Analysis of H.R. 800 / S. 1041, The Employee Free Choice Act

"The legislation is called the Employee Free Choice Act, and I am sad to say it runs counter to ideals that were once at the core of the labor movement. Instead of providing a voice for the unheard, EFCA risks silencing those who would speak. … Under EFCA, workers could lose the freedom to express their will in private, the right to make a decision without anyone peering over their shoulder, free from fear of reprisal."

– Former Senator George McGovern, D-S.D., 1972 Democratic presidential candidate

"One method of approach to the problem of industrial peace would be for the Government to invoke compulsory arbitration, or to dictate the terms of settlement whenever controversy arises. Where this procedure has been tried in European nations it has met with only questionable success. In any event, it is so alien to our American traditions of individual enterprise that it would provoke extreme resentment and constant discord."

– Senator Robert F. Wagner, D-N.Y., chief sponsor and original architect of the National Labor Relations Act

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Introduction

Under the guise of protecting "employee free choice," Congress is considering the most significant change to the nation's labor laws since the National Labor Relations Act (NLRA) became law. Contrary to its proclaimed goals, the "Employee Free Choice Act" (H.R. 800/S. 1041) would constrain employee choice over union representation and substitute government dictation of wages and benefits for voluntary collective bargaining in newly unionized workplaces. Because the legislation has been considered in a politically-charged atmosphere, very little attention has been paid to the details or profound implications of the legislation.

In the U.S., workers have traditionally decided the important question of being represented by a union in a federally-supervised secret ballot election. The secret ballot process is the best way to ensure confidentiality and protection against coercion by either the employer or the union. Over the years, the courts and the National Labor Relations Board have recognized secret ballot elections as the most reliable method in determining union representation.

Once the employees have chosen to be represented by a union, it serves as their representative at the bargaining table in the attempt to reach an agreement with the employer on an initial collective bargaining agreement. Because the employer has the best understanding of its business model and competitive needs, and the union is presumed to have the best understanding of the employees' wishes, only the parties themselves can determine the terms of the agreement. The role of the law is to ensure that they are negotiating in good faith with the goal of reaching agreement. For a variety of reasons, agreement is not always possible, especially when the union campaign has raised unrealistic expectations among the workers, precluding it from settling for less in the face of the economic realities of the business enterprise.

This, in a nutshell, is how the system has worked since the end of World War II. When unions thrived in the post-war era, few alterations were considered. If anything, the system was often viewed as unfairly tilted in favor of labor. Only when labor's representation started to decline as a result of a globalized economy, increased workforce mobility, expansion of government regulation of the workplace and other factors did labor begin to complain that the system was broken.

While the language of the bill is relatively sparse, the Employee Free Choice Act would fundamentally restructure American labor relations by:

- mandating that the NLRB certify a union that presents authorization cards signed by a majority of the workers in a unit in the presence of union organizers;
- impose compulsory arbitration by government-sponsored arbitrators to determine the wages and other terms and conditions of employment for newly organized workers;
- impose substantial new penalties for certain labor law violations by employers, but not unions; and

- require the NLRB to seek an injunction when a complaint is issued against an employer during union organizing or first contract negotiation.

In the 110th Congress, the Employee Free Choice Act was quickly passed by 241 to 185 by the House of Representatives on March 1, 2007, a little less than two months after convening. On June 26, 2007, the bill's supporters were only able to gain 51 of the 60 votes needed in the Senate to shut off debate, with 48 voting against. Thereafter, the bill lay dormant awaiting the results of the November 2008 elections.

Regardless of the outcome of that election, it is hoped that the 111th Congress will give the details and implications of the bill much more thorough consideration than has occurred thus far. What follows is an analysis of the upheaval in American labor relations that the Employee Free Choice Act portends.

Card Check Certification: The Inferior Process for Labor Elections

Union Authorization Cards and the Current Method for Choosing Unions

Union authorization cards are generally used to demonstrate support for a particular union. The wording of these cards varies widely. They may authorize the union to act on behalf of the employee, affirm that the employee is a union member or state that an employee will vote for a union if a secret ballot election is held. In its most modest form, the card will simply indicate that the employee is interested in having a union representation election conducted.

There are some general rules regarding the content of cards — for example, that employees generally must sign and date the card for it to be valid. However, as far as the card-signing process is concerned, there are virtually no procedural requirements other than a general prohibition against union or employer coercion or deception in obtaining the signature. The cards may be signed anywhere — at work, home, a bowling alley, a bar, etc. — and typically are signed in the presence of union organizers or other union supporters. Because authorization cards were merely intended to establish a "showing of interest" sufficient to invoke a secret ballot election, the Board has generally adopted a hands-off approach to regulating the process, strategy and tactics unions use to obtain signatures.

Currently, union authorization cards are used or considered in three situations.

NLRB Election Trigger. The first, and intended, use of authorization cards is for a union to establish a "showing of interest" so the NLRB can conduct a secret ballot election. For the NLRB to hold an election a union must demonstrate a "showing of interest" — that is, at least 30 percent of the workers have some interest in union representation evidenced by signed authorization cards. In reality, unions rarely file a petition supported by less than a majority of the workers because, once the election campaign begins and the employees hear both sides of the issue, support for the union typically wanes.

Voluntary Employer Recognition. Another way unions use authorization cards is to secure voluntary recognition from an employer without an election. An employer may lawfully recognize a union voluntarily as the collective bargaining representative of the "unit" employees if the union can show that a majority of employees support the union. It is an unfair labor practice for the employer to recognize the union without such a showing. "Majority status" is usually established by acquiring authorization cards signed by more than 50 percent of the unit.

Voluntary recognition by the employer may result from an acknowledgment that the union clearly has the majority support of the employees and an election would be a mere formality. However, in recent years, it is often the result of an aggressive "corporate campaign" by the union, described by George Washington University Professor Jarol Manheim, a noted expert on corporate campaigns, as:

> a multifaceted and often long-running attack on the business relationships on which a corporation (or an industry) depends for its well-being and success. It is a highly sophisticated form of warfare in which a target company is subjected to diverse attacks — legislative, regulatory, legal, economic, psychological — the function of which is to so thoroughly undermine confidence in the company that it is no longer able to do business as usual.[i]

In one example of such a corporate campaign leading to a card check recognition, the Culinary Workers union launched a corporate campaign against the MGM Grand Hotel in Las Vegas when the latter refused to agree to a card check recognition. The campaign included negative reports issued to investment analysts, opposition to MGM's planned expansion into other locations, a sit-in of 500 employees in the hotel's lobby and several demonstrations. After suffering financial losses, the company agreed to recognize the union in November 1996 after 1,494 employees out of 2,840 eligible employees — or 52.6 percent — signed cards.

In response, a group of workers called the "Organization of Non-Union Cast Members" alleged that the union threatened and intimidated workers into signing cards and filed several petitions in an attempt to obtain a secret ballot election on union representation, with the final petition supported by 1,910 signatures out of a total of approximately 3,000 employees. However, because the employer had recognized the union, the NLRB rejected the petition pursuant to the so-called "recognition bar," which prohibits any election following voluntary recognition while the employer and the union are engaged in bargaining.[ii]

In 2007, the NLRB modified this rule in Dana/Metaldyne,[iii] in a case involving a similar set of facts. The Board modified the "recognition bar" by requiring notification to the employees of the recognition and allowing them, upon being notified, to file a decertification petition within 45 days of the employer recognition if the petition is supported by at least 30 percent of the workers in the unit.

Gissel Bargaining Orders. The third situation in which cards are considered is when the Board orders an employer to recognize and bargain with a union regardless of the outcome of an election. Such bargaining orders, known as Gissel

orders, are issued when an employer's unfair labor practices have tainted the results of an election and are so egregious as to prevent the holding of an untainted election. For a Gissel order to be issued, there must also be objective evidence — usually signed authorization cards — that, at some point, the union had a majority status.

NLRB-Supervised Secret Ballot Election

In contrast to the unsupervised manner in which authorization cards are signed, the Board has developed an intricate web of procedures and rules to protect workers' rights not only during elections but for some time preceding them, as well. As noted, the employees and/or the union initiate the process by filing a petition with the Board establishing a showing of interest — i.e., at least 30 percent of the employees in a bargaining unit want an election — by filing authorization cards in support of the petition.

Prompt Elections. While much is made of NLRB delays in conducting elections, it is rarely noted that these delays occur in a small minority of cases. According to NLRB statistics for fiscal year 2005, an overwhelming majority (more than 81 percent) of all representation elections were conducted based on an "election agreement" between the employer and the union, where no hearing was necessary.[iv] Moreover, the median time for conducting elections after the filing of a petition has decreased in recent years. In FY 1997 the median time for conducting elections was 42 days after the petition was filed, dropping to 39 days in FY 2007.[v] Similarly, in FY 2007, 93 percent of all elections were conducted within 56 days of the filing of the petition, whereas in FY 97, 87.5 percent of all elections were conducted within 57 days.[vi]

Thus, in the great majority of situations, an election is held soon after the petition is filed. However, occasionally there are critical procedural issues that must first be resolved. These issues, which must be decided by the NLRB Regional Office, often relate to the employees who make up the "appropriate bargaining unit" — i.e., those employees who are authorized to vote and will ultimately be represented by the union if it is elected. If a party disagrees with the Regional Office's decision, it may appeal that decision to the five-member NLRB in Washington, D.C. The Board may sustain the decision, decide that the Regional Office incorrectly applied the Board's precedent, or reverse or modify its own precedent. Elections may also be delayed by unfair labor practices charges filed against either the employer or the union. These so-called "blocking charges" will delay the election pending their adjudication if the Board deems the alleged violations serious enough to interfere with employee free choice in the election.

"Laboratory Conditions." Once the procedural issues have been disposed of, the election is conducted under NLRB supervision by secret ballot with strict procedures designed to protect the employees' free choice. The election is usually held in the workplace, as that is generally the most convenient location for the workers in the bargaining unit.

The Board has developed an intricate web of procedures and rules to protect workers' rights not only during elections but for some time preceding them, as well. These substantive and procedural protections are designed to ensure that "laboratory conditions" exist to maximize the workers' free choice regarding union representation.[vii] The purpose of such protections is to ensure that the employee casts his or her vote in the strictest confidentiality and without union

or employer coercion. For example, employees vote in private booths and are asked not to sign their ballots.[viii] Moreover, "no one, other than a Board agent and the individual voter, is permitted to handle the ballots."[ix] The Board has developed numerous rules and a multi-factored test to analyze objections.[x] If it deems that "laboratory conditions" have not been met, the Board will overturn the election results and order a new election. It is worth noting that this may result from conduct by either the employer or the union that may not otherwise constitute an unfair labor practice.[xi] For example, the NLRB set aside the election results for objectionable conduct (although not an unfair labor practice) when a union demanded that an employee sign a union authorization card and if he didn't the union would take an initiation fee out of the employee's pay "like a penalty."[xii]

If a majority of the employees vote for the union, the NLRB certifies it and the employer must bargain with the union for the purpose of reaching a collective bargaining agreement, which will govern the represented workers' terms and conditions of employment. On the other hand, if a majority of the employees vote against the union or if there is a tie vote, the union is not certified and no representation election may be held for at least one year from the date of the election.

While organized labor has been critical of the election process, occasionally contrasting it unfavorably with political elections,[xiii] the process enjoys a number of advantages that are not available to employers. These advantages were described in testimony on the Employee Free Choice Act by former NLRB Member Charles Cohen, who pointedly contrasted NLRB elections with political elections:[xiv]

- "The union controls whether and when an election petition will be filed. Imagine if the challenger in a political election controlled the timing of the election."
- "The union largely controls the definition of the bargaining unit in which the election will occur, because the union need only demonstrate that the petitioned-for unit is an appropriate bargaining unit. Imagine if the challenger in a political election had almost irreversible discretion to gerrymander the voting district to its maximum advantage."
- "The union usually has obtained signed authorization cards from a majority of employees at the time the petition is filed. Thus, the union already knows the voters and has conducted a straw poll before the employer is even aware that an election will be held. Imagine if the challenger in a political election could campaign and poll the electorate without the incumbent's knowledge, wait until the polls show that the challenger has majority support, and then give the incumbent less than 60 days' notice of the election."
- "Even though the union already knows the voters well by the time the election petition is filed, the employer must give the union a list of all of the voters' names and home addresses after the petition is filed. The union, but not the employer, is permitted to visit the employees at home to campaign for their vote."
- "The union, unlike the employer, can make campaign promises to the employees to induce them to vote for the union."

These facts illustrate that, far from being unfair to unions, the NLRB's election process offers unions many unique advantages.

Historic Preference for Secret Ballot Elections. For decades, the courts and the Board (and even organized labor, when it comes to decertification) have recognized that the NLRB secret ballot election is the best and most reliable method of deciding whether employees want union representation. As stated succinctly by Supreme Court Justice William O. Douglas in the 1974 Linden Lumber case: "[I]n terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored."[xv]

Even in the Gissel decision, which allowed the use of cards to determine majority support where a fair election is impossible, the Supreme Court stated:

> The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory — indeed the preferred — method of ascertaining whether a union has majority support.[xvi]

In doing so, the Court noted with approval a lower court's "comparison of the card procedure and the election process":

> The unreliability of the cards is not dependent upon the possible use of threats. … It is inherent, as we have noted, in the absence of secrecy and in the natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees.[xvii]

Indeed, as recently as 1998, in making the case for requiring secret ballot elections for employees to get rid of unions (i.e., decertification), the AFL-CIO, the United Auto Workers (UAW) and the United Food & Commercial Workers (UFCW) argued to the National Labor Relations Board:

> a representation election "is a solemn … occasion, conducted under safeguards to voluntary choice," … other means of decision-making are "not comparable to the privacy and independence of the voting booth," and [the secret ballot] election system provides the surest means of avoiding decisions that are "the result of group pressures and not individual decision[s]." In addition … less formal means of registering majority support … are not sufficiently reliable indicia of employees' desires on the question of union representation to serve as a basis for requiring union recognition.[xviii]

Tactics in Securing Card Signatures

The history of union authorization cards has consistently undermined their credibility as a reliable mechanism for determining employee choice. Former Rep. Pat Schroeder of Colorado, a staunch labor supporter with an 86 percent

AFL-CIO support ratingxix who, prior to becoming a member of Congress, was an NLRB attorney, said: "I remember how complicated so many of these cases would be. Sometimes the cards that were turned in were found to be fraudulent because somebody got excited; sometimes employees changed their minds; and all sorts of things."xx

A look at the NLRB casebooks shows why any NLRB attorney would be so familiar with the problems associated with authorization cards:

- threats of violence to the worker;[xxi]
- misrepresentation of what the card means;[xxii]
- signatures on cards written in English by workers who cannot read or speak English;[xxiii]
- promises of benefits;[xxiv]
- forged signatures;[xxv]
- threats of job loss or other economic harm;[xxvi] and
- taunting and forms of blatant peer pressure.[xxvii]

The tactics used by the unions in most of these cases were ultimately exposed because the employer chose to contest the union's claims of majority representation. In situations where the employee remains silent or the employer agrees to the union's demands — as is being sought through labor's card check strategy — these tactics are rarely uncovered.

Failure of an employee to bring the case to the NLRB's attention should not be surprising. When confronted with these tactics, the employee obviously must factor in the consequences of refusing to sign. In the best of circumstances, this likely means social rejection by his or her pro-union co-workers. In the worst of circumstances, it could involve threats to personal and family safety.

Card Check Certification under The Employee Free Choice Act

The Employee Free Choice Act would short-circuit the current secret ballot election process by going directly from signed cards to union recognition.

NLRB Certification. Under the bill, if a union files a petition with the NLRB backed by authorization cards signed by a majority of employees in an "appropriate unit," the Board would certify the union as the collective bargaining representative and the employer would be required to bargain with the union without an election. The bill would not explicitly prohibit elections, but votes would only take place in those exceedingly rare instances, if any, in which a union or a group of employees filed a petition with authorization cards signed by less than a majority of the workers.

As noted, the legislation would retain the requirement that the represented employees be contained in "a unit appropriate for bargaining," which requires that the employees have a "community of interest." There is a presumption in favor of the unit submitted by the union and, with the elimination of a Board-conducted election, it is not even clear whether the employer would retain the ability to contest the union's assertion as to the specific

employees and positions that should be included within the unit. Thus, it can be anticipated that unions would often seek to start with the smallest possible unit for which it could get a majority to sign cards, with hopes of later expanding the unit to include others.

Failure to Address Abuses. While eliminating elections, the bill does very little to increase the integrity and reliability of the card check process. It does direct the Board to establish "guidelines and procedures" for a new card check certification process, including model language that may be used on the authorization cards (but is not required) and procedures for verifying employee signatures. However, it fails to devise or authorize new procedures to protect against the coercive and deceptive tactics that are often used to obtain signatures on authorization cards. Furthermore, it does nothing to guarantee "laboratory conditions" in the card-signing process. As noted previously, an election may be overturned because of employer or union behavior that does not rise to the level of an unfair labor practice if that behavior thwarts employee free choice. Yet the bill would permit harassment or pressure directed toward employees that does not rise to the level of an unfair labor practice, even though, under current law, such activity may be sufficient to overturn election results.

Employees may indeed theoretically file a charge with the NLRB if they are subject to coercion or threats. If an employer engages in threats or coercion, the union will typically file a charge on the employee's behalf. But if the union is the accused, the employee must act on his or her own, thus taking a highly public stand on the issue of union representation without any assistance. Indeed, workers acting alone would bear the burden of bringing the union's coercive tactics to the attention of the NLRB.

Under current law, the election, with its strict procedures and protections (as shown in "Procedural Safeguards: Election v. Card Check"), is the final safeguard workers have against an inadequate and unreliable card authorization process. The secret ballot election provides workers who may have signed a card under duress or as a result of misinformation the opportunity to anonymously cast their ballot in a protected environment.

No Card Checks for Decertification. In a glaring omission that demonstrates the one-sided nature of the legislation, the bill fails to apply card check recognition to the decertification process. Thus, even if the employees file a decertification petition with the NLRB signed by a majority of the bargaining unit, the matter must still be resolved by a secret ballot election.[xxviii]

Yet it is inevitable that, by eliminating the secret ballot election, the number of situations in which employees will want to get rid of the union will increase. Traditional campaigns in which employees hear both sides of the union issue before making their decision would diminish, increasing the number of situations in which employees might have second thoughts after certification and wish to reverse a hasty and uninformed decision.

Not only does the legislation retain the requirement of a secret ballot election for decertification, but it also retains all of the obstacles that currently exist when a majority of the employees want to dissolve the union-employee relationship. Thus, the "contract bar" doctrine would continue to prohibit decertification elections for the duration of

a collective bargaining agreement or three years, whichever is shorter.[xxix] In addition, unions would continue to be able to protect their status by filing unfair labor practice charges that block a decertification election until those charges are resolved.

Proponents of EFCA contend that employers already have the ability to withdraw recognition of a union if presented evidence, such as a signed petition, that a majority of the employees do not support the union. However, this is a rare occurrence because, in contrast to the card check certification under EFCA, it lacks the finality of an NLRB decertification. Absent the finality of a decertification election, the employer acts at its peril and the union can challenge the withdrawal with evidence indicating the majority support still exists.[xxx] If the employer is proven wrong by the union, its withdrawal of recognition is likely to be deemed an unfair labor practice. In contrast, under EFCA, the establishment of a card check majority results in an NLRB certification that automatically results in a bargaining obligation by the employer that the NLRB will enforce. If the legislation were balanced, the NLRB would similarly decertify the union based on the cards with no requirement for a secret ballot election, and it would result in a final determination that the union would no longer represent the employees under the law.

In sum, the proposed legislation provides organized labor with a powerful (and untrustworthy) tool to achieve certification — card check recognition — while retaining the more reliable secret ballot election to defend against decertification.

Procedural Safeguards: Private-Ballot Elections vs. Card Check

The following side-by-side comparison explains some of the procedural safeguards found in the NLRB election process along with any counterpart card check protections:

Private-Ballot Election	Card Check
An NLRB-approved notice that explains the workers' rights must be posted by the employer at least three days before the election.	Workers are informed of their rights only to the extent articulated by the union organizer.
"Captive audience" speeches within 24 hours of the election are prohibited.	Employees are subject to un-rebutted, pro-union speeches up until the time they sign an authorization card.
The election is conducted by an agent of the NLRB in conjunction with an equal number of observers selected by the union and employer.	Union authorization cards are solicited in the presence of union organizers.
The names of prospective voters are compared against a previously established eligibility list before they may cast their ballots.	Anyone may sign union authorization cards. Although forgery of authorization cards is prohibited, there is no safeguard that prevents forgeries before the fact.
The election ballot box is physically inspected and sealed by the NLRB agent immediately before voting.	The union maintains control over signed authorization cards.
The NLRB agent retains positive control over the ballots at all times.	The union retains control over authorization cards at all times.
The ballots are secret: no name or other identifying information appears on the ballot to indicate how an employee voted.	The union knows which employees signed authorization cards.
Employees may not be assisted in casting their votes by agents of the union or employer.	Union organizers may fill out and sign authorization cards on behalf of the workers with their express or implied permission, regardless of whether they have read the cards.
Electioneering near the polls is prohibited.	Solicitation of authorization cards may be accompanied by any pro-union propaganda that does not rise to a material misrepresentation regarding the consequences of signing the card.
Neither the employer nor the union may engage in coercive or threatening conduct prior to the election.	The union may not use threats or coercion in order to obtain signed cards nor may the employer use threats or coercion to prevent cards from being signed.

Compulsory First Contract Labor Arbitration

Organized labor seeks to fundamentally alter American labor law by undermining the foundation of the voluntary collective bargaining process. While most of the debate concerning the EFCA has focused on its "card check" provisions, the bill contains another equally, if not more, nefarious provision. Proponents of EFCA would invite arbitrators — who are strangers to the workplace — to impose contract provisions governing the workplace of extreme importance to both employers and employees. A poor decision by an arbitrator could have immediate, lasting devastating effects.

EFCA would require that wages, benefits and other terms and conditions of employment for newly organized employees be dictated by such arbitration panels appointed by the Federal Mediation and Conciliation Service (FMCS). In other words, the federal government would be in charge of a process that would set employee wages, hours and working conditions for new union members. Unions would no longer have any responsibility for negotiating sound labor agreements in first contract situations.

Collective Bargaining and the Role of Arbitration in Labor Disputes

The Government's Role in the Collective Bargaining Process. The NLRA provides employees with a federally protected right to join a union and bargain collectively through their chosen representatives regarding issues affecting their employment. A collective bargaining agreement typically covers a broad range of issues, such as wages, benefits, seniority systems, overtime, job classification, discipline rules, grievance procedures (which invariably includes grievance arbitration), subcontracting restrictions, union dues check-off, etc.

One of the stated purposes of the NLRA "is to promote industrial stabilization through the collective bargaining agreement."[xxxi] To further this important purpose, the NLRA requires employers and unions to bargain in good faith.[xxxii] The Act, however, does not require the parties to reach agreement. In fact, the voluntary nature of the collective bargaining process is at the very foundation of American labor law.[xxxiii]

As the U.S. Supreme Court held in *H. K. Porter v. NLRB*,[xxxiv] our labor laws are premised on the notion that, in collective bargaining, the employer and the union, not the government, should determine the applicable terms and conditions of employment:

> The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. *But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such*

cases step in, become a party to the negotiations and impose its own views of a desirable settlement.[xxxv]

What is more, the legislative history of the NLRA makes it abundantly clear that it was not intended for the government to step in and "become a party to the negotiation and impose its own views of a desirable settlement."[xxxvi] For example, the Senate Committee on Education and Labor's report stated, "The Committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed the duty to bargain does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide if proposals made to it are satisfactory."[xxxvii]

To understand the collective bargaining process, it is important to recognize that, metaphorically, the NLRA puts the parties in a room to negotiate the terms and conditions of the workplace.[xxxviii] The government, however, does not enter the room or interfere with the negotiations. Indeed, the government plays no part in determining the terms of collective bargaining agreements.[xxxix] Congress, instead, created the NLRB to merely "supervise the collective-bargaining process."[xl] The NLRB will only step into the room when one of the parties cries foul. Even so, the NLRB is "without authority to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement."[xli]

If one party to the negotiations cannot realize its goals at the negotiating table it is free to use its economic weapons, such as the strike or lockout.[xlii] As has been noted, "collective bargaining is a process of reaching agreement; and the statutory rules of the game are that the employees may strike if dissatisfied with the terms offered by the employer and the employer may close his plant if, in his opinion, the union becomes unreasonable in its demands. The strike and the threat of strikes are thus themselves a part of the bargaining process and are, so to speak, the catalysts which make agreement possible."[xliii]

Collective bargaining agreements are more than mere contracts,xliv and have been portrayed by U.S. Solicitor General Archibald Cox as an instrument of government.[xlv] Indeed, the collective bargaining process "is an effort at establishing a system of industrial self-government."[xlvi] As one court noted, "the trade agreement becomes, as it were, the industrial constitution of the enterprise setting forth the broad principles upon which the relationship of employer and employee is to be conducted."[xlvii] And a grievance procedure culminating in final binding arbitration is an integral dispute resolution mechanism in virtually all collective bargaining agreements.[xlviii]

Arbitration is a Voluntary Dispute Resolution Mechanism. Arbitration is a non-judicial proceeding typically chosen voluntarily by parties "who want a dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case, they agree in advance to accept as final and binding."[xlix] The voluntary nature of arbitration is a key feature of the dispute resolution mechanism.[l]

In contrast, compulsory arbitration has been defined by Department of Labor to mean a "process of settlement of employer-labor disputes by a government agency (or other means provided by the government) which has power to investigate and make an award which must be accepted."[li] This type of labor arbitration is generally limited to collective bargaining agreements covering public sector safety personnel, such as police and fire, because the workers are prohibited from going on strike.

Because of the voluntary nature of arbitration, the parties must determine in advance whether the subject matter of the dispute is appropriate for arbitration. As stated by the U.S. Supreme Court: "Arbitration is a matter of contract and a party cannot be required to submit to arbitration in a dispute which he has not agreed so to submit."[lii]

Grievance and Interest Labor Arbitration. Labor arbitrations can be divided between "rights/grievance" and "interest" arbitrations.[liii] "Rights" or "grievance" arbitration involves the interpretation and application of the provisions of collective bargaining agreements, laws, or customary practices.[liv] Indeed, this type of arbitration contemplates "the existence of a collective bargaining agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in the terms" or to create a new agreement. The underlying dispute relates either to the meaning or proper application of a particular contractual provision "with reference to a specific situation or to an omitted case. In the latter event the claim is found on some incident of the employment relation, or asserted one, independent of those covered by the collective agreement. … in either case the claim is to rights accrued, not merely to have new ones created for the future."[lv]

Interest arbitration, on the other hand "relates to disputes over the formation of collective bargaining agreements or efforts to secure them. They arise where there is no agreement or where it is sought change terms of [an existing agreement] and therefore the issue is not whether an existing agreement controls the controversy." They look to the "acquisition of rights for the future, not to assertion of rights claimed to have vested in the past."[lvi]

One interest arbitrator noted the unique task presented by writing a contract provision instead of the usual job of interpreting collective bargaining agreements. He noted, "The task placed before this Arbitrator is not the usual settlement of a grievance based upon interpretation of a contract already agreed upon by the parties. Rather the Arbitrator has been asked to write a term into the contract upon which the parties could not agree during negotiations."[lvii] Indeed, another arbitrator noted, "The task is more clearly legislative and judicial. The answers are not to be found within the four corners of a pre-existing document which the parties have agreed shall govern their relationship."[lviii]

Compulsory interest arbitration places heavy burdens on arbitrators and they must impose the most important terms and conditions of employment upon the parties. As one arbitrator noted, "In an arbitration proceeding with the present kind [interest arbitration], the arbitrator is in a much more difficult position than in the more common types of case in which he is asked to interpret an existing Agreement. In the latter situation he has before him a standard against which to measure the dispute; a standard, however vague, arising from agreement between the parties. In the

controversy now before me, I am asked to decide, not merely the 'rights' of the parties under an agreement they have themselves made, but rather to write the 'Agreement' for them. For criteria of judgment I cannot look to the parties; I must look to myself."[lix]

Because employers and, up to this time, unions have generally been wary of letting a stranger to the workplace dictate the most important terms of employment, interest arbitration is used much less frequently that grievance arbitration. Indeed, "the most popular use of labor arbitration concerns disputes involving the interpretation or application of the collective bargaining agreement. There is much less enthusiasm for its use, even on a voluntary basis, as a means of resolving disputes over terms of new or renewable contracts."[lx] Moreover, when interest arbitration is used it is generally in connection with compulsory arbitration in the public sector. While it is true that interest arbitration has been accepted in a few private sector situations, as one interest arbitrator noted, an agreement to compulsory arbitration "*is bottomed on voluntary, privately negotiated agreements — not compulsory arbitration awards*."[lxi] In other words, in the private sector even an agreement between an employer and union for compulsory interest arbitration must be *voluntary*.

Compulsory Interest Arbitration was Explicitly Excluded from the NLRA

The NLRA "in no respect regulates or even provides for supervision of wages or hours, nor does it establish any form of compulsory arbitration."[lxii] In fact, the legislators specifically rejected compulsory arbitration and compulsory interest arbitration. Senator Wagner, the original architect of the Act, declared:

> One method of approach to the problem of industrial peace would be for the Government to invoke compulsory arbitration, or to dictate the terms of settlement whenever controversy arises. Where this procedure has been tried in European nations it has met with only questionable success. *In any event, it is so alien to our American traditions of individual enterprise that it would provoke extreme resentment and constant discord*.[lxiii] … It is clear that in this country peace must be based on reason rather than force. We have cherished always the ideal of employers and workers meeting together with friendly and open minds in order that they may exchange views and *arrive at solutions based not upon compulsion but upon mutual concessions and mutual benefit*.[lxiv]

Significantly, the NLRA as introduced included a provision that would have allowed parties to voluntarily submit disputes to the NLRB. In describing the provision, Senator Wagner went out of his way to explain that even though "the board [would be] empowered also to arbitrate labor disputes upon voluntary submission…its award [would] be binding only upon parties who have agreed in advance, and there is not the slightest flavor of compulsory arbitration."lxv The provision, however, was ultimately eliminated from the final version of the bill.

Restrictions on Government Imposition of Contract Provisions on Labor or Employers

In 1970, the U.S. Supreme Court decided the very issue of whether the government can impose contract terms on a party. In *H. K. Porter v. NLRB*,[lxvi] the NLRB determined that a company failed to bargain in good faith by refusing to bargain about union dues check-off provision in the first collective bargaining agreement. The Board ordered the company to "engage in further collective bargaining" including the issue of union dues check-off if the union insists.[lxvii] The federal circuit court of appeals went further, holding that in certain circumstances a "check-off may be imposed as a remedy for bad faith bargaining."[lxviii] The Board again reviewed the case and ordered the company to "grant to the Union a contract clause providing for the check-off of union dues."[lxix] In other words, the Board ordered the company to agree to a contract provision. The federal appellate court upheld the Board's order.

The Supreme Court, however, reversed the lower court and the Board. The Court ruled that while the Board has the authority to order a company and union to negotiate, "it is without authority to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement."[lxx] Instead, the role of the Board is "to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties."[lxxi] The Court noted that "one of the fundamental policies [of the NLRA] is freedom of contract" and reasoned that by "allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based — private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract."[lxxii] EFCA undermines the "fundamental premise" of the NLRA and would dictate that government-sponsored arbitrators impose labor contract terms soon after a union is certified as the bargaining agent.

Compulsory First Contract Interest Arbitration under the Employee Free Choice Act

Under EFCA, once the NLRB certifies the union, the employer is required to meet with the union and make "every reasonable effort to conclude and sign a collective bargaining agreement" within 10 days from the time the union requests to bargain. Because labor agreements are often highly complex documents affecting the long-term economic interests of both employees and employers, collective bargaining negotiations typically take months to negotiate. Under EFCA, the process is unrealistically accelerated. If no agreement is reached within 90 days, either party can request mediation from the FMCS. If mediation fails to produce an agreement within 30 days (or a longer period agreed upon between the parties), the matter would be referred to an arbitration board "established in accordance with such regulations as may be prescribed by the Service." The arbitration panel must then "render a decision settling the dispute" (i.e., mandate the terms of the contract), which is then binding upon the parties for two years unless the parties agree by written consent to amend the contract.

It is important to recognize the fundamental change that EFCA is proposing for collective bargaining and the use of labor arbitrators. As noted above, under current practice, the employer and union negotiate a collective bargaining agreement and employees typically ratify the agreement by a majority vote. As part of the collective bargaining

agreement's grievance process, arbitration is generally used to resolve disputes that arise under the agreement between the parties. In such circumstances, labor arbitrators interpret the language of the collective bargaining agreement to resolve disputes arising under the agreement between employees/labor and management.

In contrast, EFCA would, in many circumstances, require a panel of arbitrators to actually *write* the underlying agreement and impose it on labor and management. The right to choose arbitration would no longer be available. Employers would be given no right of review, and employees, already denied the right to a secret ballot election on union representation, would further be denied the right to vote on the contract mandated by the arbitration panel.

This is contrary to the American system of free collective bargaining. Indeed, even interest arbitrators have refused to force an interest arbitration provision on a party if they did not want it. In *Pacific Neo-gravure*,[lxxiii] the arbitrator refused to force a union to be bound by a compulsory interest arbitration provision when the union argued that "a compulsory arbitration provision should not be imposed on a non-consenting party."[lxxiv] The arbitrator held that "it would seem a fair conclusion that for an Arbitrator to order mandatory arbitration of new contract terms over the objections of either party would be, as the union states, 'the equivalent of compulsory arbitration of a new contract.' In the view of many — in both labor and management — imposition of such a requirement on a non-consenting party is incompatible with our system of free collective bargaining."[lxxv]

Similarly, in *San Joaquin Baking Co*.,[lxxvi] an arbitrator refused to force a union to continue to "submit new contract negotiations" to arbitration.[lxxvii] The arbitrator decided that "to order such a clause would in effect be to order compulsory arbitration of new contract terms. *Such action would be out of accord with the system of collective bargaining which in essence is based on volunteerism and freedom of contract*."[lxxviii]

Rationale for Compulsory First Contract Arbitration Provisions. Proponents of EFCA assert that, under current law, employers fail to bargain in good faith with newly organized unions, their goal being to undermine the union's support among the employees. Even though such a tactic is clearly illegal, labor asserts that more than a year after being certified, unions are unable to negotiate first contracts 32 percent of the time. While there is no conclusive data on this point, the difficulties in negotiating a first contract where there is a good faith effort to reach agreement cannot be understated. Newly certified unions often bear a heavy burden to make good on promises made to employees by union organizers to gain recognition. In a card check situation, where there may have been little or no opportunity for the other side to be heard, expectations are likely to be even higher. But when these promises come up against reality at the bargaining table, it is often very difficult to reach agreement, especially when an employer is already offering competitive wages and benefits to its employees. When this reality is combined with a lack of any historic track record between the parties, especially when coupled with inexperienced negotiators at the bargaining table, reaching agreement on a package that satisfies the union's political needs while being economically realistic or even feasible for the employer can be extremely difficult and time-consuming.

Compulsory Labor Arbitration Would Undermine Collective Bargaining. The imposition of compulsory first contract arbitration would effectively eliminate good faith bargaining for a first contract.

In testimony on the Employee Free Choice Act, former NLRB Chairman Peter J. Hurtgen, who also served as Director of the FMCS, stated:

> I spent 20 years of my practice in Florida where I represented many public employers in the negotiation of their collective bargaining agreements. That process, under state law, ended in non-binding interest arbitration. More often than not, the parties bargained simply to set the issues up for the arbitrator which resulted in days and weeks of hearings. The process led to hearings and imposed legislative body decisions — not agreements. Any process which ends with an imposed contract will perforce put the parties into their positioning and arbitrating shoes, not their bargaining shoes.[lxxix]

As one arbitrator noted, "Indeed, as some who have the basis for judgment urged, the availability of a procedure yielding compulsory awards tends to demoralize the bargaining process. Such procedures, it is widely believed, inhibit normal bargaining by inviting unreasonable offers and demands designed to compel arbitration… by deterring bargainers from assuming responsibility for a settlement when they believe that are terms might be arrived at terminal arbitration, and in various other ways."[lxxx] For the same reasons, another arbitrator agreed with a union's argument that forcing arbitration of new contract terms "operates to prevent the parties from really attempting to settle their differences by negotiation."[lxxxi]

Either party to negotiations may easily succumb to the "narcotic effect" of compulsory arbitration. A panel of interest arbitrators recognized the parties came to over-rely on interest arbitration and failed to fully utilize collective bargaining. The panel stated, "Arbitration should be a last resort and not an easy pillow on which to fall just because difficulties are encountered. There is some evidence that in the transit industry there has not been the fullest utilization of collective bargaining just because there has existed a ready alternative."[lxxxii] Moreover, in *Asplundh Tree Expert Co.*,[lxxxiii] an employer opted to eliminate interest arbitration provisions from future collective bargaining agreements because "the Union did not negotiate in good faith because of the safety net supplied by interest arbitration."[lxxxiv]

Proponents, however, will say that EFCA does not prevent the parties from negotiating their own contracts. But the reality is that to persuade employees to sign authorization cards, unions will promise employees what they want to hear even if the employer is not in an economic position to make good on the union's promise. Similarly, the union might think it can get more from arbitration than through collective bargaining. Under EFCA, the union can simply wait until the negotiation period ends, because the arbitration panel will have the power to write those promises into a contract that will bind the employer. Moreover, EFCA eliminates labor's accountability to deliver on those unrealistic campaign promises, because if the panel does not give the union everything it promised the employees,

the union can simply blame it on the arbitrators. And even though the employees may not get what they were promised by the union, the union will still get to collect its dues from those workers. In sum, it is a win-win-win for the union even though it may be a devastating defeat for the employees and the employer.

Arbitration was never intended to supplant collective bargaining. As one arbitral panel put it, "It is certainly a fundamental rule of law, having particular reference to labor law, that whatever either party does not get in negotiation sessions, they cannot get in arbitration proceedings."[lxxxv] Yet this is exactly what EFCA would provide.

New Role for Labor Arbitrators — Writing the "Contract". It should also be recognized that EFCA will significantly change the relationships among arbitrators, unions, employees and companies. Today, labor arbitrations are based on the mutual desire by labor and management to have their disagreements over the application of contract language settled by a third party. Arbitrations, therefore, are voluntary. Both sides agree to submit their dispute to arbitration, and they mutually agree to be bound by the arbitrator's decision. In contrast, EFCA would, in many circumstances, require a panel of arbitrators to actually *write* the underlying agreement and impose it on labor and management.

Moreover, it is a misrepresentation to refer to the end result of the so-called "first contract arbitration" procedure as an "agreement" or "contract." The reality is that because neither party has agreed to the arbitrators' decision, there will be none of the traditional elements of a binding contract such as offer, acceptance, or a "meeting of the minds." Rather, the labor arbitrator will have made a unilateral decision instead of the parties arriving at a traditionally negotiated collective bargaining agreement. Passage of EFCA would signal the end of collective bargaining agreements in first contract situations and the beginning of labor arbitrator mandates.

Many labor arbitrators have refused to take such action. For example, one arbitrator refused to adopt a union's broad reading of an arbitration provision so as to incorporate interest arbitration, which would have effectively permitted the arbitrator to write in new contract terms. In *Junior House Collectibles*,[lxxxvi] the arbitrator noted that "interest disputes are not readily adaptable to settlement by arbitration" and "parties to a contract do not normally abdicate to arbitrators the responsibilities of writing a collective bargaining agreement."[lxxxvii] Indeed, he stated, "It should not be an arbitrator's responsibility to determine what the parties should have voluntarily agreed to or accept the function to impose contract terms which they clearly did not agree to. The give and take process of collective bargaining should determine the terms of a contract rather than a party imposing his individual interests."[lxxxviii] Accordingly, the arbitrator ruled that "absent contract language which indicates a clear intent of the parties to arbitrate these types [interest] of disputes, this arbitrator is unwilling to allow grievances which permit the union to obtain through arbitration what they could not contain through collective bargaining."[lxxxix]

Similarly, in *Clean Coverall Supply Co.*,[xc] an arbitrator refused to write new terms into an agreement. He declined to impose upon a company a new contractual provision regarding vacation rights for female employees during maternity. The arbitrator stated, "In the last analysis, the Union requests that the Arbitrator ignore clear language, the intent of the parties, and write a new provision into the Labor Agreement. As we all know, such conduct on the part of

the arbitrator would be indefensible. After all, the authority of an arbitrator is limited to the construction of contractual language as agreed to by the parties. He may not legislate new language, since to do so would usurp the role of the labor organization and employer."[xci] Therefore, he noted, "If the union believes that denial of vacation benefits to employees who take a maternity leave of absence is in equitable, the proper forum to seek a remedy is it the bargaining table and not in arbitration."[xcii]

Under EFCA, arbitrations will become compulsory. If an agreement is not reached within the relatively short time period prescribed by EFCA, both sides will be compelled by law to submit their dispute to arbitration, and both sides will be compelled by law to be bound by whatever the arbitration panel decides should be in the contract. In other words, for first contracts the arbitration is not voluntary, it is compulsory.

Are Arbitrators Qualified to Write First Contracts? A fundamental issue is whether arbitrators are qualified to decide essential issues of the labor market and general marketplace. For example, would an arbitral panel have the expertise to decide whether an employer must begin contributing to a union's defined benefit plan?

In *Employer and Union Trustees*,[xciii] an arbitrator refused to write a provision into the contract dealing with the number of hours required for vested benefits under the company's pension plan, let alone decide whether the employer must begin contributing. Indeed, the arbitrator ruled that the parties should decide such matters based on expert information, not his decision. He noted, "I believe that the proposed change in the vesting requirement should be decided on in collective bargaining negotiations where a complete opportunity to gather and study all relevant facts and to properly interpret their meaning and importance with the assistance of actuaries and other experts available to the parties would be possible and feasible."[xciv]

As former Chairman Hurtgen has stated:

> No outside agency, whether arbitration, courts, or government entity has the skill, knowledge, or expertise to create a collective bargaining agreement. If it is not a creature of the parties' creation it likely will fail of its purpose. The negotiation of a collective bargaining agreement is the search for mutually resolving each side's interests. It must be done with tradeoffs and separate prioritizing. Only the parties can do that. There are no standards for arbitrators to apply. There is no skill set for arbitrators to use. Solomon is simply unavailable.[xcv]

What if an arbitral panel dictated that an employer must begin contributing to a union's underfunded pension plan or make any one of numerous blunders that could dramatically impact a business and the employment of workers? The panel would simply get paid and go on its merry way. There is no recourse from such a decision. As one court noted, "Unlike a judge, an arbitrator is neither publicly chosen nor publicly accountable."[xcvi] Indeed, this raises a number of unanswered questions related to EFCA's first contract arbitration provision.

Unresolved Issues Concerning Compulsory Arbitration

Notwithstanding the philosophical and policy objections to EFCA's compulsory arbitration provisions, there are a number of issues raised by the bill's brief 300-word provision that in many instances would be left to the FMCS to fill in the blanks.

Composition of the Arbitration Panel. Given the enormous responsibilities of the arbitration panels created by EFCA, a number of important questions will need to be answered:

- How will FMCS determine the field of arbitrators from which the panels will be drawn?
- Will arbitrators be required to have any special expertise in the business or industry in which the employer and employees operate?
- Will arbitrators be required to have any experience in running a business and making significant economic decisions affecting the long-term interests of the company and its employees?
- Will the performance of arbitrators be monitored and scored to help in determining future assignments in order to ensure sound outcomes?
- What input, if any, will the employer and union have in the selection of the panel?
- Will employers or unions be able to challenge the selection of a particular panelist based upon previous performance, conflict of interest, or any other potentially disqualifying factor?

Procedures in Deciding the Imposed Contract. Because the FMCS does not now have any comparable function forcing labor contracts on employers, employees, and unions, it will be necessary for the Service to develop procedural standards for the creation of contracts, such as:

- Where do the arbitrators begin in writing a new labor contract?
- Will the arbitrators ask the parties for their positions on all of the issues?
- Will arbitrators be required or permitted to ask each party to submit a proposed contract?
- Will FMCS develop a set of model contracts for arbitration panels to use?
- In issuing the first contract, can the arbitrators consider the behavior of the parties during the 90-day and 30-day negotiation and mediation period?
- What standards will be in place to govern how arbitrators will consider information submitted to them by the parties for their consideration? In other words, what safeguards will be in place to ensure that arbitrators have given appropriate consideration of the information submitted to the panel?
- Will the arbitrators be able to force the parties to disclose proprietary information to the panel or the other party? If so, will that information be held confidential, provided to the other party, or simply made public?
- What happens if an arbitrator discloses highly confidential information?
- What types of information will the arbitrators be able to demand and what powers will they have to require the parties to submit requested information?

- Will the parties be able to appear before the panel?
- Will the parties be able to present witnesses?
- Will the arbitration panels have subpoena power?
- Will the arbitration panels be required to follow any rules of evidence or civil procedure?
- Will arbitrators have the authority to issue injunctions to stop one or both parties from taking action during the time the panel is writing the first contract?
- Will the arbitration panels have to justify and explain in writing the rationale underlying the contract's provisions?
- Will the panel be required to consider information about the employer's business and the industry within which it operates?
- If the NLRB has issued a complaint against a party for failing to bargain in good faith, must the panel wait until that complaint has been adjudicated to impose the first contract?
- What is the time frame for issuance of the panel's decision and how will the parties be protected against a decision that is either too hasty or too protracted?
- Will the panel's decision have to be unanimous or can it be issued by majority vote? If so, can the minority file a dissent?

Scope of the Imposed Contract. Under current practice, labor arbitrators issue decisions based on provisions in a labor agreement. Under EFCA, in contrast, panels of labor arbitrators will be required to write the labor contract in the first instance. Indeed, the legislation simply states that the arbitration panel is to "render a decision." This so-called "decision" will be the actual first labor contract between the parties, and it will bind the workplace for two years. This raises a number of issues about the terms of the contract:

- Is there any limit on the issues a panel may consider and terms it may use in writing the first contract?
- Will the first labor agreement be limited to mandatory subjects of bargaining such as wages, benefits, shift schedules, job classifications, seniority rules, job bidding, etc., or will it also cover permissive subjects of bargaining like retiree health insurance?
- If there is a dispute as to whether a subject is mandatory or permissive, how will it be decided?
- Will the panel have the authority to write in "no strike" or "no lockout" clauses in the contract?"
- If the panel considers the parties' information, will it be prohibited from imposing terms on issues that were not raised by the parties?
- Will the arbitrators be able to write in a provision that all subsequent labor contracts between the parties be decided by compulsory interest arbitration?
- Will the panel have the power to impose new financial obligations on employees such as mandatory union dues, initiation fees, or special assessments? Will there be any limits on the financial obligations that the panel can impose on employees?

- Will the panel have the power to require the employer to pay into union-controlled trust funds (e.g., benefit plans) and be subject to withdrawal liability if the employer later is dissociated from the plan?

Challenges to the Imposed Contract. If challenged, arbitration awards are currently granted significant deference by courts and are very rarely overturned. Those awards, however, are made in proceedings in which the parties submit their dispute to arbitration voluntarily. Under EFCA, the process is involuntary. At the same time, the decisions by arbitration panels will have significant economic repercussions for employers, employees, and unions, yet EFCA fails to provide any clarification as to whether there will be any meaningful appellate review. Further, because the parties did not negotiate the imposed labor contract, it is highly likely that in many instances, one or more of the parties will wish to challenge a contract mandated by the FMCS panel, either on procedural or substantive grounds. This raises several questions:

- Will there be a way for the employer, the union, or the employees to appeal the panel-written contract?
- If so, will the challenge have to go first to a federal agency — the NLRB or FMCS — or can it go directly to a federal court?
- What will be the standard of review for challenging a panel's contract?
- If no challenges are allowed and an employer suffers serious economic injury from an economically unrealistic panel decision, will any other recourse be available to the employer?

Employee Rights. Employees have a number of rights under the National Labor Relations Act that are not addressed by EFCA's terms. Several questions about those rights will need to be resolved:

- Will employees still have a right to strike during negotiations and after the matter has been submitted to the arbitration panel?
- Will employees be able to file a decertification petition at any point during the bargaining, while the arbitration panel is deliberating, and for the two-year life of the contract, or will the traditional "bars" to such petitions continue to apply?
- Absent the ability to decertify the union, what protections would be available to the employees if a majority is unhappy with the contract imposed by the arbitration panel?

During and After the Contract Expires. EFCA only addresses the first two years of the contract but fails to indicate the parties' obligations thereafter:

- If, during the life of the contract, the employer wishes to implement a change in terms and conditions of employment that is not addressed by the contract, is the employer required to bargain with the union and, if impasse is reached, may the employer implement the change, or will it have to be referred to the arbitration panel?

- Upon expiration of the imposed contract, is the employer required to maintain its terms until it has either bargained to impasse with the union or a new contract has been agreed upon?

The Compulsory Arbitration Provision Runs Afoul of the Constitution and Supreme Court Precedent

If enacted, it is highly likely that the compulsory arbitration provision in EFCA will be challenged as an unconstitutional delegation of legislative authority. Experience among the states is instructive. Several states have adopted compulsory interest arbitration schemes to resolve contract negotiation disputes between the state or municipalities and essential public personnel such as firefighters, police, transportation, etc. Such personnel are often prohibited from striking because of the harmful impact it would have on the public interest. Several state supreme courts, however, have ruled that compulsory interest arbitration statutes are unconstitutional delegations of legislative authority.[xcvii]

EFCA's 300-word first contract compulsory arbitration provision fails to provide any statutory standards or guidelines for the FMCS, arbitrators, arbitral procedures, or proceedings. The absence of such legislative guidance and standards would likely render the compulsory arbitration provision unconstitutional. For example, in *Salt Lake City v. International Ass'n of Firefighters, Local 1645*,[xcviii] the court found that a state compulsory interest arbitration provision was unconstitutional, in part, because "the legislature failed to provide any statutory standards in the act or any protection against arbitrariness, such as hearings with procedural safeguards, legislative supervision, and judicial review."[xcix]

Moreover, the compulsory arbitration provision runs afoul of the rationale the U.S. Supreme Court used to uphold the constitutionality of the NLRA. In 1937, the Supreme Court ruled (in a 5 to 4 decision) that the NLRA was not unconstitutional because it "does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contact and hiring individuals on whatever terms' the employer 'may by unilateral action determine.' The Act expressly provides that in § 9(a) that individual employees shall have the right at any time to present grievances to their employer. The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about adjustments and agreements which the Act in itself does not attempt to compel."[c]

Increased Penalties Against Employers Only

The Employee Free Choice Act would abandon the traditional "make whole" approach of the NLRA by adding new and enhanced enforcement provisions and penalties in situations where employees are being organized or where first contract negotiations are taking place.

Despite the criticism by organized labor of NLRB procedures and penalties, the fact remains that in contrast to most other employment laws, enforcement is far more accessible to an aggrieved employee because of the existence of the NLRB. In contrast to most other employment laws,ci employees do not need to hire an attorney, who often take the case only if significant awards are available or if the party's case is a "slam dunk." Instead, under the NLRA, employees need only file a charge with the NLRB General Counsel, who then effectively becomes their attorney and prosecutes the case at least to the Board level. If the Board decides in favor of the employee, the General Counsel will continue to represent them if the decision is appealed in the federal courts.

The make-whole remedies of the NLRA are closely interwoven with this scheme. Rather than try to obtain a huge monetary reward or impose severe penalties on labor law violators, the Board's goal is to obtain quick relief through reinstatement with back pay. In more than 90 percent of all meritorious cases, this is achieved through a settlement,[cii] typically within a very short time frame. Employers, faced with the prospect of engaging in a lengthy and expensive legal battle with the federal government, will often simply settle the case with or without an admission of guilt, resulting in a quick reinstatement of the employee. The cases that take longer to resolve typically involve more complicated or ambiguous factual or legal determinations that are left to an administrative law judge and the Board to resolve.

The Employee Free Choice Act would disrupt this orderly resolution of disputes by creating new penalties for employer violations only, including triple back pay and civil penalties of $20,000 per violation. Currently, the law strikes a balance between quick resolution of disputes and ensuring the availability of fair procedures for the minority of complicated cases requiring third-party adjudication. By raising the stakes for both the employer and the aggrieved party, the legislation threatens to disrupt this balance.

Meanwhile, the lack of balance in the bill is further underscored by failing to apply these new penalties to union violations, even though the increased use of authorization cards would clearly warrant stepped-up protection against union coercion in obtaining signatures.

Fast Track Enforcement. Under current law, the NLRB has the discretion to issue injunctions under Section 10(j) against unfair labor practices when there is reasonable cause to believe they have occurred. These are generally sought when the alleged unfair labor practices are widespread, the public interest is at stake, the Board's procedures are interfered with, or the ultimate remedies are inadequate and the conduct is clear-cut and flagrant.

The card check bill expands the use of injunctions through an existing provision in the law — Section 10(l) — designed to provide enhanced protections for neutral parties during a labor dispute. The bill would apply these to unfair labor practice charges arising during organizing or first contract negotiations.

Under current law, section 10(l) of the NLRA protects third-party employers and their employees from being dragged into an ongoing dispute between another employer and a union' — a so-called "secondary boycott." The secondary boycott provisions of the Act prohibit unions from picketing or calling a strike against a supplier, customer, or other employer doing business with the original or "primary" employer with whom the real dispute exists. Section 10(l) requires the NLRB General Counsel to give such cases, which constitute a small percentage of the charges filed with the Board,[ciii] top priority in investigating the charges. If the General Counsel finds there is reasonable cause to believe a violation exists, it must seek an injunction against the activity. In considering any expansion of section 10(l), it is worth noting that it is extremely rare for the General Counsel to seek a §10(l) injunction; the Office of the General Counsel filed only three such injunctions in FY 2007.[civ]

In short, the unlawful secondary boycott protections under Section 10(l) are not primarily aimed at protecting the employer who has a dispute with the union, but those neutral employers — and their employees — who could otherwise suffer economic harm from a dispute in which they have no involvement. Ultimately, these provisions were intended to benefit the American economy. But to expand these seldom-invoked provisions to include the many unfair labor practice charges that arise during organizing efforts would distort their original intent while imposing an enormous burden on the General Counsel and the federal courts.

Conclusion

Throughout the 70-year history of the National Labor Relations Act, both management and labor have had various complaints about how the Act works and have proposed changes to it. Yet for all of its flaws, at its centerpiece is the ability of employees to register their votes in private, with government supervision to ensure that privacy and the absence of coercion or other activities that would taint that vote. Moreover, once that preference has been expressed, if the union is selected, it has been left to the parties to negotiate the agreement that will decide "mutually satisfactory conditions" in the workplace. With a few brief provisions, the Employee Free Choice Act would fundamentally alter these basic tenets while soundly contradicting the very title of the legislation.

Notes

[i] Jarol B. Manheim, TRENDS IN UNION CORPORATE CAMPAIGNS, 7.
[ii] *MGM Grand Hotel, Inc.,* 329 NLRB 464 (1999).
[iii] 351 NLRB No. 28 (Sept. 29, 2007).
[iv] Seventieth Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 2005, at 14.
[v] Office of General Counsel, Summary of Operations (Fiscal Year 2007) at 1.
[vi] *Id*.
[vii] "In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled… Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice. An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative." *General Shoe Corp*., 77 NLRB 124, 126-27 (1948).
[viii] NLRB Case Handling Manual, § 11304.3.
[ix] *Id*. at § 11306.
[x] In *Harsco Corp*., 336 NLRB 157, 158 (2001) the Board set forth the objective test for evaluating objectionable party misconduct. The test includes weighing several factors including: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party.
[xi] *General Shoe Corp*., 77 NLRB 124, 126-26 (1948).
[xii] *Connecticut Health Care Partners*, 325 NLRB 351, 368 (1998).
[xiii] See testimony of Dr. Gordon Lafer before the House Education and Labor Subcommittee on Health, Employment, Labor and Pensions (Feb. 8, 2007), available at http://edlabor.house.gov/testimony/020807GordonLafertestimony.pdf.
[xiv] Testimony of Charles I. Cohen before House Education and Labor Subcommittee on Health, Employment, Labor and Pensions at 12-13 (Feb. 8, 2007), available at http://edlabor.house.gov/testimony/020807ChuckCohentestimony.pdf.
[xv] *Linden Lumber v. NLRB*, 419 U.S. 301, 307 (1974).
[xvi] *NLRB v. Gissel Packing Co*., 395 U.S.575, 602 (1969).
[xvii] *Id*. at 602 n. 20 (citation omitted).
[xviii] Joint Brief of the United Automobile, Aerospace, and Agricultural Implement Workers of America, the United Food and Commercial Workers, and the AFL-CIO in *Chelsea Industries and Levitz Furniture Co. of the Pacific, Inc.*, Nos. 7-CA-36846, 7-CA-37016 and 20-CA-26596 (NLRB) at 13 (May 18, 1998), *quoting NLRB v. Gissel Packing Co*., 395 U.S. 575, 602 (1969) and *Brooks v. NLRB*, 348 U.S. 96, 99, 100 (1954).
[xix] Philip Duncan and Christine Lawrence, POLITICS IN AMERICA 1996, (1995) (average of AFL-CIO ratings 1989-94).
[xx] 139 Cong. Rec. H3556 (daily ed. June 15, 1993) (Statement of Rep. Schroeder).
[xxi] *American Beauty Baking* 198 NLRB 327, 328 n. 12 (1972).
[xxii] *Medline Industries, Inc. v. NLRB*, 593 F. 2d 788, 793-5 (7th Cir. 1979).
[xxiii] *Brancato Iron Works, Inc.*, 170 NLRB 75 (1968).
[xxiv] *Gaylord Bag Co*., 313 NLRB 306, 306 (1993).
[xxv] *Imco Container Co.*, 148 NLRB 312, 312-13 (1964).
[xxvi] *The Rowand Co., Inc*., 210 NLRB 95, 95 (1974).
[xxvii] *City Welding & Mfg. Co*., 191 NLRB 124, 135 (1971).
[xxviii] Under current Board doctrine, a union may also lose its representation rights if an employer withdraws recognition and is able to objectively prove that the union has indeed lost majority support. *Levitz Furniture Co.*, 333 NLRB 717 (2001). However, the employer does so at its peril. It may not solicit the employees' views with a poll or by circulating a petition and if it is ultimately determined by the Board that majority support has not been lost, the employer's withdrawal of recognition is an unfair labor practice. Thus, except in instances where a union truly has no further interest in representing the employees, employer withdrawal of recognition is rare.

[xxix] The legislation does not address the situation raised by the pending *Dana/Metaldyne* case where a petition is filed during the initial bargaining period after the union has been certified.

[xxx] *Levitz Furniture Co.*, 333 NLRB 717 (2001).

[xxxi] *Steelworkers v. Warrior & Navigation Co.*, 363 U.S. 574, 578 (1960) (citations omitted); *see also*, S. REP. No. 74-573, at 2 (1935) (after noting that maintaining industrial peace was the primary purpose of the NLRA, the committee report stated, "Prudence forbids any attempt by the Government to remove all the causes of labor disputes. Disputes about wages, hours of work, and other working conditions should continue to be resolved by the play of competitive forces, so far as the provisions of the codes of fair competition are not controlling. This bill in no respect regulates or even provides for supervision of wages or hours, nor does it establish any form of compulsory arbitration.").

[xxxii] NLRA § 8(a)(5).

[xxxiii] 79 Cong. Rec. S. 7571 (May 15, 1935) (Senator Wagner) ("Most emphatically this provision [duty to bargain] does not imply governmental supervision of wage or hour agreements. It does not compel anyone to make a compact of any kind if no terms are arrived at that are satisfactory to him. The very essence of collective bargaining is that either party shall be free to withdraw if its conditions are not met."); 79 Cong. Rec. S. 7659 (1935) (remarks of Senator Walsh) ("Let me say that the bill requires no employer to sign any contract, to make any agreement, to reach any understanding with any employee or group of employees… Nothing in this bill allows the Federal Government or any agency to fix wages, to regulate rates of pay, to limit, or to effect or govern any working condition in any establishment place or place of employment….").

[xxxiv] 397 U.S. 99 (1970).

[xxxv] *Id.* at 103-104 (emphasis added).

[xxxvi] *H.K. Porter Co., Disston Divison-Danville Works v. NLRB*, 397 U.S. 99, 104 (1970).

[xxxvii] S. Rep. No. 573, at 12 (1935).

[xxxviii] Senator Walsh provided an apt example. "A crude illustration is this: The bill indicates the method and manner in which employees may organize, the method and manner of selecting their representatives or spokesmen, and leads them to the office door of their employer with the legal authority to negotiate for their fellow employees. The bill does not go beyond the office door. It leaves the discussion between the employer and the employee, and the agreements which they may or may not make, voluntarily and with that sacredness and solemnity to a voluntary agreement with which both parties to an agreement should he enshrouded." 79 Cong. Rec. S. 7659 (1935) (Senator Walsh); *see also*, 79 Cong. Rec. S. 7672 (1935) (Senator Walsh) (remarking that the NLRA "only leads the employees to the door of the employer and states, 'These are the representatives chose by a majority of the workers and you should bargain with them.' That us all it does.").

[xxxix] 79 Cong. Rec. S. 7659 (1935) (Senator David Walsh); 79 Cong. Rec. S. 7672 (1935) (Senator Walsh).

[xl] *H.K. Porter Co., Disston Divison-Danville Works v. NLRB*, 397 U.S. 99, 103 (1970).

[xli] *H.K. Porter Co., Disston Divison-Danville Works v. NLRB*, 397 U.S. 99, 102 (1970)

[xlii] *Pacific Neo-gravure*, 51 LA 14, 24 (Platt, 1968) (citing *NLRB v. Insurance Agents Union*, 361 US 490 (1960) ("While government has provided the statutory framework for bargaining through the enactment of the National Labor Relations Act, the issues — the substantive wages, hours, and working conditions, as well as agreement on procedures for disputes settlement and no strike pledges — are, in the main, for the parties to agree upon. Collective bargaining is a process of reaching agreement; and the statutory rules of the game are that the employees may strike if dissatisfied with the terms offered by the employer and the employer may close his plant if, in his opinion, the union becomes unreasonable in its demands. The strike and the threat of strikes are thus themselves a part of the bargaining process and are, so to speak, the catalysts which make agreement possible.").

[xliii] *Pacific Neo-gravure*, 51 LA 14, 24 (Platt, 1968) (citing *NLRB v. Insurance Agents Union*, 361 US 490 (1960).

[xliv] *Steelworkers v. Warrior & Navigation Co.*, 363 U.S. 574, 580 (1960); *Cole v. Int'l Security Services*, 105 F.3d 1465,1473-74 (D.C. Cir. 1997).

[xlv] Archibald Cox, *Arbitration in the Light of the Lincoln Mills Case*, ARBITRATION AND THE LAW, 36 (1959); *NLRB v. Highland Park Mfg. Co.*, 110 F.2d 632, 638 (4th Cir. 1940).

[xlvi] *Steelworkers v. Warrior & Navigation Co.*, 363 U.S. 574, 580 (1960).

[xlvii] *NLRB v. Highland Park Mfg. Co.*, 110 F.2d 632, 638 (4th Cir. 1940).

[xlviii] *Steelworkers v. Warrior & Navigation Co.*, 363 U.S. 574, 578 (1960) (noting that federal labor policy "is to promote industrial stabilization through the collective bargaining agreement. A major function in achieving industrial peace is the inclusion of a provision for arbitration agreements is in the collective bargaining agreement.") (citations omitted); *see also*, Ray, Sharpe, Strassfeld, UNDERSTANDING LABOR LAW, 337 (2003).

[xlix] Elkouri & Elkouri, HOW ARBITRATION WORKS, 3 (6 ed. Alan Miles Rubin Editor-in-Chief); Thomas E. Carbonneau, EMPLOYMENT ARBITRATION, 11 (2 ed. 2006) (Arbitration is a private, voluntary, and non-judicial trial procedure for deciding disputes. The parties to the dispute confer on an

arbitrator or arbitral panel the authority to adjudicate a specific dispute or type of dispute. The arbitrator's decision is binding (i.e., the arbitrator's order can be enforced in courts)).

[l] Thomas E. Carbonneau, EMPLOYMENT ARBITRATION, 11 (2 ed. 2006); *Volt Info Sciences, Inc. v. Leland Standford Junior University*, 489 U.S. 468, 474 (1989).

[li] *Should the Federal Government Require Arbitration of Labor Disputes in American industries?*, 26 Cong. Dig. 193, 195 (1947).

[lii] *Steelworkers v. Warrior & Navigation Co.*, 363 U.S. 574, 582 (1960).

[liii] Elkouri & Elkouri, HOW ARBITRATION WORKS, 108 (6 ed. Alan Miles Rubin Editor-in-Chief)..

[liv] Elkouri & Elkouri, HOW ARBITRATION WORKS, 108 (6 ed. Alan Miles Rubin Editor-in-Chief).

[lv] *Elgin, Joilet & E. Ry. v. Burley*, 325 US 711, 723 (1945).

[lvi] *Elgin, Joilet & E. Ry. v. Burley*, 325 US 711, 723 (1945).

[lvii] *Zia Company*, 72 LA 383, 386 (Johannes, 1979).

[lviii] *New York Shipping Assn*., 36 LA 44, 45 (Stein, 1960).

[lix] *Billings Contractors' Council*, 33 LA 451, 455 (Heliker, 1959).

[lx] Elkouri & Elkouri, HOW ARBITRATION WORKS, 105 (6 ed. Alan Miles Rubin Editor-in-Chief

[lxi] *Pacific Neo-gravure*, 51 LA 14, 25 (Platt, 1968) (emphasis added).

[lxii] S. Rep. No. 74-573, at 2 (1935).

[lxiii] 79 Cong. Rec. S. 7573 (May 15, 1935) (Senator Wagner) (emphasis added).

[lxiv] 79 Cong. Rec. S. 7573 (May 15, 1935) (Senator Wagner) (emphasis added).

[lxv] Hearings before the Committee on Labor, House of Representatives, H.R. 6288, 74th Cong. 1st Sess., Testimony of Senator Robert F. Wagner (D-NY), at 21(emphasis added).

[lxvi] 397 U.S. 99 (1970).

[lxvii] *H.K. Porter Co., Disston Divison-Danville Works v. NLRB*, 397 U.S. 99, 101 (1970)

[lxviii] *United Steel Workers v. NLRB*, 389 F.2d 295, 298 (D.C. Cir. 1967).

[lxix] *H.K. Porter Co., Disston Divison-Danville Works v. NLRB*, 397 U.S. 99, 102 (1970).

[lxx] *H.K. Porter Co., Disston Divison-Danville Works v. NLRB*, 397 U.S. 99, 102 (1970)

[lxxi] *H.K. Porter Co., Disston Divison-Danville Works v. NLRB*, 397 U.S. 99, 108 (1970).

[lxxii] *H.K. Porter Co., Disston Divison-Danville Works v. NLRB*, 397 U.S. 99, 108 (1970).

[lxxiii] 51 LA 14, 25 (Platt, 1968).

[lxxiv] *Id*. at 22.

[lxxv] *Pacific Neo-gravure*, 51 LA 14, 25 (Platt, 1968) (emphasis added).

[lxxvi] 13 LA 115, 125 (Haughton, 1949).

[lxxvii] *San Joaquin Baking Co.*, 13 LA 115, 125 (Haughton, 1949).

[lxxviii] *San Joaquin Baking Co.*, 13 LA 115, 125 (Haughton, 1949) (emphasis added).

[lxxix] Testimony of Peter J. Hurtgen before Senate Health, Education, Labor and Pensions Committee, at 16 (March 27, 2007), available at http://help.senate.gov/Hearings/2007_03_27_a/Hurtgen.pdf..

[lxxx] *Pacific Neo-gravure*, 51 LA 14, 25 (Platt, 1968); *see also*, *Asplundh Tree Expert Co.*, 89 LA 183, 187 (Allen, Jr., 1987) (employer opted to eliminate interest arbitration provisions from future collective bargaining agreements because "the Union did not negotiate in good faith because of the safety net supplied by interest arbitration.").

[lxxxi] *San Joaquin Baking Co.*, 13 LA 115, 125 (Haughton, 1949).

[lxxxii] *Reading St. Ry.*, 6 LA 860, 871 (Simkin, 1947). In *United Traction Company*, 27 LA 309 (Scheiber, 1956), the terms and conditions of a collective bargaining agreement had been submitted to an Arbitration Board and the company sought to have the interest arbitration provision eliminated from future contracts. The Board of Arbitration noted, "the Company is understandably reluctant to give a Board of Arbitration a 'blank check' because in some instances unhappy or dissidents in the arbitration process have described its results '*as a one-way street to bankruptcy*,' thereby ignoring the numerous instances where arbitration brought industrial peace with due regard for what was justly due to all concern. Also, sight should not be lost of the many transit properties which have ended in bankruptcy through no fault of arbitration nor for that matter of unionization." *Id*. at 318 (emphasis added). The Board of Arbitration pointed out that the company had agreed to the interest arbitration provision in the original contract. In first contract interest arbitration under the Employee Free Choice Act, however, the parties will not have the option of agreeing to interest arbitration. It will be thrust on them by statute.

[lxxxiii] 89 LA 183 (Allen, Jr., 1987).

[lxxxiv] *Id*. at 187.

[lxxxv] *Laclede Gas Co.*, 49 LA 1270, 1273 (Erbs, Brazil, and White, 1967). Another arbitrator rejected the invitation to "substitute himself for the collective bargaining process and amend the contract in conformance with his own view of industrial justice." Indeed, he noted, "This I am without power to do." *Libby McNeill & Libby*, 54 LA 1295, 1298 (Marshall, 1970).

[lxxxvi] *Junior House Collectibles*, 94 LA 673 (Redel, 1990).

[lxxxvii] *Junior House Collectibles*, 94 LA 673, 675 (Redel, 1990).

[lxxxviii] *Junior House Collectibles*, 94 LA 673, 675 (Redel, 1990).

[lxxxix] *Junior House Collectibles*, 94 LA 673, 676 (Redel, 1990).

[xc] *Clean Coverall Supply Co.*, 47 LA 272 (Witney, 1966).

[xci] *Clean Coverall Supply Co.*, 47 LA 272, 277 (Witney, 1966).

[xcii] *Clean Coverall Supply Co.*, 47 LA 272, 277 (Witney, 1966).

[xciii] 57 LA 796 (Karasick, 1971).

[xciv] *Employer and Union Trustees*, 57 LA 796, 801 (Karasick, 1971).

[xcv] Testimony of Peter J. Hurtgen before Senate Health, Education, Labor and Pensions Committee, at 15 (March 27, 2007), available at http://help.senate.gov/Hearings/2007_03_27_a/Hurtgen.pdf.

[xcvi] *Cole v. Int'l Security Services*, 105 F.3d 1465, 1476 (D.C. Cir. 1997).

[xcvii] *City of Biddeford v. Biddeford Teachers Ass'n*, 304 A.2d 387, 400 (Me. 1973) (holding that the law failed to provide sufficient standards necessary to protect the parties from a "possible arbitrary and irresponsible exercise of this delegated power"); *Erie Firefighters Local No. 293 v. Gardner*, 178 A.2d 691 (Pa. 1962); *State v. Traffic Tel. Workers' Fed. of N.J.*, 66 A.2d 616, 625 (N.J. 1949). *See also*, *Transit Auth. Lexington-Fayette Urban Cty. Gov't v. ATU*, 698 S.W.2d 520 (Ky. 1985); *Salt Lake City v. International Ass'n of Firefighters*, Local 1645, 563 P.2d 786, (Utah 1977); *City of Sioux Falls v. Sioux Falls Firefighters' Local 814*, 234 N.W. 2d 35, 37-38 (S.D. 1975).

[xcviii] 563 P.2d 786, 789 (Utah 1977).

[xcix] *Id*. (citation omitted).

[c] *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

[ci] Under Title VII and other discrimination laws, the employee must file a charge with the Equal Employment Opportunity Commission or a state agency. However, unlike the NLRB, which must proceed in a case where a charge has merit and is not settled, those agencies have the discretion as to whether to proceed or issue a so-called "right to sue" letter to the individual.

[cii] Office of General Counsel, Summary of Operations (Fiscal Year 2006) at 1.

[ciii] In FY 2005, 7.3 percent of all charges filed were 8(b)(4) cases, which involve secondary activity. See Seventieth Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 2005, at (Table2).

[civ] Office of General Counsel, Summary of Operations (Fiscal Year 2007) at 6.