First Contract Arbitration

What is first contract arbitration?

The Employee Free Choice Act (EFCA) would substantially alter the process for establishing a collective bargaining agreement in newly unionized workplaces. The bill would require that a panel of government arbitrators impose the first collective bargaining agreement on the parties if they could not reach agreement within a 120-day timetable.

How are contracts agreed upon currently?

Where a union has been recognized by the employer or certified by the National Labor Relations Board (NLRB) as representing the employees, the National Labor Relations Act (NLRA) requires employers and unions to engage in good faith collective bargaining.

This process requires that the parties negotiate with the intent of trying to reach an agreement unless and until they reach an impasse. It is called "free collective bargaining" because neither party has to agree to a proposal or concession, and the government does not interfere with the bargaining process unless there is a violation of law.

If a party fails to negotiate in good faith, it will be prosecuted by the NLRB for committing an unfair labor practice. In addition to the prospect of legal sanctions, the parties are motivated to reach an agreement in order to avoid economic pressure by the other party either through a strike or a lockout. This process forces each party to prioritize important issues and find ways to achieve them through trade-offs or compromises. The end product reflects these trade-offs in a way that only the parties themselves can achieve.

How would EFCA change the process?

Under EFCA's first contract arbitration provision, employers and unions would bargain for 90 days, followed by 30 days of mediation if either party requests it. If that mediation fails, the Federal Mediation and Conciliation Service (FMCS) would appoint a government arbitrator to settle the contract for the parties.

The government arbitrator's decision—the contract between the employer and employees—would be binding on the parties for two years. Thus, EFCA's first contract provision would mandate that government arbitration panels dictate the terms and conditions of employment such as wages, benefits, and other working conditions for newly organized employees if the parties cannot reach agreement within 120 days.

Why should EFCA's first contract arbitration provision not be enacted?

- **EFCA imposes unrealistic time frames** for employers and employees to negotiate the terms of a first contract, which can take many months to get right. For employees, contracts are about training and education, vacation and sick leave policies, healthcare and other benefits, the ability to work overtime, and grievance processes—an entire set of rules that will govern the relationship between employees and employers for years to come.

  First contracts are complex, and set the tone for all future contracts to follow. If the first contract is done too quickly to meet an arbitration deadline, it could lock in arrangements that harm employees and the company, for years to come.

- **EFCA discourages good-faith bargaining.** Because EFCA would automatically impose arbitration at the request of either party, there is a risk that rather than earnestly seeking agreement, both parties would spend the 130-day period positioning themselves for the impending arbitration with proposals unlikely to be accepted by the other party. That is, employers and unions would take positions so extreme that they know the other party wouldn't accept them, knowing that a government arbitrator would eventually impose a "middle ground" solution. There would be little or no incentive for the parties to develop reasonable proposals, prioritize important issues and engage in the give-and-take that is part of the collective bargaining process.

- **EFCA will create substantial economic harm to employers and their employees.** EFCA would put government-appointed arbitrators with little or no business experience in charge of making fundamental decisions affecting the company's costs and way of doing business. This could add substantial costs that the company's competitors will not have to incur, thus causing a potential loss of business along with the employees' jobs that depend on that business.

- **EFCA leaves many questions unanswered.** EFCA is vague and provides no details on who the government arbitrators will be, how they would be chosen, or what their qualifications are. Arbitrators could be unfamiliar with the industries and businesses they are assigned to work with, determining salaries and benefits for employees who have highly specialized jobs or work environments. Finally, EFCA provides no standards for how an arbitrator is to make his or her decisions. Because of how labor contracts are important components of a business strategy, an arbitrator's unfamiliarity could be detrimental to a business's ability to execute its strategy and compete.