
# The Facts Behind the Employee Free Choice Act

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Protecting the right to form unions is about maintaining the American middle class. It has been 30 years since this country came close to amending the National Labor Relations Act to offer more protection for workers trying to organize. In 2007, a bipartisan majority of the House passed the Employee Free Choice Act, which would ensure that workers have a free and fair choice to form a union. Though the threat of a filibuster in the Senate killed the legislation in 2007, Congress will revisit the bill after the 2008 election of more worker-friendly Senators.

If you need information on the Employee Free Choice Act, this document is a good place to start. We have assembled over 100 sources that provide insight into the issues related to each provision of the bill, bolstering the case for why we need labor law reform. There has been a wealth of serious research on this topic, and we hope that by making it readily available, it will aid supporters of the bill as they make their case to the public.

This document is comprised of four parts:

1. A brief account of the history of the National Labor Relations Act and attempts to reform it prior to the Employee Free Choice Act
2. A section on each of the three provisions of the Act:
    a. Majority sign-up
    b. Strengthening enforcement
    c. First contract arbitration.

Within each section is a brief summary of the provision, the actual language of the provision, arguments making the case why the provision is needed, and rebuttals to common critiques of the provisions. We have also included an abridged version of this document. Finally, every article and case cited (excluding those available on the internet) has been saved onto a CD accompanying this packet, in addition to electronic versions of the two papers.

We hope that you find this white paper on the Employee Free Choice Act helpful, and welcome you to contact us for further information related to this important legislation.

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# A Brief History of Labor Law Reform

## 1. The failure of the representation election to guarantee employee free choice

The inclusion of the representation election in the National Labor Relations Act (NLRA) was a response to the pervasive problem of companies creating their own illegitimate unions, and authors of the law wanted to give workers a choice in voting between a company union and an independent union (despite the fact that Section 8(a)(2) was already being included in the law to ban company unions).[1] Though the election model remained in the law, the National Labor Relations Board (NLRB) was still granted the authority to certify unions through majority sign-up and other non-election processes. In its first five years of operation, a quarter of the certifications issued by the NLRB were based on non-election evidence of majority support.[2]

In the early years after the passage of the NLRA, the NLRB understood that for representation elections to be fair, employers had to remain neutral.[3] The agency treated anti-union statements as unfair labor practices, recognizing that even without a direct or indirect threat, an anti-union statement by an employer will cause employees to fear for their jobs.[4] A 1940 legal manual even advised employers to "Stay *completely neutral* regarding elections."[5]

With the Taft-Hartley amendments of 1947, the representation election became the only form of union certification by the NLRB (unless there is a *Gissel* bargaining order),[6] leaving workers to rely on the voluntary agreement of their employers to recognize unions through majority sign-up. Coupled with the 1941 Supreme Court decision *NLRB v. Virginia Electric and Power* that barred the NLRB from enforcing employer neutrality, representation elections became what University of California professor David Brody called, "the instrument by which labor's enemies have hijacked the law."[7] Cornell University professor James Gross assessed the later impact of these amendments:

> Since about 1970 Taft-Hartley has primarily been interpreted and applied in ways that put federal government power in private employer hands by strengthening the managerial authority of employers who already had great power over their employees.[8]

The 1959 Landrum-Griffin Act further amended the NLRA to frustrate workers' efforts to form unions. The bill included severe restrictions on workers' rights to picket employers who refused to grant them union recognition. Employees were prohibited from picketing when an NLRB

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[1] Brody, David. "Labor Vs. the Law: How the Wagner Act Became Management's Tool," *New Labor Forum* 13 (1): 9-16, Spring 2004.
[2] Becker, Craig. "Democracy in the Workplace: Union Representation Elections and Federal Labor Law," *77 Minn. L. Rev. 495* (1993).
[3] Brody, David. 2005. Labor Embattled (University of Illinois Press: Urbana and Chicago), p. 102-103.
[4] Brody, 2005, p. 103.
[5] W.A. Rickoff and Harvey B. Rector. 1940. *Procedures and Practices under the National Labor Relations Board* (Cincinnati), p. 14. Cited in Brody, David. 2005. Labor Embattled (University of Illinois Press: Urbana and Chicago), p. 103.
[6] In *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969), the Supreme Court held that the NLRB could order an employer to bargain without a certification election if the employer's unfair labor practices were so egregious as to render a fair election (or rerun election) impossible, and if it could demonstrate that a majority of employees were at some point in favor of union representation. The Labor Board currently uses signed authorization cards as evidence of majority support.
[7] Brody, 2005, p. 105, 149.
[8] Gross, James A. 1995. *Broken Promises: The Subversion of U.S. Labor Relations Policy, 1947-1994.* (Temple University Press: Philadelphia), p. 283.

election had been conducted within the previous 12 months, or where a petition for an election had not been filed. In addition, the bill limited workers' ability to pressure consumers to boycott employers that refused to recognize their union. Employees could no longer picket third party employers, and they could not try to persuade the company's employees from refusing to handle the primary employer's goods. According to James Gross, "These amendments denied unions a realistic opportunity to obtain consumer support."[9]

## 2. Efforts at reforming labor law from 1977-2007

In January 1977, the Labor Law Reform Act of 1977 was introduced in Congress, supported by Democrats and worker advocates. After President Carter revised the bill, he sent it back to Congress with the statement, "Our labor laws guarantee employees the right to choose freely their representatives and to bargain collectively with employers over wages, fringe benefits, and working conditions. But legal rights have limited value if many years are required to enforce them."[10] The bill's components included time limits for holding elections, increasing the size of the NLRB and allowing it to more swiftly handle cases, doubling backpay awards to workers discriminated during organizing campaigns, compensation for employees when their employer refuses to bargain a first contract, and barring willful employer violators from receiving federal contract for three years. During negotiations with President Carter, the AFL-CIO was unable to include a provision for the NLRB to certify unions through majority sign-up.

Though the House passed the bill in October 1977 by a substantial margin, intense employer opposition prevented the Senate from breaking the filibuster by a single vote in June 1978. The president of the U.S. Chamber of Commerce declared that the bill's defeat was "a resounding victory for the American people."[11] It was not until the early 1990s that there was any serious attempt at reforming labor law.

In 1991 and 1993, the House passed legislation banning the permanent replacement of workers during economic strikes. Both times, the Senate failed to overcome a filibuster and pass the bill given intense employer opposition. According to John Logan of the London School of Economics, the defeat of striker replacement legislation was predictable given that it was a "defensive campaign designed to protect the interests of existing union members and strengthen the least popular of labor's collective rights."[12]

In 1996, Congress responded to pressure by anti-union employers and narrowly passed the Teamwork for Employees and Managers (TEAM) Act, which would have amended the NLRA to broaden the ability of employers to set up management-worker committees to discuss workplace matters. Edward Miller, the Republican Chair of the NLRB under the Ford Administration, testified before the Committee on the Future of the American Worker-Management Relations that if the law passed, "I have no doubt that in not too many months or years sham company

[9] Gross, James A. 1995. *Broken Promises: The Subversion of U.S. Labor Relations Policy, 1947-1994.* (Temple University Press: Philadelphia), p. 143.
[10] Mills, D. Quinn. "Flawed victory in labor law reform," *Harvard Business Review*, Vol. 57 Issue 3, p92-102, May/Jun79.
[11] Ibid.
[12] Logan, John. "The Clinton Administration and Labor Law: Was Comprehensive Reform Ever a Realistic Possibility?" *Journal of Labor Research*, Vol. 28 Issue 4, p609-628, Fall 2007.

unions would again recur."[13] Clinton vetoed the legislation, remarking that "This Congress tried to make company unions the law of the land, and I wouldn't let them do that."[14]

Later attempts by Congress to pass the TEAM Act were unsuccessful, as the legislation failed to generate bipartisan support with the view that it was simply a scheme to bust unions. According to Daphne Taras of the University of Calgary and Bruce Kaufman of Georgia State University, "the empirical record is full of evidence from both Canada and the USA that employer interest in and commitment to [non-employee representation] is strongly influenced by their desire to remain union-free."[15]

## 3. Legislative history of the Employee Free Choice Act

The Employee Free Choice Act was first introduced in 2003 and later died in committees in both the House and Senate. After the Democrats won majorities in both houses of Congress in 2006, the bill was revived. In February 2007, the bill was introduced as H.R. 800 by Reps. George Miller (D-CA), Robert Andrews (D-NJ), and Peter King (R-NY), with 232 cosponsors. Rep. Miller introduced the bill with the observation that "the current process for forming unions is badly broken and so skewed in favor of those who oppose unions, that workers must literally risk their jobs in order form a union."[16] On March 1, 2007, the House passed the Employee Free Choice Act with the support of 241 members, including 13 Republicans (two Democrats voted against the bill). None of the amendments offered by Republicans were approved.

In April 2007, the Employee Free Choice Act was introduced in the Senate by Senators Edward Kennedy (D-MA) and Arlen Spector (R-PA). During the debate over a Motion to Invoke Cloture, which would have permitted a vote on the bill, Sen. Mike Enzi (R-WY) remarked that the bill, "about taking away the right for people to have a secret ballot…it has absolutely nothing to do with preserving free choice. In fact, it's just the opposite. How would you like to have someone come into your house with two or three people—one of them being very big—and pressuring you to sign a union card?

Would you feel a little intimidated? Most people certainly would."[17] In June 2007, 51 senators voted for the Motion to Invoke Cloture, nine votes shy of the number needed to end the filibuster and pass the bill.

[13] Herrnstadt, Owen E. 1997. "SECTION 8(a)(2) OF THE NLRA: THE DEBATE," *Labor Law Journal*, Vol. 48, Issue 2.
[14] "Transcript of Clinton Remarks to United Steelworkers of America," *U.S. Newswire*, 9 Aug 1996.
[15] Taras, Daphne G. and Bruce E. Kaufman. 2006. "Non-union employee representation in North America: diversity, controversy and uncertain future," *Industrial Relations Journal*, Vol. 37 Issue 5, p513-542.
[16] 153 Cong. Rec. E260 (Feb. 5, 2007) (statement of Rep. Miller).
[17] 153 Cong. Rec. S8288 (June 22, 2007) (statement of Sen. Enzi).

# The Provisions of the Employee Free Choice Act: Majority Sign-Up

## 1. Summary of the provision

Under the Employee Free Choice Act, the NLRB certifies a union once it finds that a majority of employees have signed written authorization forms designating the union as their collective bargaining representative. Under current law, management can refuse to recognize a union even when 100 percent of employees have signed union authorization cards. It is only through the voluntary agreement of their employer that employees can currently form a union through majority sign-up. The bill would allow employees, and not employers, to choose whether to proceed through the NLRB election process or majority sign-up process in order to form a union.

## 2. Language of the provision

SEC. 2. STREAMLINING UNION CERTIFICATION.

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

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

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

`(A) model collective bargaining authorization language that may be used for purposes of making the designations described in paragraph (6); and

`(B) procedures to be used by the Board to establish the validity of signed authorizations designating bargaining representatives.'

## 3. Justification for the provision

### a) NLRB elections fail to guarantee employee free choice

60 million non-union workers say they would join a union if they could,[18] yet only 16 million workers belong to unions in the United States.[19] What explains this discrepancy? The NLRB representation election poses a huge barrier for America's workers seeking to form a union. The process is nothing like the political elections for governor or president because it fails to protect employees from the inherent coercive power that management holds over them—the power to deprive employees of their livelihood and to control their pay, hours, and working conditions. In fact, scholars have noted that if the process used in most workplaces were used in an election for president, the results would be held invalid and our government would refuse to recognize the process as free and fair.

According to Gordon Lafer of the University of Oregon, American law recognizes that fair elections require certain ground rules.[20] These include but are not limited to:

- Equal access to voters by both parties
- Equal access to media
- Free speech for both candidates and voters
- Protection of voters from economic coercion
- Secret ballots

With the partial exception of the secret ballot, however, the NLRB system fails every single one of these tests for basic fairness:[21]

> Unequal access to voter lists. In elections to public office, all candidates have access to the list of registered voters at the same time, on the same cost basis. In NLRB elections, while management has all employees' contact information from the moment they're hired, pro-union employees and/or union organizers are not entitled to a list of eligible voters until after they've collected 30 percent of workers' signatures on a petition for election and all legal objections by the employer have been adjudicated. As a result, union representatives have a very limited ability to talk to every employee in the lead up to the NLRB election.[22]
>
> Unequal access to the media. In federal elections, a host of laws guarantee opposing candidates equal access to the voters. There is no law allowing a neighborhood or restaurant to be available to one candidate and off-limits to the other. Even private corporations are banned from inviting one candidate to address their employees without providing equal opportunity for the opposition. By contrast, under the NLRB system, management is allowed to plaster the workplace with anti-union leaflets, posters, and banners – while prohibiting pro-union employees from doing likewise. As one prominent management-side attorney notes, "unions are at a severe

[18] Peter D. Hart Research Associates poll, conducted for the AFL-CIO, December 2006. <http://www.aflcio.org/joinaunion/voiceatwork/efca/57million.cfm>

[19] U.S. Department of Labor. "Union Members in 2007," Bureau of Labor Statistics, 25 Jan. 2008. <http://www.bls.gov/news.release/union2.nr0.htm>

[20] Lafer, Gordon. "Free and Fair? How Labor Law Fails U.S. Democratic Election Standards," American Rights at Work report, June 2005. <http://www.americanrightsatwork.org/publications/general/free-and-fair-how-labor-law-fails-u.s.-democratic-election-standards.html>

[21] Excerpts from Lafer, Gordon. "Policy Brief: The Employee Free Choice Act," August 2008, on hand at American Rights at Work.

[22] James Rundle, "Winning Hearts and Minds in the Era of Employee Involvement Programs," in Bronfenbrenner, et. al., eds., *Organizing to Win: New Research on Union Strategies*, Cornell University Press, 1998, p. 219, cited in Lafer, Gordon. *Neither Free Nor Fair: The Subversion of Democracy Under National Labor Relations Board Elections*, American Rights At Work, Washington, DC, 2007. <http://www.americanrightsatwork.org/dmdocuments/ARAWReports/NeitherFreeNorFair.pdf>

disadvantage in the communications battle. Home visitations are expensive and time-consuming, meetings are sparsely attended because they take place on the employee's own time, and union organizers can rarely ensure that all voters will even receive the union flyers that organizers hand out. On the other hand, management has the employee under its control for eight hours a day."[23]

There is no right to free speech for employees. Employees do not have equal free speech rights during union election campaigns. Anti-union managers are free to campaign against unionization all day long and anywhere in the workplace. Unlike normal political speech, employees have no right to walk away or refuse to engage in such discussions. By contrast, pro-union workers are banned from talking about unionization except on break times. The most extreme restriction on free speech is employers' forcing workers to attend mass anti-union meetings. Not only are pro-union employees not given equal time, but they can be forced to attend on condition that they don't open their mouths. If they ask a question, they can be fired on the spot. Studies show that between 75-100 percent of major employers use them, with an average of 5 to 10 mandatory meetings during the course of a typical election campaign.[24]

Workers are subject to forms of economic coercion that are illegal in federal elections. Federal law protects employees against the potential undue political influence of their employers. Under the Federal Election Campaign Act, corporations are prohibited from telling employees how they should vote, or suggesting that if one party wins business may suffer and workers may be laid off.[25] Wal-Mart workers recently charged the company with forcing them into meetings where supervisors told them not to vote for Sen. Barack Obama because he supports the Employee Free Choice Act.[26] If these allegations are true, Wal-Mart violated the law.[27]

Yet in NLRB elections, this kind of intimidation is completely legal. Standard employer practice is to have not only the CEO, but workers' direct supervisors—the person with the most immediate control over one's job—repeatedly instruct subordinates in the strictest possible terms as to why they should oppose unionization. And it is both legal and extremely common for management to predict that if employees vote to form a union, some of them will lose their jobs.

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[23] Alfred DeMaria, "From the Editor: The Use of Videos in the Employer Campaign," *Management Report for Nonunion Organizations* 28.8 (2005): 3, cited in Lafer, Gordon. *Neither Free Nor Fair: The Subversion of Democracy Under National Labor Relations Board Elections*, American Rights At Work, Washington, DC, 2007. <http://www.americanrightsatwork.org/dmdocuments/ARAWReports/NeitherFreeNorFair.pdf>

[24] These numbers come from the four most recent statistically significant studies, ranging from 1994-2005. They are summarized in Appendix Table 2 in Lafer, Gordon. *Neither Free Nor Fair: The Subversion of Democracy Under National Labor Relations Board Elections*, American Rights At Work, Washington, DC, 2007. <http://www.americanrightsatwork.org/dmdocuments/ARAWReports/NeitherFreeNorFair.pdf>

[25] Under FECA, corporations are free to campaign to their "restricted class" of managerial and supervisory employees, but are prohibited from engaging in any communication to rank-and-file employees that includes express advocacy for a specific candidate or party. 2 USC 441(b)(2)(A); 11 CRF 114.3, 114.4. Federal Election Commission, *Campaign Guide for Corporations and Labor Organizations*, Washington, DC, June, 2001, p. 31, cited in Lafer, Gordon. *Neither Free Nor Fair: The Subversion of Democracy Under National Labor Relations Board Elections*, American Rights At Work, Washington, DC, 2007. <http://www.americanrightsatwork.org/dmdocuments/ARAWReports/NeitherFreeNorFair.pdf>

[26] Maher, Kris and Ann Zimmerman. "Unions Seek Probe of Wal-Mart Over Election Law," *The Wall Street Journal*, 14 Aug. 2008. <http://online.wsj.com/article/SB121867433681738991.html?mod=hpp_us_whats_news>

[27] A formal complaint has been filed with the FEC, yet the agency has not yet decided to investigate. <http://www.americanrightsatwork.org/wal-mart/wal-mart/video-60000-ask-fec-to-investigate-wal-marts-electioneering-20080814-618-1-1.html>

If foreign elections were held by NLRB standards, the U.S. government would deem them undemocratic.

The U.S. government upholds higher standards for voters abroad than for American workers. In 2002, the State Department condemned elections in Ukraine for failing to "ensure a level playing field." Among the reasons for which the Ukrainian elections were declared illegitimate were that employees of state-owned enterprises were pressured to support the ruling party; faculty and students were instructed by their university to vote for specific candidates; and the governing party enjoyed one-sided media coverage, while the opposition was largely shut out of state-run television. Unfortunately, every one of these practices is completely legal under the NLRB election system.

**b) Majority sign-up would make it easier for workers to form unions**

The Employee Free Choice Act would go far in narrowing the gap between the workers who say they want a union versus those who actually have one. Workers have had more success forming unions through the majority sign-up process than through NLRB elections. According to a study by Adrienne Eaton of Rutgers University and Jill Kriesky of Wheeling Jesuit, workers organized unions successfully in 62.5 percent of majority sign-up campaigns.[28] Compare this win rate to the NLRB process, where workers voted to form unions in 55.7 percent of elections held in fiscal year 2006.[29] While workers have more success organizing unions through the majority sign-up, there is clearly no guarantee of forming a union through this process. Indeed, Liz Claiborne recently filed an amicus brief with the NLRB and asserted that the company "has had success in employing card checks, and we believe our workers have had their individual rights upheld. While we have had card checks that resulted in recognition of [the union], we have also had card checks where insufficient support for the union was established."[30]

One major disadvantage to the NLRB election process is that workers often face months of delay between the time they sign a union authorization card and the time they eventually vote in the election. Employers can use procedural delays to postpone the election and further expose workers to their anti-union campaign. According to James Brudney of Ohio State University, research has demonstrated that the "aggressive and hierarchical nature of employer communication" explains why the more an employer communicates to workers during organizing campaigns, the less likely workers are to vote union.[31] Similarly, John Logan of the London School of Economics notes that "delays extend the duration and the effectiveness of the employer campaign and undermine employee confidence in the effectiveness of both the union and the labor board."[32] One study found that unionization rates drop 0.29 percent for each day of delay.[33]

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[28] Eaton, Adrienne and Jill Kriesky. "Union Organizing Under Neutrality and Card Check Agreements," 55 INDUS. & LAB. REL. REV. 42, 45 (2001).

[29] Annual Report of the National Labor Relations Board for Fiscal Year 2006. <http://www.nlrb.gov/publications/reports/annual_reports.aspx>

[30] Amicus Brief on Behalf of Liz Claiborne, Inc., filed in *Dana Metaldyne* NLRB case. <http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/Liz20Clairborne.pdf>

31. Brudney, James J., "Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms," *Iowa Law Review*, Vol. 90, 2005. <http://law.bepress.com/cgi/viewcontent.cgi?article=1002&context=osulwps>

[32] Logan, John. "Consultants, Lawyers, and the 'Union Free' Movement in the USA Since the 1970s," *Industrial Relations Journal,* vol. 33, no. 3, 2002.

[33] Roomkin and Juris. "Unions in the Traditional Sectors: the Mid-Life Passage of the Labor Movement," 31 IRRA Proceedings 212, 217-18; 1978, cited in Weiler, Paul. 1983. *"Promises to Keep: Securing Workers' Rights to Self Organization Under the NLRA,"* 96 *Harvard Law Review* 1769, 1777.

The late Terry Thomason of McGill University compared the effect of unfair labor practices on the outcome of union organizing efforts in the U.S. and Ontario.[34] He found that unfair labor practices were far less effective in reducing support for the union in Ontario, where the procedure for certifying a union is much quicker than in the U.S. and thus where exposure to management's anti-union campaign is more limited.

**c) Majority sign-up is already commonly practiced**

The Employee Free Choice Act's provision for majority sign-up would codify into law a procedure that is already widely practiced in both the private and public sectors. Since 2003, over half of a million American workers formed unions through majority sign-up.[35] These workers come from diverse professions, regions, and successful companies in the United States, including:

- 64,000 hotel and casino workers
- 46,000 home care providers
- 11,000 UPS Freight workers
- 8,000 farm workers jointly employed by Mount Olive Pickle and the North Carolina Growers Association
- 5,800 public school teachers and aides
- 225 reporters and editors at Dow Jones
- 162 nuclear engineers at Pacific Gas & Electric

Just as states are at the forefront in tackling problems of health coverage and global warming, they are advancing legislation that seeks to balance power between employees and employers. There are now 22 laws in 12 states that grant certain public and private employees the right to form unions through the majority sign-up process.[36] In 2004, Oklahoma passed a law granting municipal employees the right to choose union representation through majority sign-up. The law's stated intent was "encouraging labor peace through the establishment of standards and procedures which protect the rights of the public employer, the public employee and the citizens of this state."[37]

Majority sign-up is also widely practiced in Canada. Labor laws in four Canadian provinces and the federal jurisdiction require union certification upon a showing of authorization forms from a majority of employees. The experience of the Canadian provinces with these majority sign-up procedures has made it easier for workers to organize. Susan Johnson of Wilfrid Laurier University examined organizing data in Canada between 1978 and 1996 to determine the effect of the certification procedure, and found that mandatory elections reduced the success of union certification nine percentage points below what it would have been under majority sign-up.[38] In another article, Johnson estimated that of the 19.4 percent gap in union density between the U.S.

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[34] Thomason, Terry. "The Effect of Accelerated Certification Procedures on Union Organizing Success in Ontario," *Industrial and Labor Relations Review*, Vo. 47, No. 2 (1994).
[35] American Rights at Work. "Half a Million and Counting," Issue brief, September 2008. <http://www.americanrightsatwork.org/publications/general/half-a-million-and-counting-20080917-654-116-116.html>
[36] Ibid.
[37] State of Oklahoma Legislature, 49th Session, Senate Bill 1529, "The Oklahoma Municipal Employee Collective Bargaining Act," as introduced on the floor. <http://webserver1.lsb.state.ok.us/WebBillStatus/main.html>
[38] Johnson, Susan. 2002. "Card Check or Mandatory Representation Vote? How the Type of Union Recognition Procedure Affects Union Certification Success," *Economic Journal* 112: 355-359.

and Canada in 1998, 17 to 24 percent of it can be attributed to the use of elections, which are more commonplace in the U.S. than in Canada.[39]

**d) Majority sign-up benefits labor-management relations**

Majority sign-up procedures promote healthy relationships between employers and employees. Adrienne Eaton and Jill Kriesky conducted a survey of employers who voluntarily agreed to recognize a union through majority sign-up and to remain neutral during the organizing effort.[40] Of employers who had previously experienced organizing efforts, 81 percent reported that they responded differently to organizing after the agreement, where they "softened or even eliminated their campaign behavior." In addition, with rare exceptions, management did not view the agreements as impeding workers' rights. Unlike contentious NLRB election campaigns, majority sign-up allows employers and newly-formed unions to bargain and address labor-management issues without the cloud of hostility left over from the campaign.

An example of labor-management relations that improved as a result of majority sign-up is at the wireless division of AT&T, which negotiated its first contract with the Communications Workers of America (CWA) in 2000 using this process. Both parties took an additional step of creating a voluntary code of conduct to help create a level playing field during the union organizing process by prohibiting the disparaging of one another, and banning the use of intimidating and coercive tactics on employees.

The result has been effective – both parties serve as business partners, advancing a cooperative labor relations model in direct contrast to hostile relationships that so often pit employers against unions during organizing drives. Given a free and fair chance to make an informed decision, a significant number of wireless workers across the country elected to form unions. To date, 21,000 AT&T employees have chosen union representation. According to Rick Bradley, former Executive Vice President of Human Resources at AT&T Wireless, "We believe that employees should have a choice…Making that choice available to them results, in part, in employees who are engaged in the business and who have a passion for customers."[41]

In September 2007, the Republican majority of the NLRB ruled in *Dana Corp.*[42] to overturn 40 years of precedent and remove the voluntary recognition bar which protected a newly-formed union, allowing a minority of anti-union employees to force a decertification election up to 45 days after an employer voluntarily recognizes that a majority of employees authorized union representation.[43] Prior to the decision, several major employers filed amicus briefs in defense of the voluntary recognition process, including Liz Claiborne, Levi Strauss, Kaiser Permanente, and

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[39] Johnson, Susan. 2004. "The Impact of Mandatory Votes on the Canada-U.S. Union Density Gap: A Note," *Industrial Relations*, Vol. 43, No. 2 (April).

[40] Eaton, Adrienne E. and Jill Kriesky. 2006. "Dancing With the Smoke Monster: Employer Motivations for Negotiating Neutrality and Card Check Agreements," in *Justice on the Job: Perspectives on the Erosion of Collective Bargaining in the United States,* ed. by R. Block, S. Friedman, M. Kaminski, and A. Levin. (Upjohn: Kalamazoo, MI).

[41] American Rights at Work. "Partnerships That Work: Cingular Wireless," Socially Responsible Business Program, May 2006. <http://www.americanrightsatwork.org/dmdocuments/ARAWReports/arawcingularfinal.pdf>

[42] Dana Metaldyne, 351 NLRB No. 28 (2007). <http://www.nlrb.gov/shared_files/Board20Decisions/351/v35128.pdf>

[43] Johansson, Erin. "Radical Labor Board Ruling Undermines Organizing Efforts," Eye on the NLRB, an American Rights at Work publication, October 2007. <http://www.americanrightsatwork.org/eye-on-the-nlrb/editions/radical-labor-board-ruling-undermines-organizing-efforts.html>

General Motors.[44] According to Kaiser Permanente, the company and its employees' unions agreed to the majority sign-up process because all the parties "recognized that the protracted and often adversarial NLRB election process frequently undermined the ability of everyone involved to focus on the primary mission of providing quality health care."[45]

**e) Majority sign-up strengthens the middle class**

Given the greater success workers have had organizing through the majority sign-up process than through the NLRB election process, the Employee Free Choice Act would lead to expanded union representation. On average, union members earn 30 percent more than non-union workers.[46] When controlling for factors such as education, occupation, and experience, union members still earn 14 percent higher wages than non-union employees.[47] The difference is even greater for Latinos, with a union wage advantage of 18 percent, and for low-wage workers, where union membership raises wages by 21 percent.[48] Unions also raise the wages of African American members by 12 percent,[49] and for women union members by 11 percent.[50] They are also 59 percent more likely to be covered by employer-provided health insurance.[51] Yet the benefits of union representation extend far beyond just members. Studies have demonstrated that high union density in a region or industry can raise wages for non-union employees.[52]

Unions have also helped pass the following legislation to help working families:[53]

- Accrued Sick and Safe Days Act of 2007, requiring Washington, DC employers to provide workers with paid sick leave and paid time off for victims of domestic violence, stalking, and sexual assault. Unions continue to promote paid sick leave provisions in a number of states, including West Virginia and Ohio.
- Paid family leave programs implemented in California and New Jersey in 2004 and 2008, guaranteeing paid leave for workers taking care of ill family members or new children.
- The Family and Medical Leave Act of 1993, allowing employees to take unpaid leave during serious medical conditions or to care for sick family members or new children.
- Nurses and their unions successfully pushed for the passage of safe staffing ratio legislation in California,[54] and are helping to pass similar legislation in several other states.

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[44] Amicus briefs filed before the NLRB in *Dana Corp*. 6-RD-1518, 6-RD-1519 (2004). <http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/DanaMetaldyneAmicusBriefs.html>

[45] Amicus Brief on Behalf of Kaiser Foundation Health Plan, Inc., filed in *Dana Corp*. 6-RD-1518, 6-RD-1519 (2004). <http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/Kaiser.pdf>

[46] U.S. Department of Labor, Bureau of Labor Statistics, *Union Members in 2007,* Jan. 25, 2008.

[47] Mishel, Lawrence, Jared Bernstein, and Heidi Shierholz. *The State of Working America 2008/2009*. Economic Policy Institute, 2008.

[48] Schmitt, John. 2008. "Unions and Upward Mobility for Latino Workers," Center for Economic and Policy Research, Washington, DC; Schmitt, John. 2008. "The Union Wage Advantage for Low-Wage Workers," Center for Economic and Policy Research, Washington, DC.

[49] Schmitt, John. 2008. "Unions and Upward Mobility for African-American Workers," Center for Economic and Policy Research, Washington, DC

[50] Schmitt, John. 2008. "Unionization Substantially Improves the Pay and Benefits of Women Workers," Center for Economic and Policy Research, Washington, DC

[51] U.S. Department of Labor, Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in Private Industry in the United States, March 2007,* Aug. 2007.

[52] Mishel, Lawrence and Matthew Walters. "How Unions Help All Workers," Economic Policy Institute Briefing Paper #143 Aug. 2003. < http://www.epi.org/content.cfm/briefingpapers_bp143>

[53] For more information on the advantages of unions, see American Rights at Work website. <http://www.americanrightsatwork.org/component/option,com_issues/Itemid,366/view,issue/id,12/>

Unions also help expand civic participation of both members and non-members. Roland Zullo of the University of Michigan found that in 2000, unions increased voter turnout—a finding supported by multiple studies.[55] He found that unions also increased political participation among non-wealthy, less-educated people who have lower-than-average voter turnout.[56] Additionally, the presence of right-to-work laws and the absence of collective bargaining protections for public employees were associated with 5 percent lower voter turnout.[57]

## 4. Response to *critiques* of the majority sign-up provision

**5.** a) **The law replaces the secret ballot with the coercive majority sign-up process**
Opponents of the Employee Free Choice Act argue that the law would do away with the secret ballot election process and would expose workers to coercion by their coworkers or union representatives who would pressure them to sign union authorization cards. There are several rebuttals to this argument. First, it is incorrect to say that the bill would remove the NLRB election process, as workers would simply have a choice between an election or majority sign-up (a choice that only employers have under the current law). Secondly, as mentioned in the beginning of this section, the NLRB election fails every test for a free and fair election. The mere presence of a secret ballot fails to erase the impact of employer coercion. Just as President Bush asserted of the recent sham election in Zimbabwe, "You can't have free elections if a candidate is not allowed to campaign freely and his supporters aren't allowed to campaign without fear of intimidation."[58]

Thirdly, there is no evidence of union coercion during card signing; in fact, research has demonstrated the superiority of majority sign-up in promoting free employee choice. In 2002, Daniel Yager of the HR Policy Association testified before Congress in support of the Workers' Bill of Rights, which would have banned the voluntary recognition of unions formed through majority sign-up. To support his opposition to majority sign-up, he asserted that union coercion "has been documented in numerous decisions over the years," and submitted a document of 113 supposed NLRB cases of union coercion during card signing.[59] An American Rights at Work examination of the cases revealed union misconduct in only 42 of the 113 cases, which represents less than one case per year during this period of 1938 to 1997.[60] Indeed, the NLRB addressed this misconduct through its unfair labor practice procedures.

Through a survey of employees who experienced either an NLRB election campaign or majority sign-up procedure, Adrienne Eaton and Jill Kriesky found significantly less coercion under the

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[54] AFL-CIO Now Blog. "California's Nurse-Patient Ratio Law Saves Lives, Reduces Nursing Shortage," 13 Jan. 2008. <http://blog.aflcio.org/2008/01/13/californias-nurse-patient-ratio-law-saves-lives-reduces-nursing-shortage/>
[55] Zullo, Roland. 2008. "Union Membership and Political Inclusion," *Industrial and Labor Relations Review*, Vol. 62, No. 1 (October).
[56] Ibid.
[57] Ibid.
[58] Associated Press. "Bush calls Zimbabwe runoff election a sham," 25 June 2008. <http://www.wtop.com/?nid=116&sid=1335837>
[59] Yager, Daniel V. Testimony before the Senate committee on Health, Education, Labor and Pensions, *Federal Document Clearing House*, 20 June 2002.
[60] American Rights at Work. "Evidence Indicates Union Coercion is Extremely Rare: Background on HR Policy Association Assertions," unpublished brief.

latter process.[61] Of those workers who signed an authorization card in the presence of the person who gave it to them during a majority sign-up, 94 percent said that the presence of this person did not make them feel pressured to sign the card. Only 17 percent reported that coworkers and 14 percent that union staff pressured them to support the union during the majority sign-up process, and 23 percent reported that management pressured them to oppose the union. In contrast, during the election process, 46 percent reported that management pressured them to oppose the union, with half of that group indicating that there was a great deal of pressure.

Opponents may argue that secret ballot elections are the "gold standard," yet as James Brudney of Ohio State has written, there is nothing in the NLRA which says that an election is the only legal – or even the preferred – method to establish a union. In fact, in the early days of the NLRA, majority sign-up was the more prevalent way for workers to establish unions.[62]

**a) Shortened elections are the best solution to the problems of the system**

Another argument against the majority sign-up provision of the Employee Free Choice Act is that the problems of the current election process could be solved simply by shortening the election process and increasing penalties to prevent illegal coercion. While it's true that delay exposes workers to more employer anti-union campaigning, the election process is still fundamentally flawed. Once the NLRB notifies an employer that a petition for an election has been filed, it can pursue an aggressive and entirely legal anti-union campaign within a mere week of an election. Among some of the legal but intimidating tactics used by employers are the following:

- Predict that voting for a union will result in the employees losing their jobs.[63]
- Tell employees that unions are linked to workplace violence, and then hire a security guard to patrol the workplace with a 100-pound Rottweiler, despite no actual security problem.[64]
- Tell employees how a hypothetical employer can legally thwart its obligations to bargain in good faith by stalling negotiations with a union and "not really agreeing to anything."[65]
- Interrogate employees to find out whether or not they want union representation.[66]
- Fire employees for discretely leaving captive audience meetings.[67]

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[61] Eaton, Adrienne and Jill Kriesky. "NLRB Elections vs. Card Check Campaigns: Results of a Worker Survey," INDUS. & LAB. REL. REV., forthcoming 2008.

[62] Brudney, James. "Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms." 90 Iowa Law Review 819 2004-2005, pp. 819-886. <http://law.bepress.com/cgi/viewcontent.cgi?article=1002&context=osulwps>

[63] See *NLRB vs. Gissel Packing Co.,* 395 U.S. 575 (1969). The Supreme Court ruled that an employer is free to predict the economic consequences it foresees from union representation as long as the prediction is based on objective facts outside of the employer's control. But, see *Crown Bolt, Inc.*, 343 NLRB 86 (2004), where the Board reversed *Springs Industries, Inc*., 332 NLRB 10 (2000), to hold that, while threats of plant closure are "very severe," they do not inherently warrant setting aside an election.

[64] See *Quest International*, 338 NLRB No. 123 (2003). After the workers petitioned for an NLRB election, the employer hired a security guard with a Rottweiler to patrol the plant at shift changes and brought in an additional off-duty police officer on election day. Although the employer had asserted to employees on multiple occasions that electing a union would create a violent workplace, the Board did not find the employers' actions constituted coercion and grounds for overturning the election results.

[65] See *Medieval Knights LLC,* 350 NLRB No. 17 (2007). The employer hired anti-union consultants who told employees that, "an employer, by giving into lesser items or addendums on the contract, would be able to stall out the negotiations because they would still be bargaining in good faith but not really agreeing to anything…not really getting anything done." The Board ruled that the statement was legal since it referred to a hypothetical company and did not describe the strategy of the employer. http://www.nlrb.gov/shared_files/Board20Decisions/350/v35017.pdf

[66] See *NLRB v. Lorben Corp*., 345 F.2d 346 (1964). An employer passed around a paper asking employees to check whether or not they wanted union representation. The court ruled that since there was no showing of hostility, the employer did not violate the law. Employer interrogation of employees as to their desire for union representation is not held to be coercive on its face.

- Ban pro-union employees from attending captive audience meetings.[68]
- Prohibit employees from discussing union organizing with their coworkers during work hours and in work areas.[69]
- Eavesdrop on employees' off-duty conversations about unions and interrupt their conversations to make anti-union remarks.[70]

Employers even have wide latitude to intimidate employees on the day of the election. Managers can go around and talk to each individual employee and tell her to vote against the union right up until the election is held.[71] Employers can monitor employees as they enter and exit the election site, checking employees' names off a list as they vote.[72] Employers can even pay off-duty employees to come in to vote and force them to sign a roster.[73] Thus from the day until the petition is filed until the time that employees actually vote, employees can be subjected to such serious intimidation by their employer as to render the election unfair.

In contrast, the majority sign-up process allows workers to make a decision about forming a union with much greater privacy. Employees do not have to notify their employer of their intention to form a union through the NLRB, where they would likely be subjected by an anti-union campaign by their employer. Employees can talk to each other and to union representatives to make an informed decision without being bombarded with anti-union propaganda from their employer. Workers can freely decide whether or not to sign the card in the privacy of their own home, rather than standing in line at work to vote in an NLRB election, where their supervisors can watch them and even check their names off of a list. It's just a process of workers coming together, at their own pace, to make a decision about whether or not they want a democratic structure in the workplace.

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[67] See *Litton Sys., Inc*., 173 NLRB 1024, 1030 (1968). The Board found the employer did not violate the law when it fired an employee for discretely leaving a captive audience meeting, affirming the administrative law judge's holding that workers have "no statutorily protected right to leave a meeting which the employees were required by management to attend on company time and property to listen to management's noncoercive anti-union speech designed to influence the outcome of a union election."

[68] See *Luxuray of New York,* 185 N.L.R.B. 100, 101 (1970). Supervisors forced all employees to attend a series of captive audience meetings, with the exception of those known to be pro-union, who were forced to continue to work. The Board upheld the finding of the administrative law judge that while the employer "did its best to inhibit the free play of discussion," it still acted within the confines of the law.

[69] See *NLRB v. United Steelworkers, CIO (NuTone, Inc.),* 357 US 357 (1958). The employer in one case prohibited employees from distributing literature or discussing the union on company property during work hours, while it distributed anti-union material and interrogated employees about their union activity. The employer in the second case verbally prohibited employees from organizing while it carried out its own anti-union campaign, which included interrogations and threats of plant closure. The Supreme Court ruled that the employer bans on union activity, despite their own anti-union campaigning, were legal.

[70] See *Aladdin Gaming,* 345 NLRB No. 41 (2005). On two occasions, supervisors listened in on private, lunchtime conversations between off-duty employees who were discussing forming a union. The supervisors interrupted the conversations to advise the employees against organizing, speaking against the union for two minutes in one case, and in the other case, the supervisor demanded to know what the employees were saying in Spanish. The Board held that the supervisors' presence in the employee dining area was routine and did not constitute illegal surveillance.

[71] See *Peerless Plywood* 107 NLRB 427 (1953). The Board found the employer's anti-union speech to a group of employees coercive because of the "mass psychology" of the group, and announced a prohibition of "election speeches on company time to massed assemblies of employees" within the twenty-four hours preceding an election. Under this rule, employers can still campaign within the last twenty-four hours before an election, even addressing every employee individually, as long as they don't hold captive audience meetings.

[72] See *American Nuclear Resources, Inc*., 300 NLRB No. 62 (1990). The Board upheld an election where one company supervisor checked off the names of employees on a list as they entered the employer's van to ride to the polls, and another checked off their names as the employees entered the employer's facility housing the polls. The Board argued that the employees at this plant were accustomed to being monitored, and that listkeeping was a "normal security procedure."

[73] See *Red Lion*, 301 NLRB 33 (1991). The Board held that when the employer offered to pay off-duty employees to come in to vote, and made them sign a roster, it did not constitute vote buying or surveillance.

**b) Unions cannot organize workers through NLRB elections, so they are pushing for majority sign-up, which would guarantee them millions of new members**

The Employee Free Choice Act does not guarantee that anyone will join a union—it simply adds greater options and protections for workers seeking to form unions. No one knows how workers will respond when they are presented with that choice. And while workers have more success organizing unions through majority sign-up, there is clearly no guarantee of forming a union through this process—as a 62.5 percent win rate attests.[74] Liz Claiborne recently wrote that the company "has had success in employing card checks…While we have had card checks that resulted in recognition of [the union], we have also had card checks where insufficient support for the union was established."[75]

**c) Workers fail to hear management's side in a majority sign-up**

Though many may argue that employers deserve the right to be notified about a union effort and to campaign against union representation, they fail to recognize that employers always have the opportunity to express their views on unions. From the first day an employee shows up at work, employers can force new hires to watch videos during orientation, post its anti-union position on bulletin boards, and send anti-union emails and letters to all employees. As Gordon Lafer notes, new hires are considered more impressionable, leading anti-union consultants to "advise employers to write anti-union principles into the employee handbook and include them in orientation sessions on the first day new hires are on the job."[76]

The notion that workers need to endure an election campaign in order to obtain enough information to make a decision is not supported by the research. According to the study by Eaton and Kriesky of workers who signed cards in a majority sign-up recognition, 81 percent felt they had enough information on the union recognition process, 70 percent had enough information on the union itself, and 73 percent had enough information on management's attitude toward the union.[77]

Another benefit to majority sign-up is that there is no deadline imposed by an NLRB scheduled election. Workers can proceed at their own pace. As Lafer writes, "By letting workers rather than management control the timing of the campaign, workers' debate, discussion, and decision making takes place on their own schedule, with momentum building or falling according to the natural pace of conversations and card signing rather than the artificial manipulation of delay tactics."[78] The majority sign-up process also avoids the problem of limited access by pro-union employees to their coworkers' contact information until days before an election, leaving many employees to only hear management's perspective. Without the time limits of a scheduled

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[74] Eaton, Adrienne and Jill Kriesky. "Union Organizing Under Neutrality and Card Check Agreements," 55 INDUS. & LAB. REL. REV. 42, 45 (2001).
[75] Amicus Brief on Behalf of Liz Claiborne, Inc., filed in *Dana Metaldyne* NLRB case. <http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/Liz20Clairborne.pdf>

[76] Lafer, Gordon. "Neither Free Nor Fair: The Subversion of Democracy Under NLRB Elections," American Rights at Work report, August 2007. <http://www.americanrightsatwork.org/publications/general/>
[77] Eaton, Adrienne and Jill Kriesky. "NLRB Elections vs. Card Check Campaigns: Results of a Worker Survey," INDUS. & LAB. REL. REV., forthcoming 2008.
[78] Lafer, Gordon. "What's More Democratic than a Secret Ballot? The Case for Majority Sign-Up," *Working USA*, Vol. 11 (March 2008).

election, pro-union workers can ensure they speak to everyone before they file a request for recognition.

Finally, majority sign-up removes much of the incentive for employers to impose frivolous legal delays on the recognition process. Lafer argues that "Management might still file multiple legal objections to a bargaining unit definition, status of a labor organization, or any other aspect of the proposed union. However, the process of workers making their decisions and casting their ballots (in the form of signed cards) would all take place without delay."[79]

[79] Ibid.

# The Provisions of the Employee Free Choice Act: Strengthening Enforcement

## 1. Summary of the provision

The Employee Free Choice Act includes several changes to the law to strengthen enforcement. It increases penalties employers must pay when they illegally fire or discriminate against employees. While current law provides for the award only of backpay to victims of illegal discrimination, the Employee Free Choice Act provides for the award of three times the amount of backpay. The bill also provides for civil fines of up to $20,000 for violations of employees' statutory right to join a union. Currently, the law does not levy fines against employers for unfair labor practice violations.

The Employee Free Choice Act also requires the NLRB to sue for injunctive relief if it has reasonable cause to believe allegations that an employer has illegally discharged or otherwise discriminated against an employee for protected union activity, threatened to illegally discharge or otherwise discriminate against employees for protected union activity, or engaged in any other violation of the NLRA that significantly interferes with employees' right to self-organization. Under current law, the NLRB is not required to seek injunctive relief in response to employer violations of the law.

All of these provisions for stepped up enforcement and penalties only apply to employer violations of the law during organizing efforts or negotiations for a first contract.

## 2. Language of the bill

**SEC. 4. STRENGTHENING ENFORCEMENT.**

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

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

(A) in the second sentence, by striking `If, after such' and inserting the following: `(2) If, after such'; and

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

`(1) Whenever it is charged—

`(A) that any employer—

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

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

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

while employees of that employer were seeking representation by a labor organization or during the period after a labor organization was recognized as a representative defined in section 9(a)

until the first collective bargaining contract is entered into between the employer and the representative; or
`(B) that any person has engaged in an unfair labor practice within the meaning of subparagraph (A), (B) or (C) of section 8(b)(4), section 8(e), or section 8(b)(7);
the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred.'.

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

(b) Remedies for Violations-

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

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

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

(B) by adding at the end the following:

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

## 3. Justification for the provision

### a) Employer lawlessness is pervasive during NLRB elections

Monetary penalties must be strong enough to change employer behavior, and not simply be treated as another cost of doing business. Nearly every federal employment law orders violating employers to pay fines or punitive damages, including discrimination, health and safety, and minimum wage and overtime laws.[80] Yet there are no fines assessed against employers who violate employees' rights under the NLRA.[81] When an employer illegally fires a worker for

[80] "The Inadequate Costs of Labor Law Violations," issue brief by American Rights at Work, November 2008.

[81] *Note: There are no fines or other penalties assessed against employers for committing unfair labor practices. The NLRA only assesses fines or penalties on employers in cases where they unlawfully make payments to employee representatives or where*

union activity, they are only obligated to pay backpay during the period the employee was out of work, plus interest. In fiscal year 2006, the average backpay award paid by employers was $4,026.[82] For this paltry sum, an employer can fire a union supporter and chill an organizing effort, avoiding paying higher wages or providing better health care through a union contract. Some anti-union executives are known to call this backpay amount their "hunting license."[83]

With few consequences facing employers who break the law, it should come as no surprise that there is widespread use of illegal and intimidating anti-union tactics. Over the period of 2000-05, there were an average of just over 19,000 charges filed per year alleging employer violations of federal labor law.[84] In fiscal year 2006, 26,824 employees received backpay from their employer because they were illegally fired, demoted, suspended, laid off, or otherwise financially penalized because of their union activity.[85] Gordon Lafer found that in comparison, the FEC reports 565 cases of illegal activity for all elections to federal office during the 2001-02 campaign cycle, the most recent for which complete data is available. If federal campaign law were broken as commonly as labor law, the number of FEC violations would increase from 565 to over 7.5 million.[86]

According to a 2005 study by Chirag Mehta and Nik Theodore of the University of Illinois at Chicago, a majority of employers aggressively use both legal and illegal anti-union tactics during union representation elections, which impedes workers' ability to form unions.[87] Among employers faced with organizing campaigns:

- 30 percent fire pro-union workers
- 49 percent threaten to close a worksite when workers try to form a union, but only 2 percent actually do
- 51 percent coerce workers into opposing unions with bribery or favoritism
- 82 percent hire high-priced unionbusting consultants to fight union organizing drives
- 91 percent force employees to attend one-on-one anti-union meetings with their supervisors

The study also found that in 91 percent of the union recognition petitions filed with the NLRB in the survey, a majority of workers indicated they wanted a union before the process began. In several cases, workers demonstrated more than 80 percent support. However, unions were victorious in only 31 percent of the campaigns in which they filed a petition.

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*they interfere with the duties of an NLRB agent.* Source: National Labor Relations Act, 29 U.S.C. §§ 151-169. http://www.nlrb.gov/about_us/overview/national_labor_relations_act.aspx

[82] Seventy-First Annual Report of the National Labor Relations Board, for the Fiscal Year ended September 30, 2006. (Washington: NLRB, 2005). Table 4. <http://www.nlrb.gov/publications/reports/annual_reports.aspx>

[83] Norwood, Steven. Strikebreaking and Intimidation: Mercenaries and Masculinity in Twentieth-Century America (Chapel Hill: University of North Carolina Press, 2002) 247, cited in Lafer, Gordon. "Neither Free Nor Fair: The Subversion of Democracy Under National Labor Relations Board Elections," American Rights At Work, Washington, DC, 2007. <http://www.americanrightsatwork.org/dmdocuments/ARAWReports/NeitherFreeNorFair.pdf>

[84] Lafer, Gordon. "Neither Free Nor Fair: The Subversion of Democracy Under National Labor Relations Board Elections," American Rights At Work, Washington, DC, 2007. <http://www.americanrightsatwork.org/dmdocuments/ARAWReports/NeitherFreeNorFair.pdf>

[85] Seventy-First Annual Report of the National Labor Relations Board, for the Fiscal Year ended September 30, 2006. (Washington: NLRB, 2005). Table 4. <http://www.nlrb.gov/publications/reports/annual_reports.aspx>

[86] Lafer, 2007.

[87] Mehta, Chirag and Nik Theodore. "Undermining the Right to Organize: Employer Behavior During Union Representation Campaigns," Center for Urban Economic Development, University of Illinois at Chicago. Report commissioned by American Rights at Work, December 2005. <http://www.americanrightsatwork.org/publications/general/undermining-the-right-to-organize-employer-behavior-during-union-representation-campaigns.html>

These findings of pervasive anti-union tactics during NLRB elections are supported by Kate Bronfenbrenner's 2000 study for the U.S. Trade Deficit Review Commission, where the frequency of anti-union tactics was nearly identical.[88] Evidence of widespread firings during organizing campaigns is also mirrored in research performed in the 1980s by Paul Weiler of Harvard University.[89]

A recent analysis of NLRB data by American Rights at Work also reveals employer lawlessness during elections.[90] As soon as workers file a petition with the NLRB to hold an election, employers often try to prevent the vote from ever taking place. In four out of 10 cases, workers who ask for an NLRB-supervised election don't even get a chance to vote. And when an election does take place, workers allege that employers engage in illegal intimidation an astounding 46 percent of the time. Such intimidation includes firing union supporters, threatening to shut down the workplace even when such claims are unfounded, and bribing workers into voting against the union.

**b) Injunctive relief provision levels the playing field with management**

The Employee Free Choice Act levels the playing field with management by giving employees equal access to injunctive relief. The 10(j) injunction allows the NLRB to seek swift and temporary relief, such as the reinstatement of a fired worker, to mitigate the damage of the employer's actions.[91] The NLRB can utilize this tool when normal delays in the system render the eventual remedy ordered by an administrative law judge or the NLRB ineffective. As NLRB General Counsel Ronald Meisburg wrote, "in some unfair labor practice cases, the passage of time inherent in the Board's normal administrative processes render its ultimate remedial orders inadequate to protect statutory rights and restore the status quo ante."[92] Injunctions can also serve as a deterrence, as employers may be less likely to break the law when they know it's not a given that the remedy will occur long after the violation.

Under current law, employees do not have equal access to injunctive relief that employers possess. It is up to the discretion of the NLRB whether or not to seek injunctive relief when an employer breaks the law. Yet the NLRB is required to seek court orders to stop unions from engaging in certain prohibited activity. If the NLRB has reasonable cause to believe a union has engaged in such activity, it must seek injunctive relief against the union in federal district court. The Employee Free Choice Act levels the playing field by giving employees access to the same kind of injunctive relief now available to employers.

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[88] Bronfenbrenner, Kate. "Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing," U.S. Trade Deficit Review Commission, 2000. http://digitalcommons.ilr.cornell.edu/reports/1/

[89] Weiler, Paul C. "Hard Times for Unions: Challenging Times for Scholars," *The University of Chicago Law Review*, Vol. 58, No. 3. (Summer, 1991).

[90] American Rights at Work. "Out of Control: Employer Misconduct During Union Organizing More Common Than You'd Think," September 2008. <http://www.americanrightsatwork.org/publications/general/out-of-control-employer-misconduct-during-union-organizing-far-too-common-20080917-653-116-116.html >

[91] For more information on injunctions, see Johansson, Erin. "Key Enforcement Tool Collects Dust at Bush NLRB," Eye on the NLRB, an American Rights at Work publication, 25 Apr. 2006. <http://www.americanrightsatwork.org/eye-on-the-nlrb/editions/key-enforcement-tool-collects-dust-at-bush-nlrb.html>

[92] National Labor Relations Board, "End-of-Term Report on Utilization of Section 10(j) Injunction Proceedings, June 1, 2001 through December 31, 2005," Memorandum GC 06-02, Jan. 2006. <http://www.nlrb.gov/shared_files/GC%20Memo/2006/GC%2006-02%20End%20of%20Term%20Report%20on%20Utilization%20of%20Section%2010j.pdf>

### c) Current remedies fail to address the chilling effect of firings

When a worker is fired for union activity, the impact of that firing extends not only to the worker fired, but to her coworkers that received the anti-union message from the employer. According to recent research by American Rights at Work, for every pro-union worker who is fired, 395 others get the message.[93] Yet a very small percentage of workers fired for union activity end up back on the job. Between 1999 and 2007, only 11 percent of the 86,000 workers who filed charges they were illegally fired for union activity ended up receiving an NLRB ruling determining they were eligible to get their jobs back.[94] Thirty-five percent of those who filed charges accepted some form of settlement, rather than waiting for the lengthy NLRB process to get an offer of reinstatement.[95] Few of the fired workers' coworkers saw the government act to get those fired workers back on the job.

An NLRB administrative law judge recently described the effect that a suspension has on the workplace: "I am persuaded that the Respondent's suspension of [the Union's lead organizer and advocate] amounted to misconduct sufficient in itself to overturn the election. In my view, the negative effect of this action, which I have determined was unlawful, was not merely devastating to the union cause, but was virtually tectonically negative in its impact on the employees' right to make a free choice of whether to select the Union to represent them…after [the union supporter's] punishment, employees became wary, even fearful, of broaching the union matter or possibly even being observed in the company of union supporters."[96]

The case of Point Blank Armor illustrates the effectiveness of injunctive relief in addressing the impact of firings. In August 2002, 175 employees at Point Blank's Florida plant went on strike to protest the company's firing of three employees in retaliation for their union organizing effort.[97] When Point Blank fired all 175 of the striking workers, the NLRB authorized a 10(j) injunction to reinstate the fired workers, and shortly thereafter, a federal judge ordered the company to comply. The workers then returned to their jobs and continued their organizing efforts. The following year, they gained union representation and secured a union contract—an unlikely scenario if the workers had been forced to wait for a Board decision to eventually reinstate them.

In contrast, the following example illustrates how the refusal of the NLRB to pursue an injunction impacts an organizing effort. In October 2001, Dynasteel steel fabrication plant in Iuka, MS, fired the two primary organizers of a union effort, and the NLRB issued a complaint against the company. At this point, the NLRB could have pursued an injunction to reinstate the primary union organizers and order the company to cease and desist with threats and surveillance. This move could have prevented the company from successfully dampening the workers' organizing effort. Yet the NLRB chose to let the case proceed without seeking interim relief. It wasn't until December 2005 that the NLRB finally ordered the company to reinstate the two workers—more than four years after they were fired.[98]

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[93] American Rights at Work. "The Chilling Effect: It only takes one to send a message," issue brief, October 2008.
[94] American Rights at Work. "Tip of the Iceberg: The Consequences of Employer Lawlessness in a Weak System," issue brief, October 2008.
[95] Ibid.
[96] *Trump Marina Associates*, JD-36-08, 18 July 2008. <http://www.nlrb.gov/shared_files/ALJ20Decisions/2008/JD-36-08.pdf>
[97] Danner, Patrick. "Firm Opposing Workers Broke the Law, Judge Says," *The Miami Herald*, 17 July 2003.
[98] *Dynasteel Corp.,* 346 NLRB 12 (2005).

## 4. Response to *critiques* of the strengthening enforcement provision

### a) Current law already provides adequate remedies to illegal activity because the NLRB can seek injunctions when it believes employers break the law.

By making it mandatory for the NLRB to seek injunctive relief when employers break the law, the Employee Free Choice Act mitigates the impact of political pressure by an administration to curtail the use of this remedy. Not surprisingly, the anti-worker Bush NLRB has an abysmal record of utilizing the injunction, authorizing only 70 between June 2001 and December 2005—an average of 16 per year.[99] This represents a decline of 74 percent since the Clinton Administration and 61 percent since the G.H. Bush Administration.[100]

[99] National Labor Relations Board, "End-of-Term Report on Utilization of Section 10(j) Injunction Proceedings, June 1, 2001 through December 31, 2005," Memorandum GC 06-02, Jan. 2006. <http://www.nlrb.gov/shared_files/GC percent20Memo/2006/GC percent2006-02 percent20End percent20of percent20Term percent20Report percent20on percent20Utilization percent20of percent20Section percent2010j.pdf>

[100] Data based on NLRB documents produced pursuant to a FOIA request by the AFL-CIO, Mar. 2006. Since the number of authorizations is broken down by fiscal year, not calendar year, authorizations issued at the end of the prior administration may be included in the numbers for the administration that followed.

# The Provisions of the Employee Free Choice Act: First Contract Mediation and Arbitration

## 1. Summary of the provision

The Employee Free Choice Act would create a provision that if the employer and union fail to reach a first collective bargaining agreement within 90 days, either party may request assistance from the Federal Mediation and Conciliation Service (FMCS). If after 30 days of working jointly with the FMCS and the parties have still not reached an agreement, either party may refer it to a neutral arbitrator, who could create an agreement for the parties that would be binding for two years. All time limits can be extended by mutual consent of the parties. Therefore, if both parties feel that bargaining is going well and that they just need more time to conclude negotiations, they can agree to forego referring the matter to the FMCS or an arbitrator.

The first contract arbitration provision would prevent situations where one party is stalling, asking for something unreasonable, or generally not bargaining in good faith. This provision would benefit both management and labor in that management could also refer the matter to the FMCS if it felt that the union was stalling or making unreasonable demands. It gives flexibility to the parties to use time frames that fit their specific needs while protecting them from bad faith bargaining situations.

## 2. Language of the provision

SEC. 3. FACILITATING INITIAL COLLECTIVE BARGAINING AGREEMENTS.
Section 8 of the National Labor Relations Act (29 U.S.C. 158) is amended by adding at the end the following:
`(h) Whenever collective bargaining is for the purpose of establishing an initial agreement following certification or recognition, the provisions of subsection (d) shall be modified as follows:
`(1) Not later than 10 days after receiving a written request for collective bargaining from an individual or labor organization that has been newly organized or certified as a representative as defined in section 9(a), or within such further period as the parties agree upon, the parties shall meet and commence to bargain collectively and shall make every reasonable effort to conclude and sign a collective bargaining agreement.
`(2) If after the expiration of the 90-day period beginning on the date on which bargaining is commenced, or such additional period as the parties may agree upon, the parties have failed to reach an agreement, either party may notify the Federal Mediation and Conciliation Service of the existence of a dispute and request mediation. Whenever such a request is received, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.
`(3) If after the expiration of the 30-day period beginning on the date on which the request for mediation is made under paragraph (2), or such additional period as the parties may agree upon, the Service is not able to bring the parties to agreement by conciliation, the Service shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service. The arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties.'.

## 3. Justification for the provision

### a) Current law fails to address pervasive bad faith bargaining

First contract mediation and arbitration is necessary because management can hinder employee free choice by refusing to bargain. Even when employees surmount the many obstacles to forming a union, management frequently denies them the benefits of collective bargaining by refusing to agree on a first contract. In a forthcoming article, John Paul Ferguson of MIT found that only one in seven organizing efforts survives from filing an NLRB election petition through negotiating a first contract within the first year of certification; where an unfair labor practice charge is present, the likelihood of getting to a first contract falls by 30 percent.[101] He estimated that only 38 percent of unions certified through the NLRB election process end up achieving a first contract after one year, and only 56 percent after two years.[102] Previous research by Kate Bronfenbrenner of Cornell University determined that more than a year after voting for union representation, workers are unable to negotiate initial collective bargaining agreements 34 percent of the time.[103] These stats stand in contrast to the situation in Canada, where workers who form unions only fail to sign a contract eight percent of the time (several provinces require binding arbitration if the parties cannot come to an agreement).[104]

A 2000 report by Human Rights Watch noted that the failure of workers to win union contracts "is especially acute in newly organized workplaces where the employer has fiercely resisted employee self-organization and resents their success."[105] Similarly, the FMCS asserted that "initial contract negotiations are often more difficult than established successor contract negotiations, since they frequently follow contentious representation election campaigns."[106] In arguing for tougher enforcement of the law to protect first contract bargaining, NLRB General Counsel Meisburg noted that nearly half of all unfair labor practices alleging employer refusals to bargain occurred during first contract negotiations, as opposed to subsequent bargaining sessions.[107]

Anti-union consultants are partly to blame, according to John Logan of the London School of Economics, as they "advise management on how to stall or prolong the bargaining process, almost indefinitely—'bargaining to the point of boredom,' in consultant parlance. Delays in bargaining allow more time for labor turnover, create employee dissatisfaction with the union, and prevent the signing of a contract…and by exhausting every conceivable legal maneuver,

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[101] Ferguson, John-Paul. 2008. "The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999 – 2004," *Industrial and Labor Relations Review*, Vol. 62, No. 1 (October).
[102] Ibid.
[103] Bronfenbrenner, Kate. (2001). Uneasy terrain: The impact of capital mobility on workers, wages, and union organizing. Part II: First contract supplement. Washington, DC: U.S. Trade Deficit Review Commission. <http://digitalcommons.ilr.cornell.edu/reports/1/>
[104] Bentham, Karen. "The Incidence and Impacts of Employer Opposition to Union Certification: A Study of Eight Canadian Jurisdictions," *Relations Industrielles/Industrial Relations*, Vol. 57, No. 1 (2002). <http://www.erudit.org/revue/ri/2002/v57/n1/006714ar.html>
[105] Human Rights Watch, "Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards," 2000. <http://hrw.org/reports/pdfs/u/us/uslbr008.pdf>
[106] 57 FMCS Ann. Rep. 18 (2004). http://www.fmcs.gov/assets/files/annual percent20reports/FY04_AnnualReport_FINAL113004.doc
[107] NLRB Office of the General Counsel. "First Contract Bargaining Cases," Memorandum GC 06-05, April 2006. http://www.nlrb.gov/shared_files/GC percent20Memo/2006/GC percent2006-05 percent20First percent20Contract percent20Bargaining percent20Cases.pdf

certain firms have successfully avoided signing contracts with certified unions for several decades."[108]

The NLRA prohibits bad faith bargaining ("surface bargaining"), but the law grants employers wide latitude to engage in tactics that frustrate negotiations and ultimately cause employees to give up their efforts at winning a union contract. Harvard Law School professor Paul Weiler identified ways in which employers can legally stave off a first contract.[109] First, they can offer extremely negative bargaining proposals that fail to offer any improvements in wages or benefits, knowing that the union would never accept it. Secondly, if the workers decide to go on strike to put more pressure on the employer to make concessions, the employer can permanently replace them. These new workers can then vote to decertify the union, thus the employer never has to agree to a first contract.

When the NLRB finds that employers engaged in bad faith bargaining, it can only order the employer to start bargaining in good faith. Yet employers can appeal these rulings or simply refuse to bargain in good faith, and it often take years before a court can enforce the NLRB's bargaining order. By that time, it's likely that support for union representation will have waned.

Even when employers abide by the law, if negotiations reach a stalemate, the law allows them to impose working conditions unilaterally. Thus with no real consequences for employers who break the law, and an incentive for them to hold out until impasse can be declared, it's no wonder that so many workers who choose union representation never achieve union contracts. Weiler concluded that the best policy solution to address the refusal of employers to agree to first contracts is to allow the NLRB to impose first-contract arbitration, which would be "the strongest hope of adding the teeth that have long been lacking from the enforcement of the duty to bargain in good faith."[110] The Employee Free Choice Act would do just that—offering a clear timeline for first contract bargaining to occur, an opportunity for mediation, and if negotiations still fail to progress, a binding contract is imposed by an arbitration panel.

**b) Positive experiences with arbitration in the public sector**

Twenty-five states and the District of Columbia provide public employees with the opportunity to resolve collective bargaining conflicts through interest arbitration.[111] In most states, arbitration is compulsory for police or firefighters (where one side can initiate the process without the agreement of the other side, or where a third party can initiate the process), while it's voluntary for other types of public employees. There is general acceptance of the laws by employers, employees, and citizens. In response to problems that have arisen with these statutes, legislators have merely amended the laws rather than fully repealing them.

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[108] John Logan, "Consultants, Lawyers and the 'Union Free' Movement in the USA Since the 1970s," *Industrial Relations Journal*, vol. 33, no. 3, 2002.

[109] Weiler, Paul. 1984. "Striking a New Balance: Freedom of Contract and the Prospects for Union Representation," 98 *HARV. L. REV.* 351, 405-12.

[110] Ibid.

[111] States with voluntary or compulsive arbitration include: AK, CT, DE, DC, HI, IL, IN, IA, ME, MA, MI, MN, MT, NE, NV, NH, NJ, NM, NY, OH, OK, OR, PA, RI, TX, VT.

Researchers have examined the impact of these public sector arbitration laws, many of which have been in place for over 30 years. There are some conclusions that can be drawn from these nearly 60 sources, including the following:

- The passage of an arbitration law has little to no effect on wages or benefits.[112] For instance, a 2001 study of police officer salaries from 32 states and the District of Columbia found that there was no statistically significant evidence that the presence of an arbitration statute systematically affects wages.[113]
- Wage increases and contract terms resulting from arbitration tend to be very similar to those won through voluntary negotiations.[114]Arbitrators are normally bound to base their decisions on factors outlined in the law, such as the comparability of wages with similar jobs in the region, as well as the public employer's ability to pay.
- The vast majority of contracts are settled voluntarily rather than through arbitration. The percentage of contracts reached through an arbitration award in the research cited largely ranged between 10 to 30 percent,[115] with evidence that the number of voluntary settlements increased since the time the laws were enacted.[116] It's more the threat of arbitration, not the actual use of the procedure, which encourages parties to voluntarily settle.
- Arbitration has significantly reduced the number of public sector strikes.[117]

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[112] Ashenfelter, Orley and Dean Hyslop. 2001. "Measuring the effect of arbitration on wage levels: The case of police officers," *Industrial and Labor Relations Review*, Vol. 54, No. 2, pp. 316-328; Bloom, David E. 1981. "Collective Bargaining, Compulsory Arbitration, and Salary Settlements in the Public Sector: The Case of New Jersey's Municipal Police Officers." *Journal of Labor Research*, Vol. 2 (Fall), pp. 369-84; Feuille, Peter, John Thomas Delaney, and Wallace Hendricks. 1985. "Police bargaining, arbitration, and fringe benefits," *Journal of Labor Research*, 6: 1-20; Feuille, Peter, John Thomas Delaney, and Wallace Hendricks. 1985. "The impact of interest arbitration and police contracts," *Industrial Relations*, 24: 161-181; Ichniowski, Casey, Richard B. Freeman, and Harrison Lauer. 1989. "Collective Bargaining Laws, Threat Effects, and the Determination of Police Compensation," *Journal of Labor Economics*, Vol. 7, No. 2, pp. 191-209; Katz, Harry C. and Thomas A. Kochan. 2004. An introduction to collective bargaining and industrial relations (3rd ed.) p. 347 (Boston, MA: McGraw Hill Irwin); Lipsky, David B. and Harry C. Katz. 2006. "Alternative Approaches to Interest Arbitration: Lessons from New York City," *Public Personnel Management*, Vol. 35, No. 4; Weitzman, J.S. 1980. "Attitudes of arbitrators towards final-offer arbitration in New Jersey," *Arbitration Journal*, 35, 33.

[113] Ashenfelter, 2001.

[114] Ashenfelter, Orley, James Dow, Daniel Gallagher, and Dean Hyslop. 1997. "Arbitrator and Negotiator Behavior under an Appellate System." Unpublished manuscript, August, cited in Ashenfelter, 2001; Benjamin, E. 1978. "Final-Offer Arbitration Awards in Michigan, 1973-77," unpublished manuscript, Institute of Labor Relations, The University of Michigan-Wayne State University, cited in Johnson, Brian R., Greg Warchol, and Kathleen Bailey. 1997. "Police-Compulsory Arbitration in Michigan: A Logistic Model Analysis of Environmental Factors," *Journal of Collective Negotiations*, Vol. 26(1) 27-41; Bloom, 1981; Delaney, John Thomas. 1983. "Strikes, Arbitration, and Teacher Salaries: A Behavioral Analysis," *Industrial and Labor Relations Review*, Vol. 36, No. 3, pp. 431-46; Doherty, Robert E. 1986. "Trends in Strikes and Interest Arbitration in the Public Sector," *Labor Law Journal*, August; Feuille, Peter, John Thomas Delaney, and Wallace Hendricks. 1985. "The impact of interest arbitration and police contracts," *Industrial Relations*, 24: 161-181; Feuille, Peter and John Thomas Delaney. 1986. "Collective bargaining, interest arbitration, and police salaries," *Industrial and Labor Relations Review*, 39:228-240; Kochan, Thomas A., Mironi Mordehai, Ronald G. Ehrenberg, et al. 1979. Dispute Resolution under Fact Finding and Arbitration: An Empirical Evaluation, New York: American Arbitration Association.

[115] Ashenfelter, Orley. 1987. "Arbitrator Behavior," *American Economic Review Papers and Proceedings*, Vol. 77, pp 342-46; Doherty, 1986; Feuille, Peter and Gary Long. 1974. "The Public Administrator and Final Offer Arbitration," *Public Administration Review*, November/December; Friedman, David R. and Stuart Mukamal. 1984. "Wisconsin's Mediation-Arbitration Law: What Has It Done to Bargaining?" *Journal of Collective Negotiations*, Vol. 13(2); Lester, Richard A. 1984. Labor Arbitration in State and Local Government: An Examination of Experience in Eight States and New York City (Princeton: Industrial Relations Section, Princeton University); Lipsky, David B. and Harry C. Katz. 2006. "Alternative Approaches to Interest Arbitration: Lessons from New York City," *Public Personnel Management*, Vol. 35, No. 4; Roberts, Gary E. and John R. McGill. 2000. "New Jersey Interest Arbitration Reform Act," *Review of Public Personnel Administration*, Summer.

[116] Gerhart, P. F. and J. E. Drotning. 1980. "Do Uncertain Cost/Benefit Estimates Prolong Public-Sector Disputes?" *Monthly Labor Review*, 103:9, pp. 26-30; Lester, 1984.

[117] Friedman, 1984; Johnson, Brian R., Greg Warchol, and Kathleen Bailey. 1997. "Police-Compulsory Arbitration in Michigan: A Logistic Model Analysis of Environmental Factors," *Journal of Collective Negotiations*, Vol. 26(1) 27-41; Kruger, Daniel H. 1985. "Interest Arbitration Revisited," *Labor Law Journal*, August; Lester, 1984; Loewenberg, Joseph. 1971. "Compulsory

- Arbitrators tend to be conservative and shy away from imposing any innovations in an award.[118] Innovations thus must be developed through mutual agreement by both sides.

What's clear from this body of research is that arbitration reduces labor strife, encourages productive collective bargaining, and levels the playing field for public employees—all with a minimal fiscal impact on the state and local governments. Robert Doherty, who examined the experience of arbitration across several states, concluded that the data "do not suggest that arbitration has done great mischief to the democratic process or put an undue strain on the public coffers."[119]

First contract mediation and arbitration is also available in the Canadian provinces of Manitoba, British Columbia, Ontario, Quebec, Newfoundland, Saskatchewan, and the federal jurisdiction. These laws offer incentives for management and labor to bargain productively, improving labor-management relationships. There is no evidence that the overall Canadian experience with this process has been detrimental to employers or employees.

## 4. Response to *critiques* of the first contract arbitration provision

### a) Arbitrators will impose settlements that are unworkable for employers, particularly small employers, and will put them out of business

As noted from the above analysis of public sector arbitration, wage increases and contract terms resulting from arbitration tend to be very similar to those won through voluntary negotiations. According to MIT professor Thomas Kochan, arbitrators make decisions that reflect what is occurring in comparable jurisdictions and that they weigh the factors included in the statute.[120] Thus the law and the parties can limit the discretion of arbitrators to commonly accepted wage and other contract criteria such as comparison with similar workers and employers in the industry, occupation, and region; ability of the employer to pay; and accepted practice in the industry or occupation.

As demonstrated in the public sector, arbitrators tend not to impose innovative contract terms, and are conservative by nature. According to MIT professor Thomas Kochan, there is a strong and widely shared norm among arbitrators that innovations are best left to the parties to negotiate on their own.[121] And as demonstrated in the public sector, the passage of an arbitration law has little to no effect on wages or benefits.[122]

In response to the argument that this provision will harm small businesses, it's important to note that there are certain employers that are too small to fall under the jurisdiction of the NLRB. Since the 1950s, the NLRB has held that it would exercise its jurisdiction only over businesses

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Binding Arbitration in State and Local Governments Within the United States," in Proceedings of the International Symposium on Public Employment Labor Relations (New York: New York State Public Employment Relations Board), pp. 140-151, cited in Gilroy, Thomas and Anthony Sinicropi. 1972. "Impasse Resolution in Public Employment: A Current Assessment," *Industrial and Labor Relations Review*, Vol. 25, Issue 4.

[118] Ashenfelter, 1987; Friedman, 1984.

[119] Doherty, 1986.

[120] Internal memo prepared by Thomas Kochan for American Rights at Work, 2007.

[121] Internal memo prepared by Thomas Kochan for American Rights at Work, 2007.

[122] Ashenfelter, 2001; Bloom, 1981; Feuille, 1985 (1); Feuille, 1985 (2); Ichniowski, 1989; Katz, 2004; Lipsky, 2006; Weitzman, 1980.

that have a "pronounced impact" on interstate commerce, and has set standard measures of this impact in terms of yearly sales volume. Thus, generally, retail employers with sales under $500,000 annually and non-retail employers with sales under $50,000 annually do not fall under the NLRB's jurisdiction and their employees have no collective bargaining rights under the NLRA.[123] According to research by American Rights at Work, there were about 4 million workers in 2005 without collective bargaining rights because they were employed by businesses too small to fall under the jurisdiction of the NLRB; they represent about 3.3 percent of all private sector employees and about 2.8 percent of the total workforce.[124]

**b) Unions will stall voluntary collective bargaining, forcing employers into the arbitration process in order to win more generous contracts.**

First, as the experience in the public sector demonstrates, the vast majority of contracts are resolved voluntarily where arbitration is an option.[125] It's more the threat of arbitration, not the actual use of the procedure, which encourages parties to voluntarily settle. Secondly, there is no reason to believe a union would benefit more from arbitration than an employer; as stated above, wage increases and contract terms resulting from arbitration tend to be very similar to those won through voluntary negotiations in the public sector.

**c) Arbitration removes employees from this process as arbitrators will impose a binding contract without an employee vote.**

According to NYU law professor Cynthia Estlund, "Federal law does not now guarantee employees the right to vote on the ratification of a collective bargaining agreement, yet most unions grant employees that right through their own policies and practices because they are basically democratic institutions and because they need employee support to be effective…Given that pattern, it is reasonable to expect most unions to give employees a voice in deciding whether to accept or reject employers' final offers and whether to seek mediation and binding arbitration."[126] Estlund added that the Employee Free Choice Act "provides that any contract that comes out of binding arbitration can be modified by written agreement of the parties. That allows for additional opportunities for voluntary bargaining and employee voice."[127]

The mere presence of binding arbitration will likely compel many otherwise recalcitrant employers to reach a first contract voluntarily, providing many more workers with the opportunity to vote on the terms of their work.

**d) Arbitration would result in long delays. In Quebec, it takes an average of 290 days from the time a dispute is referred until a decision is rendered.[128]**

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[123] Government Accountability Office. 2002. GAO-02-835. *Collective Bargaining Rights: Information on the Number of Workers With and Without Bargaining Rights.* Washington, DC: United States General Accounting Office.
[124] Petrova, Velina. "The Haves and Have-Nots of Collective Bargaining: How American Labor Law Denies A Quarter of the Workforce Collective Bargaining Rights," report by American Rights at Work, November 2008.
[125] Ashenfelter, 1987; Doherty, 1986; Feuille, 1974; Friedman, 1984; Lester, 1984; Lipsky, 2006; Roberts, 2000.
[126] Estlund, Cynthia. Response to First Contract Questions Posed By Senator Mike Enzi, 2007, on file with American Rights at Work.
[127] Ibid.
[128] Amber, Michelle. "Mandatory First Contract Arbitration Violates Constitution, Management Attorney Contends," *BNA Daily Labor Report*, 11 June 2008.

In his review of the experience of public sector arbitration in several states, Richard Lester found that the time span between filing for arbitration and the actual award was roughly eight months, with some states managing to winnow that process down to only three to six months.[129]

Currently, there are no time constraints on how long first contract negotiations can go on, as long as the employer is bargaining in "good faith." By delaying negotiations, employers can cause workers to grow frustrated and lose faith in their ability to be treated as equals at the bargaining table. Within one year of gaining recognition, workers who do not support the union can decertify their union. Because binding arbitration will likely compel the majority of negotiations to be resolved voluntarily, any delays in the actual process are far outweighed by the incentive it creates to bargain.

**e) Arbitration is unconstitutional. The Supreme Court noted that if the NLRA had including binding arbitration provisions, then it likely would be an unconstitutional infringement on the right to contract.[130] Ogletree Deakins lawyer Coxson asserts it would violate the "takings clause" in the Constitution, and would violate the Supreme Court's ruling in *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 73 LRRM 2561 (1970), which held that the NLRB did not have the power to compel an employer or union to agree to substantive provisions of a contract.**

Congress already has the power to impose binding arbitration for private contract disputes that affect the national interest, and it has used this power to mandate arbitration in railroad negotiations.[131] In 1992, Congress passed legislation with overwhelming bipartisan support, which was quickly signed by President Bush, to impose binding arbitration to settle a rail dispute and prevent several unions from striking.[132]According to a report by the Congressional Research Service, "judicial challenges to this legislation have been unsuccessful, with courts generally affirming Congress' authority to enact such legislation as an exercise of its commerce power."[133]

The holding in *H.K. Porter* was that the NLRB did not have power under the Act to compel employers or employees to agree to any substantive contractual provision of a collective bargaining agreement. The Court's decision does not in any way purport to address whether Congress could constitutionally enact legislation requiring binding arbitration

[129] Lester, Richard A. 1984. Labor Arbitration in State and Local Government: An Examination of Experience in Eight States and New York City (Princeton: Industrial Relations Section, Princeton University).
[130] *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1 (1937).
[131] Miller, Ronald. "Compulsory impasse procedures: recent American experience," *Industrial Relations Journal*, Vol. 10, Issue 4, pp 43-48.
[132] Suro, Roberto. "Congress Forces End to Shutdown of Train Service," *The New York Times*, 26 June 1992. <http://query.nytimes.com/gst/fullpage.html?res=9E0CE2DC1131F935A15755C0A964958260&sec=&spon=&pagewanted=all>
[133] Welborn, Angie A. "The Railway Labor Act: Dispute Resolution Procedures and Congressional Authority to Intervene," CRS Report for Congress, Order Code RS20883, February 14, 2002.