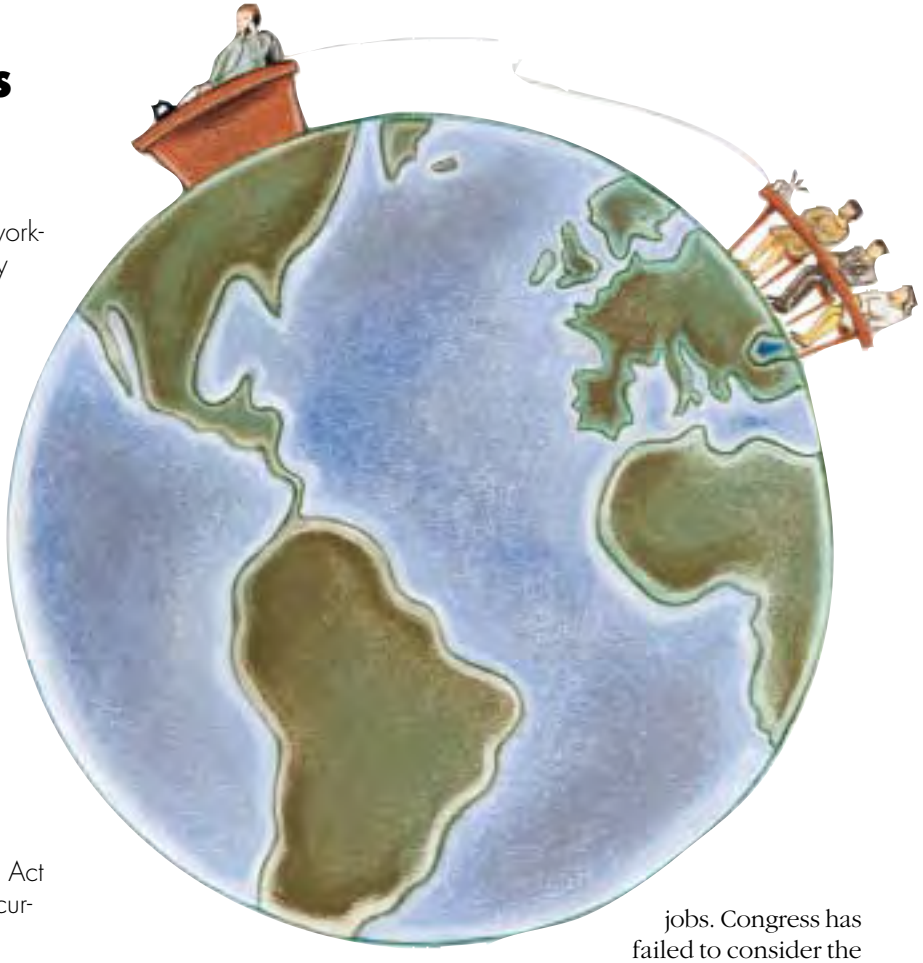
The Employee Free Choice Act:

An Improper Vehicle to Remedy the Problems of Working Americans



In the early part of the 20th century, American workers thrived under labor rights afforded to them by the National Labor Relations Act (NLRA), which was enacted more than 70 years ago. Since the 1950s, however, labor laws' effectiveness at improving the lives of American workers has drastically waned because our current social and economic realities have changed from the time the NLRA passed in 1935. For example, rather than producing most consumer goods in the United States, our country now trades globally and imports massive quantities of goods from other countries. In addition, workers in the 1930s and 1940s primarily worked in manufacturing industries, whereas today America's economy is primarily composed of service-based industries that can easily be outsourced. Because of our very different post-1950s society, Congress' efforts to reform labor law—even through the extreme methods proposed in the Employee Free Choice Act (EFCA)—will not improve the overall conditions currently plaguing American workers.

By Danielle C. Beasley

Over the last couple of years, the United States has been experiencing a recession of great magnitude. As a result, American workers have had to face problems of unemployment, decreasing wage benefits, and increasing costs of health care. In 2007, Congress turned its attention to the plight of Americans by focusing on a potential change to the NLRA through enactment of the EFCA. Although the Senate failed to pass the bill in 2007, the current favorability ratings enjoyed by the Obama administration have led to a revitalized effort to enact the EFCA. On March 10, 2009, the EFCA was introduced in the 111th Congress, and labor experts have predicted that some version of the legislation will be passed in 2009.[1]

However, Congress' attempt to provide benefits to workers through the EFCA inadequately remedies the larger-scale problems facing American workers.[2] Simply stated, merely reforming the NLRA cannot provide the same advantages promised to American workers in the 1930s and 1940s, when unionization was at its highest point of success. Today, workers compete globally with other labor markets, and employers can easily outsource service-based jobs. Congress has failed to consider the fact that a law premised on the economic and social realities of the early part of the 20th century cannot provide the same benefits to workers more than 70 years after the law was passed, even through the extreme measures set forth in the EFCA. Consequently, enacting the EFCA is likely to result in more unions for a time, but it will not improve the overall condition of workers.[3] The purpose of this article is to expose this fundamental flaw in the Employee Free Choice Act.

The EFCA's Radical Components

On March 1, 2007, the U.S. House of Representatives for the 110th Congress approved the EFCA by a vote of 241 to 185. However, on June 26, 2007, Senate Republicans were successful in blocking the consideration of the bill through the use of a filibuster. Although the EFCA was not enacted in 2007, Barack Obama has repeatedly declared, "We will pass the Employee Free Choice Act," both during his presidential campaign and now as President.

When passed, the EFCA will undoubtedly be the most radical revision of federal labor law in more than 70 years. Specifically, the EFCA—as currently proposed—will revolutionize federal labor law in three major ways: (1) by replacing the secret ballot election with the card check system,

(2) by creating an artificial bargaining process for the negotiation of first contracts between unions and employers, and (3) by increasing the penalties imposed on employers for labor law violations.

Card Check System to Replace the Secret Ballot Election

The EFCA will amend the NLRA and change the process by which unions are certified as employees' bargaining representatives. Under the EFCA, once a majority of employees signs authorization cards designating a union as their bargaining representative, the National Labor Relations Board (NLRB) will recognize that union as the exclusive bargaining representative for that particular bargaining unit.[4] Under current labor law, by contrast, an employer can refuse to recognize a union based on signed union authorization cards and can insist on a secret ballot election in which employees can vote for or against union representation.[5] Under the EFCA, however, an employer would be legally required to recognize a union solely on the basis of signed union authorization cards from more than 50 percent of the employees, and there would be no secret ballot election.

A major advantage of the secret ballot election is that it permits employees to express their true preferences regarding unionization. Election results throughout the country in fiscal year 2006 showed that unions won only 55.7 percent of elections.[6] These statistics indicate that employees may have signed cards under pressure to appease co-workers or union organizers but then expressed their true feelings about unionization in the privacy of a voting booth through the secret ballot election. Under the EFCA, these employees, after signing authorization cards, would be left without recourse, regardless of whether the signed cards accurately reflect their support for the union, because, upon receiving signed authorization cards from more than 50 percent of employees, an employer would be legally bound to recognize the union as the exclusive bargaining representative for its workers.

Furthermore, replacing the secret ballot election with the card check system may place employees in even more difficult and pressure-filled situations. For instance, news that a particular employee does not support the union could be quite damaging to both an individual's reputation and working life. That is, life after the EFCA could very well consist of repeated visits by union supporters to employees' homes or social establishments, and employees may feel a great deal of pressure to sign the authorization cards.[7] Because of these types of inherent pressures that accompany the card check system, the EFCA has been called the "No Choice Act."

A New Artificial Bargaining Process for the Negotiation of First Contracts

The EFCA will also result in an artificial negotiation process as well as potential government intervention in the collective bargaining process in the negotiation of a first contract between an employer and a union. Currently, the NLRB enforces the legal duty of employers and unions to bargain "in good faith," but it does not impose the terms of collective bargaining agreements on employers and unions.[8] However, under the EFCA, if no contract is reached within the first 90 days after negotiations have begun, either party may request that the Federal Mediation and Conciliation Service (FMCS) appoint a mediator. The FMCS would assign an arbitration board if there is no negotiated agreement after another 30 days. The government-appointed arbitration board would impose a contract on the employer and the union that would be binding for two years, unless it is amended during this period by written consent of both parties.[9]

This new bargaining system would inject an unprecedented amount of governmental intervention in the collective bargaining process in which, currently, the parties have the right to set the terms of their own contracts. In addition, because the NLRA requires only that the parties meet and convene at reasonable times and confer in good faith, both unions and employers may have an incentive to play hardball at the bargaining table.[10] Thus, rather than encouraging parties to reach a compromise, the EFCA may frustrate the bargaining process between unions and employers. More important, however, is the possibility that the mediation and arbitration provisions in the EFCA could actually result in an agreement that neither the employer nor the union-represented employees would have approved—that is, under the EFCA, even if the terms of the agreement are not beneficial to the parties, they would be still locked into the terms of the contract.

Enhanced Penalties for Employer Violations of Employee Rights

The EFCA also imposes three new penalties for unfair labor practices conducted by employers during the period of union organizing and bargaining for an initial contract. Those penalties are:

- liquidated damages equivalent to triple back pay for employees terminated in violation of the NLRA;
- civil fines of up to $20,000 for each violation by an employer; and
- mandatory injunction proceedings for campaign-related unfair labor practices, as provided under § 10(l) of the NLRA.[11]

These penalties imposed on employers, although stiffer than those imposed by the NLRA, may still be insufficient to deter some large, privately owned companies—such as Wal-Mart—from engaging in unfair labor practices.

For example, in 2000, three Wal-Mart employees in southern Nevada sought to bring in the United Food and Commercial Workers International Union to their Wal-Mart store, and Wal-Mart took adverse employment action against the employees. When the NLRB issued its decision seven years later, it determined that Wal-Mart had acted illegally and its punishment would be to pay lost wages of a few thousand dollars to one of its employees and to post notices in three of its stores disclosing the company's labor law violations. The outcome of this incident is clear: the union has long since given up trying to organize from within the stores, and the three workers quit their jobs with the company.[12] However, even if these same violations were to occur after the passage of the EFCA, the losses to Wal-Mart—the world's

largest privately owned company—would still be minimal and, therefore, may result in a rational business decision to break the law in order to prevent union organization in the workplace.[13] Therefore, even the sanctions proposed under the EFCA may not deter some employers.

The EFCA's Inability to Bring Sweeping Societal Changes

The National Labor Relations Act, which was enacted in 1935 as part of President Franklin D. Roosevelt's New Deal legislation, "was initially conceived of as the free market solution to market failures in individual bargaining."[14] The NLRA was wildly successful in the early years following its passage. However, by the mid-1950s, unionization in the United States would begin its continuous decline.

An important factor leading to the decline in union membership has been technological advances that have reduced the need for labor in production jobs and in occupations in which tasks are routinized and programmable (for example, typesetters in an earlier era and travel agents today).[15] The emergence of free trade agreements, which has unleashed the competitive forces of the global market, has also contributed to the decline in the numbers of unions in the United States.[16] The impact of the global market has most notably been felt by our services industry, which comprises the majority of jobs available to the American workforce today. It is because of these types of changes in American society that unions have not fared well in the latter part of the 20th century and beginning of the 21st century. Therefore, if Congress is to enact any meaningful laws in an attempt to fix the problems plaguing American workers, the statutes must take into account these economic realities—and these considerations are absent in the EFCA.

Unions' Successes in the Early Years after the Passage of the NLRA

Unions were highly successful in the initial years after the passage of the NLRA in 1935. In fact, the NLRA—as well as the other labor-friendly measures the Roosevelt administration created during the New Deal era—aided in increasing union membership from 3 million workers in 1933 to 4.5 million workers in 1935.[17] Moreover, in the 1940s, more than a million employees voted in NLRB elections annually, and unions won approximately 80 percent of these elections.[18] However, the success rate of unions from the enactment of the NLRA in 1935 to the peak of unionism in the 1950s is considerably attributable to the fact that employers did not suffer as great a competitive disadvantage even if the firm's workers organized. Rather, during the early part of the 20th century, most—if not all—of the firm's competition was governed by the same laws because the competition was located solely in the United States. Accordingly, firms operated in a national economy rather than a global one.

Unions were able to thrive in this national economic paradigm because most employment opportunities available during this time were in industrial or manufacturing fields, and employers were unable to outsource these jobs because advances in technology, communication, and transportation had not yet reached a level that would permit employers to easily relocate their operations and recruit a new workforce.[19] As a result, unions could credibly promise employers that they would succeed in imposing the costs of union contracts on their competitors—that is, they would "take wages out of the competition."[20] In other words, because employers were unable to move their operations off American soil and, therefore, were restricted to using local workers, the unions left them with the choice: either employ unionized workers or obtain nonunionized workers whose workforce was also likely to unionize.

Today, however, with free trade agreements fostering a competitive environment and governments deregulating sectors of the economy, such as trucking and airlines, unions can no longer sustain the ability to take wages out of the competition.[21] "As firms find themselves in a more competitive environment through increased trade and global competition, they have to pay more attention to short-term cost reduction."[22] As a result, the problems American workers face today cannot be remedied by legislation like the EFCA that fails to account for the realities of a competitive global economy, rather than a national economy.

Competitive Forces Inherent in the Global Market

Growing competitive pressure in the age of globalization has led employers to rely on flexible strategies, including outsourcing and the growth of contingent and precarious employment, which undermine the effectiveness of the pre-1950s collective bargaining law that was constructed on the norm of standard employment relations that offered workers long-term, reasonably secure employment with a large employer.[23] This new global labor market has poignantly impacted the successes that unions have enjoyed in the past, because American workers are no longer working primarily in manufacturing-based industries as they did when Congress first enacted the NLRA in 1935. For example, in December 2007, the Bureau of Labor Statistics reported that only 10.1 percent of the American workforce was employed in the manufacturing industry, whereas 84 percent of workers were employed in service industries.[24] The increased competition brought about by the global market has had a particular impact on service-related jobs—including customer call centers, information technology services, and back office support—and, according to estimates provided by the McKinsey Global Institute, nearly 160 million jobs in the service sector, constituting approximately 11 percent of total employment, "could be performed anywhere in the world."[25]

The notable feature of a job that has been outsourced is that an activity previously conducted within the firm is moved beyond the corporation's borders.[26] The decision to outsource jobs is often made in the interest of making more efficient use of land, labor, capital, information, technology, and resources. One reason for the pervasive outsourcing in our current global market is because improvements in factors such as communication, transportation, and digitalization have made it economical for firms to embrace overseas production. In other words, falling interaction costs have unlocked a massive supply of labor, driving down the price of economic inputs, realigning business processes, and causing employers to move production outside of the firm's home base to countries that have lower labor standards.

Accordingly, it is evident that labor law can no longer have the same effect it was permitted to have when the NLRA was passed in 1935—placing money in the hands of working Americans so that the American economy would prosper.[27] As a result, even through the radical provisions of the EFCA, the NLRA cannot promise the same advantages it did in the early part of the 20th century. In this regard, the EFCA is an improper vehicle to remedy the problems of working Americans.

Conclusion

Even the extreme provisions in the Employee Free Choice Act will not have the drastic positive effects on the lives of American workers that the National Labor Relations Act had in the early part of the 20th century, because our economic and social realities have changed. Accordingly, Congress has placed too much emphasis on reforming labor law without considering the reality that, in a globalized economy, labor laws cannot improve the plight of American workers as they previously could. Therefore, the EFCA represents Congress' temporary remedy to a much larger problem; it is a solution crafted at the expense of both employers and employees. **TFL**

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Endnotes

[1]As this issue goes to press, the EFCA has not been enacted into law.

[2]*See* Meghan Brooke Phillips, Note, *Using the Employee Free Choice Act as Duct Tape: How Both Active and Passive Deregulation of Labor Law Make the EFCA an Improper Mechanism for Remedying Working Class Americans' Problems*, 111 W. Va. L. Rev. 219, 220 (2008) ("Similarly, by simply reforming the NLRA in such a profound and politically motivated fashion, Congress has placed duct tape on the real problems facing workers, such as decreasing wages and increasing health care costs—problems that the EFCA is unlikely to fix.").

[3]*See id.* at 222 ("Because Congress has yet to … pass more advantageous labor laws that would encourage rather than discourage American firms to employ American workers, both the card check and arbitration and mediation provisions [in the EFCA] would likely increase the numbers in unions for a time, and could eventually harm rather than help the economic position of the American worker.").

[4]H.R. 1409, 111th Cong. (1st Sess. 2009); S. 560 111th Cong. (1st Sess. 2009).

[5]29 U.S.C. § 159(c).

[6]Phillips, *supra* note 2, at 255.

[7]*See id.* at 259–260.

[8]*See*, *generally*, 29 U.S.C. § 158(d). *See also H.K. Porter Co. v. N.L.R.B.*, 397 U.S. 99, 108 (1970) (noting that allowing the board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the NLRA is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract).

[9]H.R. 1409, 111th Cong. (1st Sess. 2009); S. 560 111th Cong. (1st Sess. 2009).

[10]Phillips, *supra* note 2, at 274.

[11]H.R. 1409, 111th Cong. (1st Sess. 2009); S. 560 111th Cong. (1st Sess. 2009).

[12]David McGrath Schwartz and Michael Mishak, *Wal-Mart Breaks the Law, Gets Punished, Wins Anyway*, Las Vegas Sun Online Sept. 14, 2007, available at www.lasvegassun.com/news/2007/sep/14/wal-mart-breaks-the-law-gets-punished-wins-anyway/ (last visited Mar. 20, 2009). *See also* Phillips, *supra* note 2, at 269–270.

[13]*See* Robert M. Worster III, Note, *If It's Hardly Worth Doing, It's Hardly Worth Doing Right: How the NLRA's Goals are Defeated Through Inadequate Remedies*, 38 U. Rich. L. Rev. 1073, 1089–1090 (2004) ("Regardless of the reasons that the most basic rights of workers have not been supported, the explanation for many employers' continued violations of the NLRA are crystal clear—rational behavior. Unfair labor practices are 'devastatingly effective in hobbling organizational campaigns' and employers will continue to 'engage in serious and pervasive unfair labor practices' until it is no longer profitable for them to do so.").

[14]Phillips, *supra* note 2, at 226.

[15]Jeffrey M. Hirsch and Barry T. Hirsch, *The Rise and Fall of Private Sector Unionism: What Next for the NLRA?* 34 Fla. St. U. L . Rev. 1133, 1138 (2007).

[16]*See* Eric Tucker, *"Great Expectations" Defeated: The Trajectory of Collective Bargaining Regimes in Canada and the United States Post-NAFTA*, 26 Comp. Lab. L. & Pol'y J. 97, 140 (2004).

[17]Phillips, *supra* note 2, at 225.

[18]*Id.* at 228.

[19]*See id.*

[20]Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 Chi.-Kent L. Rev. 3, 13–14 (1993).

[21]*See* Tucker, *supra* note 16, at 140.

[22]*Id.*

[23]*See id.* at 141.

[24]Phillips, *supra* note 2, at 242 (citing the Department of Labor's statistics for December 2007).

[25]George S. Geis, *Business Outsourcing and the Agency Cost Problem*, 82 Notre Dame L. Rev. 955, 957–958 (2007).

[26]*Id.* at 967.

[27]*See* Phillips, *supra* note 2, at 223 ("The [NLRA], as part of other New Deal Era reforms, was intended to place money in the hands of workers, who would in turn spend money and reinvigorate the economy after the Great Depression.").