

## EFCA Arbitration Is Very Different From Regular Arbitration

### *Traditional Arbitrators Interpret Contracts But EFCA Arbitrators Would Write Contracts*

An EFCA proponent recently claimed that employers' opposition to the "Employee Free Choice Act" (EFCA) (H.R. 1409 / S. 560) mandatory interest arbitration is "pure hypocrisy" because businesses use arbitration to resolve commercial, employment, labor, and other disputes.<sup>1</sup> Similarly, questions have been raised regarding why an employer would oppose EFCA's mandatory interest arbitration provisions while, at the same time, opposing the so-called "Arbitration Fairness Act" (H.R. 1020), which would ban pre-dispute arbitration agreements in employment, consumer, and franchise agreements.<sup>2</sup> The answer lies in the very real and fundamental differences between regular arbitration and EFCA's mandatory interest arbitration.

**"Arbitration Fairness Act" Would Limit Traditional Arbitrations** Regular arbitration is routinely used to privately resolve a variety of commercial, consumer, and employment disputes. To resolve such disputes, arbitrators—pursuant to arbitration agreements—interpret relevant contracts or apply the law to determine the rights of the respective parties. Traditional arbitrators act as private judges issuing decisions that are enforceable in courts of law. These decisions are enforceable based on the parties' arbitration agreement (i.e., contract) and the Federal Arbitration Act (FAA), which provides that federal and state courts will enforce arbitration agreements and arbitration decisions and provides some grounds for appealing such decisions. The "Arbitration Fairness Act," however, would amend the FAA to prohibit and invalidate pre-dispute arbitration agreements between employers and employees, businesses and consumers, and franchisors and franchisees. The legislation would impede and substantially reduce the use of traditional arbitration in these types of disputes. HR Policy and other business groups oppose the legislation because resolving such disputes would be less efficient, more costly, and would also burden the already strained resources of the federal and state judiciaries.

**EFCA Adopts A Rare Form of Labor Arbitration** In contrast to regular arbitration, EFCA would impose an unusual variant of labor arbitration known as mandatory interest arbitration. Interest arbitration is a rarely-used procedure by which an employer and a union agree to submit disputed issues to arbitration that would otherwise be settled through collective bargaining. One arbitrator cogently observed that interest arbitration is "more clearly legislative than judicial. The answers are not to be found within the four corners of a pre-existing document which the parties have agreed shall govern their relationship."<sup>3</sup> The interest arbitrator—as distinct from traditional arbitrators who interpret existing contracts—actually writes the terms of the contract. Moreover, unlike private sector interest arbitration, which is based on a voluntary agreement between the parties, under EFCA there is no arbitration agreement. The legislation, instead, would mandate that arbitration panels write labor contracts—i.e., dictate the terms and conditions of employment such as wages, benefits, and other working conditions—for newly organized employees if the union and employer cannot reach agreement within 120 days. There would be no right to appeal an EFCA arbitration decision, and employees would not have the opportunity to vote on whether they accept or reject the decision/contract. Furthermore, an EFCA arbitrator's power and scope of authority are unlimited whereas a traditional arbitrator's power and scope of authority are limited by the arbitration agreement. The differences between traditional and EFCA arbitration are dramatic and the attempt to tie the two issues together shows the lack of understanding of both processes.

<sup>1</sup> Sam Stein, EFCA Ad War Heats Up: SEIU Responds to Chamber's Latest, *Huffington Post*, (April 14, 2009).

<sup>2</sup> Kasie Hunt, Chamber Switches Focus to Fighting Arbitration Measure, *CongressDaily*, (Feb. 19, 2009).

<sup>3</sup> *New York Shipping Assn.*, 36 LA 44, 45 (Stein, 1960).