September 6, 2009

Workers would be harmed by Employee Free Choice Act

Overhaul of labor laws would ultimately hurt workers

by Juan C. Enjamio

The Employee Free Choice Act would be the most radical transformation of U.S. labor laws since the New Deal. If enacted, the legislation would allow a third party arbitrator to determine by fiat the terms governing a private workplace and would impose significant new restrictions, legal risks and costs on employers.

Its proponents justify EFCA's radical reach by promulgating myths that confuse the true state of ongoing labor relations and misplace the blame for organized labor's woes. Most glaringly, EFCA is marketed on the myth that it is a pro-worker initiative. By upsetting the balance between labor and business underlying traditional labor regulations, impeding employee access to information, and imposing burdens and costs that could hamper U.S. industrial competitiveness, EFCA hurts most the very employees it purports to protect.

As originally proposed, EFCA would have allowed a union to be certified — to be mandated in a workplace — without elections or a meaningful exchange of information. All that would have been required for the union to prevail was for a majority of employees to sign authorization cards, a process where the union controls the information, the employer has little input and the employee cannot vote by secret ballot. This attack on accepted principles of labor relations, not to say fundamental U.S. values, proved so unpopular that the Democratic-controlled Senate and its organized labor supporters have seemingly abandoned this provision. But EFCA remains a deeply flawed bill.

As now proposed, it would restrict the ability of employers and unions to bargain freely. Under EFCA, if an employer and a union cannot reach agreement within 90 days, plus a brief mediation period, they must submit to binding arbitration. A federal arbitrator then gets to impose the terms under which the employer must conduct its business for at least two years. The employer cannot reject these terms.EFCA also threatens employers with large costs and new burdens. It would allow the government to impose fines of up to $20,000 per violation against employers who violate its ambiguous limits and increase the amount employers must pay when an employee is discharged or discriminated against during an organizing campaign. It would also require the National Labor Relations Board to seek mandatory injunctions for violations of obligations that may not be well-defined.

In practice, these provisions would force even scrupulous employers, weary of the potential litigation exposure, to either refrain from communicating with employees or face large legal costs and risks. Either scenario illustrates EFCA's harm to workers. By discouraging employers from communicating with their employees, it treats workers as incapable of sifting through competing claims and making educated decisions. By imposing large additional costs, it harms the employer's competitiveness, thereby threatening the employees' economic security.

This assault on traditional principles and threat to economic vitality is premised on easily-rebutted myths. EFCA's proponents often argue that this radical transformation is needed because employers systematically abuse labor laws; that the NLRB is slow in conducting elections and resolving conflicts; and that the combination of alleged employer abuse and an ineffective NLRB leads to a skewed playing field where union elections overwhelmingly favor the employer. The facts belie these myths.

Employers do not systematically abuse labor laws. From 2003 to 2007, objections challenging a party's conduct in union organizing campaigns were filed in only about 5 percent of all certification cases, including objections filed by employers. Administrative law judges sustained the objections in less than 1 percent of all such elections. The NLRB has not been slow or dilatory. In 2006, 94.2 percent of initial certification elections took place within 56 days after a union filed a petition, and the median period for elections was barely over one month. Finally, elections do not favor employers. In 1995, when Bill Clinton was president, unions won 50.9 percent of all certification elections. In 2005, when George W. Bush was president, unions won 61.1 percent.

Since the New Deal, labor relations have been rooted on fundamental principles such as open elections with secret ballots, free exchange of information and freedom of contract. Underlying this traditional scheme has been the search for balance between labor and business, and the shared understanding that an employee's greatest protection is a thriving economy with prospering businesses.

Indeed, as the automobile industry has demonstrated, destroying the balance between labor and business can have a ruinous impact on an industry. EFCA eviscerates this balance and the traditional assumptions underlying labor relations, forcing employers to accept imposed terms and conditions, burdening American industries with new competitive disadvantages, and forcing employees to make decisions about their future without access to complete information.

For these reasons, EFCA is bad for business, and for workers.

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