Executive Summary
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How the Employee Free Choice Act Takes Away Workers' Rights

James Sherk and Paul Kersey

Organized labor has made the Employee Free Choice Act (EFCA) its top legislative priority. The act would replace the current system of secret-ballot organizing elections with card checks, in which workers publicly sign union cards to organize and join a union. It would also impose binding arbitration for the initial bargaining agreement after organization and increase the penalties for unfair labor practices committed by employers—but not unions—during organizing drives. Each of these provisions would harm American workers.

Stifling Free Choice. Under the EFCA, once organizers collect signed cards from a majority of a company's employees, all of the company's workers would be forced to join the union without a vote. This strips workers of both their fundamental right to vote and their privacy. Both the union and the employer would know exactly which workers want to join the union, leaving workers vulnerable to threats and intimidation.

Even when organizers obey the law, card check allows union organizers to push workers to commit to joining a union immediately after hearing their one-sided sales pitch without either a chance to hear the arguments from the other side or time for reflection. When workers decline to sign the union card on the spot, union organizers return again and again to pressure these holdouts to change their minds. Privately, unions acknowledge that union cards signed under these circumstances do not accurately reflect workers' desire to join a union.

Contrary to union rhetoric, organizing elections are fair and do protect the rights of workers. If anything they favor union organizers, which is why unions win 60 percent of organizing elections. Government data show that employers rarely fire union supporters—in just 2.7 percent of election campaigns—and most alleged violations are investigated and processed in a few months. Today's election procedures balance the rights of employers and unions and ensure that unions have access to workers when they are not on company time.

Workers themselves disagree with the union activists who claim to speak for them. A large majority of union members agree that secret-ballot elections are fair and should not be replaced with card check. Most other Americans also agree. Congress should not change a system that most workers support.

Reducing Accountability. The EFCA's second component would force employers and newly organized unions into binding arbitration if they were unable to settle on a collective bargaining agreement within 90 days from the start of bargaining. This provision would force private firms into a risky pro-

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cess that works poorly in the public sector. In states like Michigan that use binding arbitration, it takes an average of 15 months for arbitrators to make a ruling.

Binding arbitration places control of wages and employment conditions in the hands of unaccountable government officials. Arbitrators have little knowledge of the competitive realities that firms face and no expertise in crafting the business contracts on which workers and employers rely. An arbitrator's ruling would be final, and the arbitrator would not have to live with the consequences of the ruling. Workers could not appeal a decision that gave them too little pay or one that would bankrupt the firm. Government-imposed contracts would also stifle corporate competitiveness and innovation.

Ignoring Union Abuses. The EFCA's final section would increase penalties on employers, but not unions, that engage in unfair labor practices during organizing drives. Labor activists argue that unions almost never abuse workers during organizing drives, so there is no need to increase penalties for union abuses. But they misrepresent the facts to reach this conclusion. In fact, unions have been charged with making threats, violence, coercion, and intimidation thousands of times since 2000.

These new penalties would apply not just to cases of illegal firings but to many actions that the government prohibits but appear innocuous, such as asking workers what they would like to see changed at their workplace. Employers without experience with organizing campaigns will be at risk of committing multiple unintentional violations and racking up steep fines. This will have a chilling impact on employer speech, intimidating them into staying silent during an organizing campaign. Consequently, employees will be deprived of the information they need to make an informed choice about union representation.

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Does a ballot cast in private or a card signed in public better reveal a worker's true preference about whether to join a union? A private vote is the obvious answer, but organized labor has nonetheless made the misleadingly named Employee Free Choice Act (EFCA, H.R. 800) its highest legislative priority.

Recently, unions have switched the focus of their organizing operations from private balloting to publicly signed cards. These so-called card-check campaigns make it much easier for unions to organize workers, but most companies strongly resist the idea of denying their employees a vote. Unions now want the government to take away workers' right to vote and certify unions after only a card-check campaign. The Employee Free Choice Act would do this and more.

First, it requires the National Labor Relations Board to certify a union after a majority of a firm's workers has signed union cards, putting an end to almost all organizing elections: "if the [National Labor Relations] Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations...the Board *shall not direct an election* but shall certify the individual or labor organization."[1]

Second, the EFCA requires companies and newly certified unions to enter binding arbitration if they cannot reach agreement on an initial contract after 90 days of negotiations.[2] Neither companies nor employees could appeal the arbitrator's ruling, and the contract would last for two years.

Talking Points

- Card-check organizing strips workers of their right to secret-ballot elections. By making workers' union preferences public, it would expose them to harassment and coercion.
- Organizing elections are not stacked against unions. Unions win 60 percent of elections, and employers obey the law in 97.3 percent of campaigns.
- In card-check campaigns, unions pressure workers to sign union cards immediately without hearing the other side. These cards do not reflect workers' true preference.
- Workers disagree with the unions that claim to speak for them. Fully 71 percent of union members believe that secret-ballot elections are fair.
- Binding arbitration hands control of wage and working conditions to unaccountable government officials, denying workers the ability to bargain and vote on their contracts.

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Third, H.R. 800 would dramatically increase the penalties for most unfair labor practices committed by employers, but not unions, during an organizing drive—chilling employers' free speech and depriving workers of the ability to make an informed choice on union membership.[3]

Union activists contend that the act would protect workers' freedom to freely choose to join a union. However, workers' best defense against harassment and intimidation by either a union or an employer is a secret-ballot election in which neither knows how any individual worker voted.

To protect American workers, Congress should:

- **Protect** workers' privacy during organizing drives and guarantee every worker the right to vote in a private-ballot election;
- **Ensure** that workers hear from both sides during an organizing drive and have time to reflect on their choice so they can make an informed and considered decision; and
- **Protect** the right of workers and employers to bargain collectively without having government officials unilaterally impose employment contracts on them.

The Employee Free Choice Act would strip workers of their fundamental rights and leave them more vulnerable to pressure than before.

The Case Against Card Check

America's labor laws are grounded in the principle that workers should have the freedom to decide whether to bargain collectively with their employers. The law protects workers from retaliation for deciding to join or to reject a union. A company must recognize a union supported by a majority of its workers and may not recognize a union that lacks majority support.

Under current law, union organizers can request an organizing election once 30 percent of a company's workers sign union authorization cards in a "card check."[4] This constitutes a "showing of interest," and the National Labor Relations Board (NLRB) then orders that a secret-ballot election be held. These elections usually take place 39 days after the NLRB receives the cards.[5] Unions win about 60 percent of these certification elections.[6] Once the NLRB certifies the union as the employees' exclusive representative, the employer and the union begin negotiating a collective bargaining agreement. Through a process of mutual give and take, the two sides reach an agreement over wages and working conditions.

A company may choose to recognize a union that the NLRB has not certified if the union's organizers present union cards signed by a majority of the company's workers. Unions find it much easier to sign up workers when workers' choices are made in public. However, as the Supreme Court affirmed in *NLRB v. Gissel Packing Co.* (1969), publicly signed cards are "inherently unreliable," and a company may always request a private vote to confirm that its employees actually want to unionize. Companies usually insist on giving their workers the privacy of the voting booth and refuse to recognize unions without an election.

Fundamental Right to Vote in Privacy. The misleadingly named Employee Free Choice Act would end this system. The act would require companies to recognize a union without a private election once organizers submit union cards signed by a majority

1. H.R. 800, Section 2(a).
2. *Ibid.*, Section 3.
3. *Ibid.*, Section 4.
4. National Labor Relations Board, Office of the General Counsel, *An Outline of Law and Procedure in Representation Cases*, July 2005, Chapter 5, at *www.nlrb.gov/nlrb/legal/manuals/outline_chap5.html.*
5. National Labor Relations Board, Office of the General Counsel, "Memorandum GC 08-01 Revised, Summary of Operations: Fiscal Year 2007," at *http://www.nlrb.gov/shared_files/GC%20Memo/2008/GC%2008-01%20Summary%20of%20Operations%20FY%2007.pdf*. The typical election is defined as the median election, which took place 39 days after the election petition's filing.
6. National Labor Relations Board, *Seventy-second Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30 2007*, October 16, 2008, Table 13: RC Cases, at *http://www.nlrb.gov/nlrb/shared_files/brochures/Annual%20Reports/Entire2007Annual.pdf*. In 2007 unions won 59.9 percent of organizing elections.

of workers in a company. This effectively replaces private organizing ballots with publicly signed cards.

Abolishing elections deprives workers of a fundamental democratic right. Elections guarantee that all workers can express their views on whether they want to belong to a union. Under card check, however, workers who have not been contacted by union organizers have no say in whether their workplace organizes. If organizers collect cards from a majority of workers, all workers must join the union without a vote.

Equally important, a democratic election with private ballots ensures that all workers can express their desires without fear of social stigma or retribution. With a private ballot, no one else knows how any individual worker voted, and workers can express their intentions without outside pressure. For these reasons, the government protects the right of all Americans to vote for elected officials in private. American workers have the same right, and it should not be taken away because it impedes union organizing.

No Elections. Supporters of H.R. 800 contend that it would not prohibit private balloting but would simply give workers the option to choose whether to engage in a private vote or a card check.[7] This argument is very misleading. Under the EFCA, workers could not choose between different organizing methods. The legislation requires the NLRB to certify a union without holding an election once organizers submit cards signed by a majority of workers. Those workers would never have the option to sign a card calling for an election that does not also count toward a card-check majority.

Under current law, an election occurs when union organizers hand in union cards signed by at least 30 percent of a company's workers. If they handed in cards from less than 50 percent of the workers, this would fall short of the EFCA's majority requirement and so would lead to a traditional private election. However, the choice of organizing method would belong solely to union organizers, not workers. If workers collected cards from 30 percent of workers and submitted them, seeking an election, the union organizers could submit the cards they had collected. If the combined total of the cards exceeded 50 percent the union would be immediately recognized, even if most of the employees wanted an election and not card-check certification. Workers would have no means of separately requesting the choice of an election.

An election would occur only when union organizers submit cards signed by a minority of workers; but union organizers do not call for an election without signed cards from a majority of workers. They know that unions usually lose these elections. The AFL-CIO's internal studies show that unions win only 8 percent of elections that are called after less than 40 percent of workers have signed cards.[8]

Consequently union guidelines call for organizers to collect cards from 60 to 70 percent of workers in a company before going to the polls.[9] Unions openly state that they do not go to an election without a supermajority of cards:

1. **International Brotherhood of Teamsters:** "The general policy of the Airline Division is to file for a representation election only after receiving a 65 percent card return from the eligible voters in a group."[10]
2. **New England Nurses Association:** "Have 70–75 percent of members sign cards; if unable to reach this goal, review plan."[11]

7. Representative George Miller, Chairman, Committee on Education and Labor, U.S. House of Representatives, statement at full committee markup of the Employee Free Choice Act, February 14, 2007, at *www.house.gov/apps/list/speech/edlabor_dem/GMEFCAFeb14.html* (March 15, 2007).
8. AFL-CIO, *AFL-CIO Organizing Survey* (Washington, D.C.: AFL-CIO, 1989).
9. David L. Cingranelli, "International Election Standards and the NLRB: Representative Elections," Parts 1–3 in Richard N. Block et al., eds., *Justice on the Job: Perspectives on the Erosion of Collective Bargaining in the United States* (Kalamazoo, Mich.: W.E. Upjohn Institute, 2006), p. 42.
10. International Brotherhood of Teamsters Airline Division, "Airline Division Organizing," at *http://www.teamster.org/divisions/Airline/airlineorganizing.htm* (August 12, 2008).
11. New England Nurses Association, "Why a Union?" at *http://www.nenurses.org/your_rights.htm* (August 12, 2008).

3. **Service Employees International Union (SEIU):** "[T]he rule of thumb in the SEIU is that it's unwise to file for an election when fewer than 70 percent of the workforce has signed interest cards."[12]

With guaranteed certification under card check, organizers would almost never call for an election once they have obtained enough signatures. Top union leaders have said as much. UNITE HERE President Bruce Raynor says that he sees "no reason to subject the workers to an election."[13] SEIU Local 32BJ President Mike Fishman flatly states, "We don't do elections."[14] Workers would lose their right to a private vote as soon as union organizers collected cards from a majority of employees.

Threats and Intimidation. A private vote is more than a fundamental democratic right; it also protects workers and ensures that they can express their true views. An election ensures that workers can hear both sides, have time for reflection, and then vote their conscience without pressure or fear of retaliation. These safeguards disappear when workers must organize by publicly signing a card. Card checks fail to gauge accurately workers' desire to join a union.

Private ballots ensure that workers' decisions about whether to join a union remain private so that no one can threaten workers for making the "wrong" choice. With card checks, both the company and the union know how workers voted, and this exposes workers to the possibility of retaliation. Though threats are illegal, they still occur, and not all of them are made by employers.

A union has a direct financial stake in the outcome of an organizing drive. If the workers organize, the union will collect 1 percent to 2 percent of their wages in dues. These high stakes lead some organizers to cross the line and threaten workers who refuse to sign union cards. Two examples illustrate this problem.

- In one card-check campaign investigated by the NLRB, a pro-union employee threatened a co-worker by saying that if she refused to sign the union card, "the union would come and get her children and that it would also slash her tires."[15]
- In another case, Thomas Built Buses agreed to recognize a United Auto Workers (UAW) card-check drive in exchange for significant advance wage concessions from the union. Employee Jeff Ward successfully challenged the sweetheart deal before the NLRB and forced the company to allow its workers to vote.[16] In response, the UAW posted flyers around the plant with Mr. Ward's home address, home phone number, and a map to his house. The flyers stated, "Jeff Ward lives here. Go tell him how you really feel about the union."[17]

Forcing workers to express their beliefs in public leaves them vulnerable to threats like these and makes card checks much less reliable than private ballots for revealing employees' true wishes.

Sales Pitch. Even when union organizers do not threaten workers, card checks often do not reveal workers' free and considered choice about joining a union because workers do not hear both sides' pitches and lack time for reflection. Instead, card checks force workers to choose in a high-pressure sales situation.

In a card-check campaign, groups of organizers meet with individual workers at their homes or elsewhere and press them to sign a union authorization card. Organizers do not simply present the argu-

12. Steven Henry Lopez, *Reorganizing the Rust Belt: An Inside Study of the American Labor Movement*, (Berkeley, Cal.: University of California Press, 2004), p. 38.
13. Steven Greenhouse, "Labor Turns to a Pivotal Organizing Drive," *The New York Times,* May 31, 2003, at *http://query.nytimes.com/gst/fullpage.html?res=9E0CE6DC1430F932A05756C0A9659C8B63* (August 20, 2008).
14. Timothy Aeppel, "Not-So-Big Labor Enlists New Methods For Greater Leverage," *The Wall Street Journal*, August 29, 2005, at p. A-2.
15. *HCF, Inc. d/b/a Shawnee Manor*, 321 NLRB 1320 (1996).
16. National Right to Work Legal Defense Foundation, "Thomas Built Workers Win New Settlement Forcing UAW Union and Freightliner to Cancel Sweetheart Deal," March 10, 2005, at *www.nrtw.org/b/nr_385.php* (March 21, 2007).
17. National Right to Work Legal Defense Foundation, "24-Hour Security Detail Hired to Protect Thomas Built Bus Worker's Family Against UAW Union Reprisals," March 15, 2005, at *www.nrtw.org/b/nr_386.php* (March 21, 2007).

ments for and against joining the union and then ask for a worker's support. Instead, they employ psychological manipulation to induce workers to sign after hearing their pitch. One former union organizer described the process in congressional testimony:

> [Organizers] are trained to perform a five-part house call strategy that includes: Introductions, Listening, Agitation, Union Solution, and Commitment. The goal of the organizer is to quickly establish a trust relationship with the worker, move from talking about what their job entails to what they would like to change about their job, agitate them by insisting that management won't fix their workplace problems without a union and finally convincing the worker to sign a card....
>
> Typically, 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.... [I]f someone told me that she was perfectly contented at work, enjoyed her job and liked her boss, I would look around her house and ask questions based on what I noticed: "wow, I bet on your salary, you'll never be able to get your house remodeled," or, "so does the company pay for day care?" These were questions to which I knew the answer and could use to make her feel that she was cheated by her boss. Five minutes earlier she had just told me that she was feeling good about her work situation.[18]

Signing a card after this kind of manipulation does not reflect an employee's unfettered and considered choice.

Only One Side of the Story. Organizers have a job to do: recruit new dues-paying members to their union. They are not paid to inform workers of the downsides of unionizing. Instead, they make the strongest case they can for joining a union and ask workers to sign their card right then. A former union organizer explained the process:

> We rarely showed workers what an actual union contract looked like because we knew that it wouldn't necessarily reflect what a worker would want to see. We were trained to avoid topics such as dues increases, strike histories, etc. and to constantly move the worker back to what the organizer identified as his or her "issues" during the first part of the house call.[19]

Union organizers understandably boast about the benefits unions bring members, but they do not bring up the six-figure salaries that union bosses pay themselves from members' dues, the fact that hundreds of union officials have been convicted of racketeering in the past five years, or the role that unions' inflexibility has played in driving some companies into bankruptcy. Instead, union organizers make their pitch and ask workers to sign their cards immediately. By making card-check organizing the norm, the Employee Free Choice Act would prevent workers from making informed decisions.

Harassing Holdouts. With card checks, union organizers know who has and has not signed up to join the union, allowing them to repeatedly approach and pressure reluctant workers who declined to sign after the first sales pitch. With this technique, a worker's decision to join the union is binding, while a decision to opt out only means "not this time."

Moreover, some organizers go beyond pressure to outright harassment. Hotel workers in Los Angeles, for example, had to seek an injunction against union organizers after groups of eight to ten organizers harassed employees on their homes' porches late at night.[20] A labor lawyer explained what hap-

18. Testimony of Jen Jason, former organizer, UNITE-HERE, before the Subcommittee on Health, Employment, Labor, and Pensions, Committee on Education and Labor, U.S. House of Representatives, February 8, 2007, at *http://edworkforce.house.gov/testimony/020807JenniferJasontestimony.pdf*.

19. *Ibid*.

20. Testimony of Ron Kipling, Director of Room Operations, New Ontani Hotel and Garden, Los Angeles, before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, July 23, 2002, at *http://republicans.edlabor.house.gov/archive/hearings/107th/wp/uniondues72302/kipling.htm* (March 21, 2007).

pened to Trico Marine employees during a card-check drive:

> Some employees, when solicited at their homes by union representatives, said, "No," to signing a card; yet, they reported repeated, frequent home visits by union representatives continuing to try to secure their signatures, and they complained to the company of this harassment. After 8 visits, one vessel officer in southern Louisiana had an arrest warrant issued against a union organizer.... Employees volunteered that they signed cards just to stop the pressure and harassment.[21]

A card signed after union organizers' eighth pitch to a reluctant worker hardly reflects that worker's true opinion; nor does a card that is signed just to prevent further harassment.

Organizing Without Majority Support. Card-check campaigns expose workers to union threats and harassment and pressure them to commit after hearing a one-sided union sales pitch. Cards collected under those circumstances often do not reflect employees' free choice. Consequently card-check allows union activists to organize plants where a majority of workers oppose the union.

For example, Metaldyne Corporation agreed to allow the UAW to organize its workers with a card-check campaign in exchange for concessions at the bargaining table. The UAW soon collected union cards from a majority of workers, and Metaldyne agreed to recognize the UAW as its employees' representative. Soon afterwards, a majority of the company's workers submitted a signed petition stating that they did not want a union and requesting that the NLRB decertify their union.[22] The signed union cards did not reflect the employees' true preferences. This is not unusual. The NLRB recently voted to allow workers organized by card-check to vote on getting ride of the union in a secret ballot election. Subsequently workers at 8 percent of all companies organized by card-check have collected enough signed cards to request a decertification vote.[23]

Unions Know Card Checks Are Unreliable. Despite their public arguments in favor of the EFCA and card checks, union organizers candidly admit in private that card checks do not reflect workers' true beliefs. Union organizing manuals have long cautioned organizers that a worker's signature on a union card does not mean that he or she wants to join a union or will vote for the union in the election. The AFL-CIO's 1961 *Guidebook for Union Organizers* states:

> NLRB pledge cards are at best a signifying of interest at a given moment. Sometimes they are signed to "get the union off my back"... Whatever the reason, there is no guarantee of anything in a signed NLRB pledge card except that it will count towards an NLRB election.[24]

Union organizers also acknowledge that a card-check campaign allows them to organize workplaces without workers' majority support. United Food and Commercial Workers organizer Joe Crump openly admits that with card check, "You don't need a majority or even 30% support among employees."[25] Crump instructs organizers not to worry that aggressive campaigning for a company to

21. Testimony of Clyde Jacob, labor lawyer, before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, April 22, 2004, at *http://republicans.edlabor.house.gov/archive/hearings/108th/eer/laborlaw042204/jacob.htm* (March 21, 2007).
22. Declaration of Metaldyne Employee Lori Yost, submitted to NLRB Region 6, Case Nos. 6-RD-1518 and 6-RD-1519, at *www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/Petitioner.pdf*.
23. Heritage Foundation analysis of data obtained by the National Right to Work Foundation from the National Labor Relations Board under a Freedom of Information Act request for all card-check organizing cases between November 2007 and May 2008. In 31 of 384 card-check certification cases the workers subsequently requested a decertification election. Data available from the author upon request, and also found online here: *http://www.nrtw.org/files/nrtw/Copy%20of%20NLRB%20VR%20Database%20-%20Copy%20of%20Dana%20Information%20as%20of%2005-21-2008.xls*
24. Woodrow J. Sandler, "Another Worry for Employers," *U.S. News & World Report*, March 15, 1965, p. 86.
25. Joe Crump, "The Pressure Is On: Organizing Without the NLRB," *Labor Research Review*, Vol. 18 (Fall/Winter 1992), p. 43.

skip an election might turn workers against the union, because "if you had massive employee support, you probably would be conducting a traditional organizing [election] campaign."[26]

Metaldyne was not an unusual case. Unions regularly submit publicly signed authorization cards from a large majority of a company's workers only to see the workers reject the union in the privacy of the voting booth. In a study of organizing campaigns, the AFL-CIO admitted that "it is not until the union obtains signatures from 75% or more of the unit that the union has more than a 50% likelihood of winning the election."[27]

Unions Allege Abuses and Imbalances. It is difficult to argue for stripping workers of their right to a private vote. To justify putting an end to organizing elections, unions argue that the elections take place "in an inherently and intensely coercive environment" and are stacked against workers who want to join a union.[28]

Unions allege that companies systematically fire pro-union workers, threaten to shut down if their workers unionize, and use stalling tactics to delay holding votes. At the same time, say the activists, companies bombard their workers with anti-union messages at work while union organizers do not have access to workers to make their case. They also claim that it takes so long for the NLRB to investigate violations that employers routinely ignore laws protecting workers.[29] In the words of one labor activist, government-supervised secret-ballot organizing elections "look more like the discredited practices of rogue regimes abroad than like anything we would call American."[30] At the same time they contend that unions rarely intimidate workers. Nancy Schiffer, the AFL-CIO's Associate General Counsel, presents the unions' case:

> In one fourth of worker campaigns for collective bargaining, workers are fired…. 31,358 cases in 2005 of illegal firings and other discrimination against workers for exercising their federally protected labor law rights.[31]

If such abuses were occurring, depriving workers of a private vote would do almost nothing to stop them. However, the unions' allegations are either factually false or highly misleading. The facts show that employers rarely violate the law in organizing drives and that, if anything, NLRB election procedures favor unions: Unions win 60 percent of all organizing elections.[32]

Illegal Firings Rare. Union activists argue that Congress should replace organizing elections with card checks because employers regularly fire union supporters during organizing election campaigns in order to intimidate the remaining workers.[33] They claim that this happens in one-quarter of organizing campaigns and that there were "31,358 cases in 2005 of illegal firings and other discrimination against workers for exercising their federally protected labor law rights."[34]

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26. *Ibid.*, p. 42.
27. AFL-CIO, *AFL-CIO Organizing Survey.*
28. Testimony of Nancy Schiffer, AFL-CIO Associate General Counsel, before the Subcommittee on Health, Employment, Labor, and Pensions, Committee on Education and Labor, U.S. House of Representatives, February 8, 2007, at *http://edworkforce.house.gov/testimony/020807NancySchiffertestimony.pdf*.
29. AFL-CIO, *The Silent War: The Assault on Workers' Freedom to Choose a Union and Bargain Collectively in the United States*, *Issue Brief,* September 2005, p. 4, at *www.aflcio.org/joinaunion/how/upload/vatw_issuebrief.pdf*.
30. Testimony of Dr. Gordon Lafer before the Subcommittee on Health, Employment, Labor, and Pensions, Committee on Education and Labor, U.S. House of Representatives, February 8, 2007, at *http://edworkforce.house.gov/testimony/020807GordonLafertestimony.pdf*.
31. Testimony of Nancy Schiffer, AFL-CIO Associate General Counsel, before the Subcommittee on Health, Employment, Labor, and Pensions, Committee on Education and Labor, U.S. House of Representatives, February 8, 2007, at *http://edworkforce.house.gov/testimony/020807NancySchiffertestimony.pdf*.
32. National Labor Relations Board, *Seventy-second Annual Report of the National Labor Relations Board*, Table 13.
33. See, e.g., " AFL-CIO, Employee Free Choice Act: Employer Interference by the Numbers," at *www.aflcio.org/joinaunion/how/upload/employerinterference.pdf* (March 16, 2007).

If union activists' claims are correct, card checks would actually make it easier for companies to fire union supporters. Companies currently have no way of knowing how individual workers plan to vote in the privacy of the voting booth without asking them, but a union card signed in public is an entirely different matter. If the practice of systematically firing workers who want to unionize is widespread, then the government should not strip those workers of their privacy and enable employers to potentially learn exactly who wants to unionize.

In fact, however, the activists' claims are false. Illegal firings of union supporters are rare. Most unfair labor practice complaints that unions brought before the NLRB in 2007 were either withdrawn or dismissed.[35] The NLRB found substantiated evidence of illegal firings in just 2.7 percent of organizing election campaigns that took place that year.[36]

Misleading Numbers. Unions justify their claims of widespread illegal firings by using unreliable data from biased sources and by misrepresenting government statistics. Their claim that companies fire workers in one-quarter of organizing drives, for example, comes from a survey of union organizers that was conducted by a former union organizer.[37] Union organizers are not an impartial source, and actual government investigations reveal little evidence of the employer misconduct they allege.

Even more misleading is the claim that each year there are 30,000 cases of "illegal firings and other discrimination against workers" who want to join a union, a number that comes from the annual report of the National Labor Relations Board. The most recent number is 29,559 cases occurring in 2007.[38] But this figure has almost no connection with employer misconduct during union campaigns. Instead, it represents the number of workers the NLRB orders employers to pay back pay to each year. The NLRB awards back pay to resolve many types of disputes, only a few of which involve intimidation or organizing campaigns.

For example, if a company unilaterally changed working conditions by reducing hours to cut costs without first negotiating with the union, the NLRB would order the company to return to the status quo and bargain the changes with the union. The NLRB could also require the company to provide back pay to workers as though the changes never occurred by paying them for the hours that they would have worked had the company not reduced working hours. Asserting that all or even most awards of back pay are due to intimidation, fraud, or illegal firings during organizing campaigns is simply false.

If a company illegally fires a worker for supporting a union during an election campaign, the NLRB will order it to reinstate that worker in addition to providing back pay. While the numbers of workers reinstated and awarded back pay would be the same if these remedies were due to illegal firings, government records show that reinstatement is far less common than back pay. The NLRB ordered just 1,771 workers reinstated in 2007, a number that includes workers who were illegally fired for other causes, such as discussing salary with their co-workers.[39] Union activists' claim that employers fire

34. See testimony of Nancy Schiffer.

35. National Labor Relations Board, *Seventy second Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30 2007*, Table 7. The NLRB closed 16,983 ULP cases against employers in 2007. Of those, 5,438 were withdrawn by the charging party, and 3,791 were dismissed by the government. This accounts for 54 percent of all cases closed. Note that these are all ULP cases brought against employers, not just those brought during election campaigns.

36. J. Justin Wilson, "Union Math, Union Myths," Center for Union Facts, June 2007, at *www.unionfacts.com/downloads/Union_Math_Union_Myths.pdf*.

37. Kate Bronfenbrenner, "Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages and Union Organizing," September 6, 2000, at *http://digitalcommons.ilr.cornell.edu/reports/3*.

38. National Labor Relations Board, *Seventy-second Annual Report of the National Labor Relations Board*, Table 4.

39. *Ibid*. The law guarantees that workers may discuss their wages and salary with their co-workers. Many companies, however, do not know this and discharge workers for such activities. The NLRB orders that these workers be reinstated.

or discriminate against tens of thousands of employees each year for trying to organize reflects either a complete misunderstanding or misrepresentation of what the NLRB's data really represent.

No Cure for Illegal Threats. Labor activists claim that employers regularly attempt to intimidate workers by threatening to shut down or move plants if workers unionize and argue that card checks could curtail this intimidation.[40] Union organizers say that employers make such threats in half of all organizing campaigns, although they rarely follow through.[41] But such threats are already illegal and are grounds for setting aside an election.

Timely Investigation. Union activists agree that workers' legal protections look good on paper, but they claim that it takes so long for the government to investigate violations that these protections are meaningless in practice.[42] The AFL-CIO argues that "in 50 percent of the decisions issued by the NLRB in 2002 in unfair labor practice charge cases, workers waited more than 889 days for the NLRB to reach a decision."[43]

This claim is highly misleading. The National Labor Relations Board is labor law's equivalent of the U.S. Supreme Court. Only 3.7 percent of labor cases make it to the NLRB, and many of those embody novel legal issues, not the routine enforcement of the law.[44] Most cases are either settled by the parties or handled by lower levels of the NLRB bureaucracy.

It takes an NLRB regional director a median of only 96 days, or three months, to investigate an unfair labor practice charge, determine whether it has merit, and file a formal "complaint."[45] Only 13 percent of all cases reach that stage.[46] Fully 87 percent are closed before the complaint stage, either dismissed for lack of merit or resolved by settlements in which the company makes restitution. Cases that are not dismissed or settled take a median of six months from the filing of the complaint to the administrative law judge's decision. Only 5 percent of cases, overall, reach that stage.[47]

Ninety-five percent of all alleged violations of worker rights are settled through procedures that typically take between three to nine months. That is no reason to take away workers' right to a private vote.

Delays Rare. Unions also allege that, in addition to illegally threatening and firing workers, employers use legal maneuvers to delay holding organizing elections. They claim that companies file baseless objections with the NLRB in order to drag out election campaigns for months. This, they say, gives employers more time to intimidate their employees and causes workers to lose confidence in the union.[48] Labor activists argue that to prevent interminable delays before a vote, the government should replace private ballots with public union cards that would not be subject to delays.

The unions' claims, however, are simply false. The typical organizing election takes place 39 days after union organizers file an election petition. Over 93 percent of organizing elections take place within eight weeks after organizers have filed a petition.[49] Eight weeks is not an unreasonable delay for a decision that demands consideration by workers and that could affect them for years. Congress should not strip workers of their right to a private vote

40. AFL-CIO, *The Silent War*, pp. 4-5.

41. Bronfenbrenner, "Uneasy Terrain."

42. AFL-CIO, *The Silent War*, p. 4.

43. *Ibid.*

44. National Labor Relations Board, *Seventy second Annual Report of the National Labor Relations Boar*d, Table 8: CA Cases. 3.7 percent of all cases were closed after an NLRB decision, not counting the 0.9 percent of cases where the Board ordered the adoption of an Administrative Law Judge's decision.

45. *Ibid.*, Table 23.

46. *Ibid*. Tables 8 and 23. This concerns CA cases.

47. *Ibid.*, Tables 8 and 23. This concerns CA cases.

48. AFL-CIO, *The Silent War*, pp. 4, 8.

because labor activists think eight weeks is too long to wait for an organizing election.

Rights of Unions and Employers Balanced by Law. Unions claim that employers have an unfair advantage during organizing election campaigns. They argue that the system makes it too difficult for workers to organize, even when employers follow the law, because unions and employers do not have equal access to workers. They point out that management can campaign against unionizing all day long during working hours, while unions may do so only during break times. They say that employees cannot freely choose union membership when they do not get to hear the union case and that card checks would fix this problem.[50]

This argument is also misleading. The law balances the rights of unions and employers during organizing elections to ensure that workers can hear from both sides. Generally, union organizers may not campaign when workers are on company time, but organizers may speak during unpaid time at work, such as breaks, unless the company has a policy prohibiting all solicitation—not just solicitation by unions—on its premises.

In addition, the government requires companies to provide union organizers with a complete and accurate list of all employees' names and addresses within seven days of the NLRB's order to conduct an election. If the company refuses, the NLRB will set aside the election and order a re-vote.[51] Union organizers are free to contact employees at home or by phone to make their case, but employers may not do so.[52] The law guarantees unions the opportunity to make their case to employees--just not when companies pay those employees to work.

Deprive Employees of Informed Choice. Unions also object to the fact that employers can campaign against organizing and present workers with arguments against joining a union at the workplace. AFL-CIO president John Sweeney complains that employers require "supervisors to shovel anti-union propaganda to the employees whose schedules, evaluations and advancement they control" and force "workers to attend one-sided, anti-union meetings where management can legally fire pro-union workers who speak out."[53]

Unions say that card checks would remedy this problem. In one sense, they would. Card-check would enable unions to organize workplaces rapidly, before the employer was aware of the unions' activity and before workers have had time to reflect on their decision. Employers would have little time to persuade their workers that a union is not in their best interest.

Unions want this, but it would harm workers. Employer campaigns against unionizing benefit workers by informing them of the downsides of joining a union. This may be the only time that workers hear why they might not want to join. Union organizers will not tell workers these things. Unions train organizers to avoid topics like dues increases and strike histories that could persuade workers to reject the union.[54] Employers should provide their workers with the other side of the story. That is how democracy works: Voters make an informed decision in private after both sides make their strongest case.

Few Workers Want to Organize. Union activists contend that the low level of unionization in the United States proves that elections do not reflect

49. National Labor Relations Board, Office of the General Counsel, "Memorandum GC 08-01 Revised, Summary of Operations: Fiscal Year 2007," at *www.nlrb.gov/shared_files/GC%20Memo/2007/GC%2007-03%20Summary%20of%20Operations%20FY%2006.pdf*. The typical election is defined as the median election, which took place 39 days after the election petition's filing.
50. Testimony of Dr. Gordon Lafer.
51. National Labor Relations Board, Office of the General Counsel, *An Outline of Law and Procedure in Representation Cases*, Chapter 24, Section 324.
52. *Ibid.*, Section 321.
53. John Sweeney, "Out Front With John Sweeney: Management-Controlled Election Process," AFL-CIO, *at www.aflcio.org/aboutus/thisistheaflcio/outfront/managementcontrolledballoting.cfm* (February 21, 2007).
54. Testimony of Jen Jason.

workers' free choice. They argue that most American workers actually want to join a union. They back this up with polling numbers showing that 53 percent of non-union workers, or 57 million workers, would like to belong to a union.[55]

However those numbers are highly suspect. The AFL-CIO commissioned the poll. Peter Hart, a Democratic pollster, conducted it. The poll itself remains unpublished, and the AFL-CIO has not revealed the questions or polling methodologies used.

Publicly published polls conducted by nonpartisan pollsters show the opposite: Relatively few non-union workers want general representation. Opinion Research Corp. polling shows that by a margin of more than 6 to 1—82 to 13 percent—non-union workers do not their workplace to be organized.[56] Because a union must win the support of a majority of a company's workers to win recognition, the fact that relatively few workers belong to a union is not surprising.

Workers Disagree with Union Claims. Labor activists claim to speak for American workers, but workers disagree with the claims unions make on their behalf. Contrary to union claims of widespread corporate intimidation, Zogby polling shows that 71 percent of union members believe that the current private-ballot process is fair, versus only 13 percent who disagree. [57] Nor do union members want to lose their right to a private vote. Fully 74 percent of union members favor keeping the current system over replacing it with one that provides less privacy.[58]

The vast majority of Americans side with union members and not union bosses, believing that workers should have the choice to keep their views on organizing private. Fully 89 percent of Americans believe that a worker's ultimate choice should be kept private.[59]

In addition, a large majority of workers also oppose any effort to replace organizing elections with publicly signed cards. A recent McLaughlin poll indicates that 74 percent of Americans oppose card-check legislation that would end private-ballot elections. Some 74 percent of union members agree.[60] The very employees that union activists claim to represent oppose replacing private-ballot elections with card checks.

The Real Goal: Improving Union Finances. Unions know that private ballots best reveal workers' desires and that card-check organizing would not address, and could exacerbate, the alleged shortcomings of private elections. Yet they still favor card checks over private ballots. This is because their real aim is to reverse the labor movement's long-term decline. Unions are harder to sell to workers today than they were in the manufacturing economy of two generations ago. Today's jobs require unique skills and talents that do not lend themselves to general representation. Most workers in the modern economy do not feel that union membership provides benefits worth the 1 percent to 2 percent of their salary that they would have to pay in dues.

55. AFL-CIO, T*he Silent War*, p. 14.

56. Opinion Research Corporation, "Americans Overwhelmingly Reject Unionization," Center for Union Facts, February 4, 2009, at *http://server1.laborpains.org/wp-content/uploads/2009/02/pensionunionfactspolltopline.pdf* (February 20, 2009). For this poll 3,003 Americans were surveyed between January 15 and February 2, 2009. Of those who responded, 1,454 were employed. The margin of error among the employed was 2 percent.

57. These data come from a Zogby International poll of 703 union members, conducted in June 2004 for the Mackinac Center for Public Policy with a margin of error of plus or minus 3.8 percent. See Joseph Lehman, "Union Members' Attitudes Towards Their Unions' Performance," Mackinac Center for Public Policy, *Policy Brief* S2004-05, September 1, 2004, at *www.mackinac.org/archives/2004/s2004-05.pdf*.

58. McLaughlin & Associates, "American Voters Reject the Employee Free Choice Act," at *http://myprivateballot.com/fs/resource:id/x1wr5np68dwc8g/xq4zyrssrp99gm?_c=xs3xwoi63ehbt3*

59. Data from a poll of 1,000 likely general election voters, conducted for the Coalition for a Democratic Workplace during January 28-31, 2007, with a margin of error of plus or minus 3.1 percent. See McLaughlin & Associates, "Americans Want to Protect a Worker's Right to a Federally Supervised Private Ballot Election When Deciding Whether to Organize a Union," at *www.myprivateballot.com/UploadedFiles/CDW%20Polling%20Memo%20National.pdf*.

60. McLaughlin & Associates, "American Voters Reject the Employee Free Choice Act."

Consequently, union membership has fallen steadily since the 1950s, despite modest gains in the last two years. Today, just 12.4 percent of all workers and 7.6 percent of private sector workers belong to unions—fewer private sector workers than when Franklin D. Roosevelt signed the National Labor Relations Act in 1935.[61] Fewer members translates into less dues money and increased financial hardship for organized labor.

Unions seek to reverse that trend, and they know that card check allows them to organize workplaces without workers' majority support. Unions want the Employee Free Choice Act because it would make it easier to recruit dues-paying members, not because it would somehow defend workers' right to choose freely to unionize.

Congress Should Protect Private Ballots. A worker's best protection from pressure when deciding to join a union is the privacy of the voting booth. Card-check campaigns expose workers to potential intimidation. Even when organizers obey the law, they give workers one-sided sales pitches and press them to commit to the union immediately, without time for reflection or the opportunity to hear both sides.

Workers deserve better. To protect workers' rights and ensure that they can make informed and considered decisions, Congress should prohibit card-check organizing. Congress should stop companies from waiving their employees' right to vote by requiring a private-ballot election before a union is certified as the workers' exclusive representative.

The Case Against Binding Arbitration

The Employee Free Choice Act also provides for the use of binding arbitration to resolve bargaining impasses. Currently, negotiations on an initial contract following unionization are treated much the same as any other contract: The parties negotiate in good faith until they settle on terms. If they fail to do so, the union may call a strike, and the employer may implement its last offer or even lock out workers.

In a section misleadingly titled "Facilitating Initial Collective Bargaining Agreements," the EFCA provides that after 90 days of bargaining on an initial union contract, either party may request mediation by the Federal Mediation and Conciliation Service (FMCS). Thirty days later, if the parties are still unable to settle on a contract or agree 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.[62]

Arbitration can be a valuable method for resolving disputes and is frequently used in labor relations. Both management and labor have found it useful to bring in a trusted third party to evaluate grievances that might arise under an existing contract, a process that allows them to avoid the costs and delays of litigation. In this sense, arbitration is a valuable alternative to the court system.

But unlike in mediating contract disputes in which arbitration works well, in binding arbitration, the arbitrator does not simply take the place of a judge in a courtroom. Instead of applying the law or the terms of an existing agreement to settle a dispute, the arbitrator imposes a contract on both workers and employees. Binding arbitration is a much more difficult and risky process than mediating a contract dispute and is one that unions and management seldom agree to on their own.[63]

Ending Bargaining

A government-imposed contract is a radical departure from America's collective bargaining laws. The principle behind collective bargaining is

61. U.S. Department of Labor, Bureau of Labor Statistics, *Union Members in 2008*, January 28, 2009, at *http://www.bls.gov/news.release/union2.toc.htm* (February 20, 2009).

62. H.R. 800, Section 3.

63. Telephone interview with Frank Zotto, Vice President of Case Management, American Arbitration Association, February 12, 2007.

mutual consent. The government allows workers to form a cartel and threaten to strike in order to offset the employers' bargaining power. Both sides then use their bargaining power to negotiate a contract that they can accept, but neither side is forced to accept a contract 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." This ensures that neither party is stuck with a contract they cannot work under.

The end result of collective bargaining is a contract that both sides can live with, even if they would have preferred different terms. No contract is signed unless both 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 nothing is signed until both sides agree it is workable.

Binding arbitration is a radical departure from this established principle of mutual consent. In place of the agreement of both parties the government would simply impose working conditions on both employers and employees, whether they were workable or not.

While the EFCA purports to "facilitat[e] Initial Collective Bargaining Agreements," it does the opposite, leaving both parties subject to the decisions of an arbitration decision that one side or both sides may not want rather than encouraging them to arrive at a mutually satisfactory contract. In place of an agreement, the EFCA would impose the educated guess of a government-appointed arbitrator, leaving management and workers to deal with the consequences.

Binding Arbitration's Bad Record. The EFCA says little about the specific process of binding arbitration, leaving it to the FMCS to determine how an arbitration panel will be chosen, what sort of evidence it will consider and when, and what process it will use to make a decision. The state of Michigan uses binding arbitration to resolve bargaining impasses involving public safety workers, such as police officers, firefighters, and emergency medical technicians employed by county and municipal governments. The process in Michigan is fairly typical, and the experience of this state is a reasonable guide to the risks involved in binding arbitration.

Under the Michigan statute, binding arbitration is supposed to go quickly. Assembling the arbitration panel should take less than three weeks. Once the panel is named, the first hearing should be held within 15 days, and hearings are supposed to be wrapped up 30 days after they commence.[64]

In reality, the process takes much longer. In the early 1990s, only one out of every six binding arbitration cases was resolved within 300 days of a petition's being filed. The pace of arbitration has improved since then, but not by much.[65] A review of 29 binding arbitration cases resolved in 2005 and 2006 showed that only seven—fewer than one out of four—were resolved within 300 days. On average, binding arbitration takes almost 15 months from the date that a request is filed to the date that a decision is reached.[66]

Unaccountable Arbitrators. The Employee Free Choice Act would put control of wages and working conditions in the hands of unaccountable government officials. Arbitrators do not have to live with the consequences of their decisions and do not have expertise in the business whose operations they will dictate. They are responsible for dictating the terms and conditions of employment to employees and employers without having any practical experience in the company or its operations. The process is very arbitrary and the EFCA does not set out a step-by-step analysis that an arbitrator

64. Mich. Comp. Laws, Section 423.236.

65. Paul Kersey, "Proposal 3: Establishing a Constitutional Requirement Extending Mandatory Collective Bargaining and Binding Arbitration to State Government Employees," Mackinac Center for Public Policy, September 26, 2002.

66. Mackinac Center analysis of arbitration rulings. These rulings are available at the Michigan State University Labor and Industrial Relations Library in their Collection of Fact Finding Reports and Act 312 (1969) Arbitration Awards, at *http://turf.lib.msu.edu/awards*.

should go through. Arbitrators have sole discretion in imposing contracts with virtually no risk that their rulings will be overturned by the courts. Binding arbitration has all the downsides of bureaucratic central planning without the minimal upside of a coherent central plan.

An ill-conceived arbitrator's award can have severe consequences for both employers and employees. This has happened when it is used in the public sector. For instance, an arbitrator's 1978 decision to award Detroit police a cost-of-living allowance—an expensive item given the high inflation of the late 1970s—threw a precarious city budget out of balance. After the state courts refused to overturn the award, the city was forced to lay off 20 percent of its police force. Crime rates, which had been declining, increased dramatically. Even those officers who kept their jobs paid a price; in 1981, the city and the police union agreed to a wage freeze.[67]

Unlike a local government, a business cannot raise taxes or turn to a higher level of government for financial assistance if an arbitrator's decision goes against it. Competition in the free market means that if an arbitrator miscalculates and raises wages too high, a company cannot raise its prices to compensate for the decision without the risk of losing customers. An ill-advised arbitrator's ruling can easily lead to financial difficulty and layoffs. Yet arbitrators face no penalty if a miscalculation sends a company into bankruptcy or cheats workers out of a wage increase they would have earned. Unlike binding arbitration, with collective bargaining, both sides have a stake in making the final agreement work.

Stifling Competitiveness and Innovation. As damaging as an ill-advised arbitrator's decision might be for a local government, binding arbitration does even greater damage in the private sector by stifling competitiveness and innovation.

Unlike the typical arbitrator's decision in government, the EFCA would apply only to the initial negotiations after a union is recognized. This means that the arbitrator would not be able to look to prior collective bargaining agreements for guidance.

Without prior agreements to use as a baseline, a conscientious arbitrator will be more likely to base his or her decision on the practices of comparable companies, but this has drawbacks too. A company with its own distinctive business model could be forced to adopt the practices of its competitors, forcing it to give up its unique approach to its business and give up its competitive advantages.

If the binding arbitration process turns out to be a slow one, as it often is in Michigan government, business owners will be forced to prepare for retroactive back-pay awards while they wait for overdue decisions. This ties up funds that cannot be used to invest in new equipment, and these funds cannot be offered as incentives to lure new workers because back-pay awards go exclusively to the existing workforce.

Extreme Demands. Binding arbitration can affect the entire bargaining process. It is a common practice for both employers and unions in Michigan to make extreme proposals during bargaining with an eye toward the possibility of arbitration. The arbitrator may know little about how a specific corporation stays competitive and may not have the experience necessary to discern which demands are so extreme that they would not be agreed to in collective bargaining.

This complicates collective bargaining, as negotiators must agree to set aside these demands before they can get to negotiating on more realistic provisions. If negotiations break down and an arbitrator is brought in, the arbitrator might not be able to see through the posturing and could include these demands as part of his or her decision. The arbitrator could force companies to:

- Participate in multi-employer union pension plans, many of which are severely underfunded;
- Guarantee no layoffs irrespective of worker productivity; and
- Adopt uncompetitive work rules and production quotas.

These policies would cripple the competitiveness of American firms. In addition, binding arbitration is not without drawbacks for workers. Because of the way that binding arbitration fits in the overall scheme of the National Labor Relations Act, the arbitration process would make unions less

67. Kersey, "Proposal 3."

accountable to those whom it they are supposed to represent and protect.

Workers Lose All Say. Under current law workers can vote down a contract if they are not satisfied with its terms. Workers also have the right to honor a strike or to refrain from striking, as they think best, if the union calls for its members to cease working. All of these rights serve to give workers some degree of autonomy and some control over the union and in the workplace.

With binding arbitration in place, however, these rights are rendered moot. The 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. Once an arbitrator is called in, his or her word will be final, so a vote to reject the contract is out of the question. With a mediator-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 allowed. Workers would lose all say in their workplace once an arbitrator stepped in.

The Case Against Differential Penalties

The third and final component of the Employee Free Choice Act has received the least attention. Section 4 dramatically increases the penalties against employers for unfair labor practices conducted during an organizing drive and requires the NLRB to prioritize investigation of those cases.

Currently, when an employer illegally discriminates against a worker for supporting a union during an organizing campaign, the law requires the employer to provide that worker full back pay. The EFCA would require the employer to provide triple back pay and would add a civil penalty of up to $20,000 for unfair labor practices "willfully or repeatedly" committed by employers during organizing drives. It would also require the NLRB to give preliminary investigation of those unfair labor practices "priority over all other cases." The EFCA would not, however, increase penalties for unfair labor practices committed by unions against either workers or businesses.

Misrepresenting the Problem of Union Coercion. Union supporters contend that this differential treatment is justified because unions almost never intimidate or coerce workers during organizing campaigns. Nancy Schiffer, AFL-CIO Associate General Counsel, presents the unions' case:

> Is coercion in the signing of authorizations a legitimate concern? A recent review of 113 cases cited by the HR Policy Association as "involving" fraud and coercion identified only 42 decisions since the Act's inception that actually found coercion, fraud or misrepresentation in the signing of union authorization forms. That's less than one case per year.[68]

This misrepresents the HR Policy Association's findings to paint a completely false picture of union coercion. In a policy brief on the EFCA, the association included a list of 113 NLRB decisions involving "union deception and/or coercion in obtaining authorization card signatures."[69] Union activists examined those cases closely and found that only 42 of those 113 NLRB cases directly concerned those issues, but that does not mean that there have been only 42 cases of union coercion over the past 60 years. It means only that the HR Policy Association referenced 42 National Labor Relations Board decisions that concerned forgery or intimidation in the obtaining of union cards during that time. These are two very different things.

As described above, the NLRB is labor law's equivalent of the Supreme Court and hears only a small proportion of labor cases. Additionally, the HR Policy Association brief was not a comprehensive survey of NLRB decisions but merely a number of cases that they found to demonstrate the problem of union intimidation of workers. The union argument makes as much sense as finding 42 Supreme Court rulings over the past 60 years dealing with arson and arguing that there had been only 42 cases of arson in the United States during that time and therefore fears about arson are not "a legitimate concern."

68. Testimony of Nancy Schiffer.

69. HR Policy Association, "Mistitled 'Employee Free Choice Act' Would Strip Workers of Secret Ballot in Union Representation Decisions," Policy Brief, April 2004, pp. 4-7, at *www.hrpolicy.org/memoranda/2004/04-10_Employee_Free_Choice_Act_PB.pdf*.

Union Coercion a Real Problem. In fact, union coercion and intimidation are not as rare as labor activists contend. Thousands of unfair labor practices cases have been filed against unions since 2000, including 1,417 for coercive statements, 416 for violence and assaults, 546 for harassment, and 1,325 for threatening statements.[70] Many of these cases did not involve election campaigns, and the unions were not found guilty in every case, but these numbers show that workers have a real problem with union intimidation.

Workers have a right to decide whether to join a union without being subjected to coercion or pressure. Threats and intimidation from either employers or unions are equally repugnant. By increasing penalties against only employers, the EFCA sends the message that union threats are less of an injustice than employer threats. Prioritizing cases of employer discrimination forces workers who face union intimidation to wait longer for justice.

The law should not make this distinction. A worker assaulted by union members for refusing to sign a union card has been subjected to no less an injustice done than has a worker fired by his employer for signing a union card. If Congress believes stiffer labor law penalties are needed, those higher penalties should apply equally to employers and to unions. Cases of union violence and employer intimidation should also have equal priority.

Chilling Free Speech

Expanded employer penalties do more than fail to protect workers from union intimidation. They are also designed to chill employer speech and prevent workers from making an informed choice about union representation.

Many unfair labor practices have nothing to do with firing or threatening to fire workers. Labor law is arcane and employers are strictly prohibited from taking many actions that most Americans would assume are innocuous. During an election campaign an employer may not ask employees what is wrong with their working conditions and why they are considering a union. Employers may not ask employees if they are for or against the union. Unions are free to take these actions, but employers are not. Employers may not even raise employees' wages. Employers may not take many harmless actions that most Americans—and employers—assume are legal before studying labor law.

Consequently, it is not unusual for employers without experience with union campaigns to commit unintentional unfair labor practices. Under EFCA each ULP carries a $20,000 fine. The wording of the act levies these fines in cases of either intentional or repeated unfair labor practices. An employer who asked five employees why they were considering supporting the union and what issues they have with their workplace would face a $100,000 fine.

To avoid steep fines many employers will stay clear of saying or doing anything during the organizing campaign—the intended result. The fines are meant to intimidate employers into avoiding violating arcane labor laws by staying silent and not educating their workers about the downside of joining a union. This benefits the union but deprives workers of an informed choice.

It also gives unions tremendous leverage over employers who do commit multiple unintentional unfair labor practices. Unions can offer to withdraw their unfair labor practice charges—and the related fines—if employers agree to stop resisting the organizing drive. These penalties claim to address the problem of employers firing workers during organizing drives but actually will be a weapon used to silence employers and leave workers ignorant of the downsides of joining a union during organizing drives.

Conclusion

The Employee Free Choice Act would strip American workers of their right to a private-ballot vote, require companies to submit to binding arbitration, and increase penalties for unfair labor prac-

70. Center for Union Facts analysis of unfair labor practice charges against unions involving section 8(b)(1)(A) of the National Labor Relations Act, using data from the National Labor Relations Board's Electronic Case Information System. Analysis provided to James Sherk by the Center for Union Facts. Full results are available from Sherk at The Heritage Foundation upon request.

tices committed by employers but not by unions. Each of these provisions would be bad for American workers.

Congress should instead protect the privacy of American workers and guarantee their right to vote in an election before joining a union. Congress should also guarantee every worker the opportunity to hear arguments from both sides and time to reflect before voting.

Replacing organizing elections with public card checks is a move in the wrong direction. Card checks expose workers to threats and intimidation from unions and employers. Even when organizers obey the law, card checks still leave workers vulnerable to peer pressure and harassment. Organizers know who has and has not signed, so they repeatedly return to pressure holdouts to change their minds. They give workers a high-pressure sales pitch that only presents the union side and press them to commit immediately without time for reflection. Cards signed under these circumstances do not accurately reflect an employee's true intentions—a fact that unions privately acknowledge.

In contrast, NLRB elections balance the rights of both employers and unions and ensure that workers have the chance to hear both sides and reflect on their decision before voting. Contrary to union rhetoric, most companies obey the law during organizing elections, and the NLRB promptly remedies illegal discrimination against workers who want to organize.

Unsurprisingly, most workers say that the current election system is fair and oppose losing their right to vote. Congress should listen to American workers and decline to abolish the government-supervised organizing election system.

Congress should also protect the right of workers and employers to bargain freely. Binding arbitration means that unaccountable and unknowledgeable government bureaucrats would impose employment contracts on newly organized companies. Workers would not have the option of voting down the contract, and companies would have no recourse if an arbitrator imposed uncompetitive terms that would drive it into bankruptcy. It fundamentally conflicts with the principal of mutual consent underlying American labor law. Congress should not let the government impose wage controls throughout the economy.

The Employee Free Choice Act does not do what its sponsors contend that it would do. In reality, it strips workers of their rights and their privacy while exposing them to abuse and intimidation and taking away their ability to bargain with their employers.

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