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The Employee Free Choice Act Is Unconstitutional

Free speech and the takings clause are at stake.

BY RICHARD A. EPSTEIN

A top priority of the incoming Democratic Congress and Obama administration is the misnamed Employee Free Choice Act. The EFCA, as is well known, introduces a card-check procedure that allows a union to gain recognition without an election by secret ballot. Thereafter a government arbitration panel can impose, without judicial review, all the terms of an initial two-year collective "agreement" if the parties cannot negotiate an agreement within 130 days.

It is commonly supposed that economic regulation is immune to constitutional challenge since the New Deal. That's not the case with this labor law.

Consider card check and the First Amendment. Under the National Labor Relations Act (NLRA) today, an employer can insist upon a secret ballot after 30% of workers indicate by card checks their interest in a union. The campaign that follows lets the employer air his views about the downsides of unionization before the vote takes place.

To be sure, the employer's free-speech rights are limited under the NLRA. He cannot threaten to move or shut down if workers vote for the union. Nor can he promise higher wages if they don't. But he can make predictions of what will happen if his firm is unionized, and he can point to the reversal of worker fortunes in other unionized firms.

The Supreme Court (unfortunately, in my view) has held that the peculiar labor-law environment justified these abridgements of ordinary speech rights. But it hardly follows that if the government can curtail speech rights, the EFCA can eliminate them. There is simply no legitimate government interest in promoting unionization that justifies a clandestine organizing campaign which denies all speech rights to the unions' adversaries.

The mandatory arbitration provisions of the EFCA are also constitutionally suspect. True, the takings clause of the Fifth Amendment today is quite lax when the state just restricts how an owner can use his property. But it imposes a firm duty to compensate someone whose property is occupied pursuant to a government decree. The Supreme Court also has established that any company subject to rate regulation (such as in telecommunications, transportation, insurance, etc.) may raise a judicial challenge to secure a reasonable rate of

return on invested capital.

These Fifth Amendment protections apply to labor markets. The NLRA strips employers of basic common law rights, including the right to refuse to deal with the union. It imposes on employers (and unions) a duty to bargain in good faith toward a contract. But this duty does not force agreement. Either side is free to walk away from any deal it does not like. Unions can strike, and firms can lock out workers. Today's law, accordingly, restricts arbitration to interpreting existing agreements, not to making agreements from whole cloth.

The EFCA takes away the employer's right to walk. Now the successful union, backed by direct government power -- i.e., mandatory arbitration -- can force itself on the firm. Yet the proposed law does not let any court block the deal or ensure that the mandated terms offer a reasonable return on its invested capital. (Even modern rent control statutes require that much.)

The government-chosen panel could well impose terms that might cripple the firm competitively. Consider that the takings clause surely prevents the government from forcing any person to buy real estate for twice its market value from a seller. That same principle applies to this labor law: No government should be able to force a firm to hire labor at \$50 per hour when the company is not willing to pay half that much.

Worse, the EFCA also permits the government arbitrator to strip the employer of all its standard management prerogatives on everything from subcontracting out to promotion policy. By flatly denying the employer any option to walk away, mandatory arbitration under the EFCA runs smack into the takings clause.

Let's hope that the Democratic Congress will moot this analysis -- by refusing to jump head first into a labor-law abyss that promises to wreck labor markets in times of acute national economic distress. The Employee Free Choice Act should not be passed, and it should be struck down by the Supreme Court if it is.

Mr. Epstein is a professor of law at the University of Chicago, a senior fellow at the Hoover Institution, and a visiting professor at NYU. He has consulted on EFCA with employer groups.

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