

## How the Employee Free Choice Act's Compulsory First Contract Provision Would Destabilize Collective Bargaining

*Parties Would Position Themselves for Most Favorable Arbitration Decision Rather Than Reaching Agreement on First Contract in Newly Unionized Workplaces*

In addition to rewriting the rules on the election of unions, the “Employee Free Choice Act” (EFCA) would also substantially alter the process for establishing a collective bargaining agreement in newly unionized workplaces. The bill would require that a panel of arbitrators — third parties who are strangers to the workplace—impose the first collective bargaining agreement on the parties if they could not reach agreement within the bill’s unreasonably short 120 day collective bargaining timetable. The predictable effect in most instances would be to effectively eliminate good faith bargaining for a first contract and replace it with the parties positioning themselves for arbitration.

**The Free Collective Bargaining System** 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 requires that the parties negotiate with the intent of trying to reach an agreement unless and until they reach an impasse. Because the Act neither compels either party to agree to a proposal nor requires a concession and does not interject the government into the determination of the content of the agreement, ours is commonly called a “free collective bargaining” system. 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.

**EFCA's Compulsory Arbitration Provision** Under EFCA's first contract bargaining provision, the parties would bargain for 90 days followed by 30 days of mediation (if requested by either party) and then, assuming mediation fails, compulsory arbitration by a panel appointed by the Federal Mediation and Conciliation Service (FMCS). The panel's decision or “contract” would be binding on the parties for two years. Thus, EFCA's first contract provision would mandate that 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.

**The Parties Position For Impending Arbitration** Because of its short time frame and automatic imposition of arbitration at the request of either party, the parties, rather than earnestly seeking agreement, would be more likely to position themselves for the impending arbitration with proposals unlikely to be accepted by the other party. The strategic premise would be that their respective positions would serve as an outside boundary from which the arbitrators would seek the “middle ground” in writing the contract. 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. As one arbitrator explained, “the availability of a procedure yielding compulsory [arbitration] 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 better terms might be arrived at through terminal arbitration.” *Pacific Neo-gravure*, 51 LA 14, 25 (Platt, 1968). 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.” *San Joaquin Baking Co.*, 13 LA 115, 125 (Haughton, 1949). Indeed, President Truman’s Secretary of Labor, Lewis B. Schwellenbach recognized that the imposition of compulsory arbitration create “a weakening of free bargaining and an increasing reliance on the compulsory arbitration procedures.” H.R. REP. NO. 80-245, at 101 (1947). In testimony on the Employee Free Choice Act, former FMCS Director Peter J. Hurtgen, also a former NLRB Chairman, echoed the same sentiments:

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.* Testimony of Peter J. Hurtgen before Senate Health, Education, Labor and Pensions Committee, at 16 (March 27, 2007) (emphasis added).

**Elimination of Accountability for Content of Agreement** One fundamental premise underlying collective bargaining—that neither the employer nor the union is obligated to accept a proposal—all but guarantees that contract negotiations will take time and the results will have been carefully considered by the parties. In contrast, EFCA’s 120 day “bargaining” timetable encourages “surface bargaining” and positioning for arbitration by both parties. Union negotiators would have no inhibitions in making unreasonable demands, consistent with inflated campaign promises that may have been made to obtain enough signatures on authorization cards to be certified under EFCA’s card check provisions. Indeed, under the first contract provisions, labor is no longer accountable to deliver on 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, knowing that it will still get to collect its dues from those new union workers. In the end, there is no real downside for a union to wait four months for arbitration.

**Importance of First Contract Negotiations** The compulsory arbitration provisions would handicap the bargaining relationship from the very beginning and the importance of first contract bargaining cannot be overstated in the development of the parties’ bargaining relationship. Indeed, collective bargaining for the first agreement is the most important negotiation and sets the dominant tone of the union’s and employer’s relationship for the years to come. Interjecting a third party panel of arbitrators to impose terms that the parties are supposed to negotiate will hinder the development of the bargaining relationship that the parties must rely on to achieve prosperous labor relations. Moreover, the parties will be less inclined to negotiate disputes under an imposed contract, which will simply result in more arbitration regarding the terms and application of the imposed contract.