http://www.nlr.gov/nlr/legal/manuals/COMMON_TO_ALL_CASES_11700_11886.pdf (March 11, 2009).
3. Heritage Foundation calculations based on data from the Department of Labor, Bureau of Labor Statistics, "Employer Costs for Employee Compensation"/Haver Analytics. The typical private sector worker earned \$27.07 an hour in wages and benefits in the third quarter of 2008. That represents \$56,306 for 2,080 hours of work in one year.
4. Heritage Foundation calculations based on data from the Department of Commerce, Census Bureau, "Statistics of U.S. Businesses 2002," at <http://www.census.gov/csd/susb/susb02.htm> (March 11, 2009). The figure is the number of firms and employees at businesses with gross receipts of between \$100,000 and \$10,000,000 a year in the non-retail sector and between \$500,000 and \$10,000,000 a year in the retail sector and excluding industries not subject to the NLRA. Those industries are agriculture, railway, and airlines. Workers in the management of companies and enterprises sector were also excluded because supervisors are not subject to the NLRA.
5. The Employee Free Choice Act, S. 560, 111th Cong., 1st Sess., Section 3.
6. 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>.
7. Patrick Hardin and John Higgins, Jr., eds., *The Developing Labor Law*, 4th ed., vol. 1 (Arlington, Va.: BNA Books, 2001), Chap. 16.
8. *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 can represent such a change in business operations.

months of negotiations, the owner and the union had not reached a contract—perhaps because the union insisted on extreme demands such as firing any worker who did not join the Teamsters—the union could request mediation through the FMCS. After a lengthy process, approximately 15 months in the public sector, the government would impose a contract.⁹

At that point both the small business owner and the mechanics would lose all control over their workplace. Workers have no vote on the contract and they cannot go on strike; workers must accept whatever the government chooses for them.

For instance, the government could:

- Decide that the shop needed to hire two new mechanics while setting wage rates higher than competing repair shops,
 - Take away employee health benefits,
 - Prevent the shop from installing new labor saving machines,
 - Force the shop to fire any worker who does not pay union dues,
 - Force the workers into an under-funded union pension plan,
 - Impose work rules that prevent the most experienced mechanic from handling the most difficult jobs (unpleasant tasks would be assigned to less senior mechanics), and
- Determine which employee gets the next promotion, irrespective of merit.

Many of these provisions would drive up costs and force the repair shop to raise prices. But if higher prices drove customers to a competitor, putting the shop out of business, the government would not protect the mechanics' jobs. EFCA forces workers to accept whatever the government gives them and live with the consequences.

Government Control of Small Businesses. The misnamed Employee Free Choice Act puts control of small businesses in the hands of government bureaucrats because it contains no meaningful small business exemption. About 39 million employees from 4 million small businesses would lose their right to a secret ballot. EFCA then allows the government to impose contracts on newly organized small business employees. The federal government, not workers or their employers, would decide how much workers should earn, how—and if—they are promoted, and what benefits they receive. The government would assign work tasks and set business operations. The government would take control of every significant aspect of the small business workplace.

—James Sherk is the Bradley Fellow in Labor Policy at The Heritage Foundation.

9. James Sherk and Paul Kersey, "How the Employee Free Choice Act Takes Away Workers Rights," Heritage Foundation Backgrounder No. 2027, updated March 4, 2009, at <http://www.heritage.org/Research/Labor/bg2027.cfm>.