45 Reasons to Oppose the EFCA*

The Card Check Provision

(1) EFCA ignores organized labor's 75-year track record of coercion in the context of organizing campaigns. Indeed, studies show that union officials were charged with approximately 3,700 separate allegations of coercion, threats, harassment, and violence in the 1990's alone. In 2007, 5,992 ULP charges were filed against unions, and 84.4% alleged illegal restraint and coercion. 83% of those charges were filed by individual employees.

(2) EFCA does not purport to eliminate voter intimidation, but simply to provide unions with a monopoly over it. There are thousands of reported cases in which unions misled employees as to the true meaning of authorization cards, or coerced them into providing signatures. Many other situations go unreported, as employees are fearful of "outing" their colleagues supporting the union. Moreover, agency status must first be established before finding against a union under these circumstances, and the most egregious violations are often committed by overly zealous employees who believe they are operating in the union's best interests.

(3) The bill would undo seven decades of legal precedent and effectively disenfranchise millions of employees overnight, while we are simultaneously fighting for more democracy in the representation process overseas. Just eight years ago, EFCA lead sponsor George Miller joined 15 colleagues in urging Mexico to recognize that "the secret ballot is absolutely necessary…to ensure that workers are not intimidated into voting for a union they might not otherwise choose." Ironically, the authority of those same members of Congress derives from the secret ballot itself.

(4) The heart of the current representation framework lies within the anonymity of the secret ballot. There are rarely any "secrets" in connection with card-signing campaigns. In the event of the heightened litigation that will inevitably flow from the card-check process, the confidentiality of individual signatures would be further undermined. Moreover, unions have been known to sponsor "Organizing Incentive Programs," through which organizers earn a flat fee per signature obtained, further driving up the possibility of threats and coercion.

(5) The U.S. Supreme Court, in *Gissel* and its progeny, has consistently opined that authorization cards are a flawed mechanism for ascertaining employee sentiment.

(6) Contrary to recent suggestions, employees would not decide whether the union uses their cards to bypass an election. Union officials would, as only they can speak for the petitioner. When given the option, unions will pursue card-check recognition every time. They are fighting tooth and nail to secure the passage of this legislation for a reason, and they will use it to full advantage.

(7) Supporters of the bill have suggested that employees operating in so-called "right-to-work" states would have the right to "opt out" of union representation. That would not be the case, as there are no provisions for changing current law on this particular issue. Employees opposing the union in such states would remain represented in the event of card check certification, even if they choose not to pay membership dues.

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* This document pertains to the Employee Free Choice Act, H.R. 1409, S. 560 as introduced in 2009 and currently drafted. Although alternative proposals providing for equal union access, abbreviated campaign periods and mail ballots have been introduced, these arguments are confined to primary elements of the original bill, including card check, mandatory arbitration and enhanced employer penalties.

(8) EFCA is being contemplated at a time when union representation election win rates have steadily climbed to over 70% for some unions — levels that meet or exceed those of 40 years ago. In 1980, unions won 47.9% of all representation elections. By 1990, that figure had increased to 49.5%. By 2000 unions were winning 51% of all elections. Their winning percentage had climbed to nearly 60% by 2007, and actually eclipsed 66% for the first six months of 2008.

(9) Secret ballots are the only vehicle to ensure free choice. A truly "free" choice contemplates an informed atmosphere free from coercion. In the past, even union officials like Andy Stern of the SEIU have expressed the sentiment that representation elections are "the American way."

(10) Unions continue to lose large numbers of elections even when their underlying petitions enjoy majority support, underscoring the fact that employees do change their minds about union representation, when armed with knowledge of the facts.

(11) Critical representation decisions would be made without the benefit of key information pertaining to the bargaining process, in an unregulated atmosphere rife with intimidation. Employees cannot be expected to make a reasoned choice with only one side of the story.

(12) The NLRA contemplates a collaborative process to ensure labor stability. Under EFCA, employers would be completely excluded from the representation process for the first time in history, which would only serve to exacerbate tensions between the parties.

(13) Representation petitions are often contested, but they typically result in mutually agreeable conciliation that enhances the cooperative nature of the current scheme. This is evidenced by the fact that 90% of all elections are secured through a stipulated election agreement. Moreover, over 97% of representation elections in 2007 took place without any unlawful employer activity.

(14) There is little if any evidence to suggest that the current framework is broken to begin with. The historical decline in union membership can be attributed to any number of systemic factors, such as the general decline of heavily unionized industries, globalization of the economy, increased workplace legislation at the state and federal levels, and more enlightened employer practices — all of which would remain present in a post-EFCA era. Moreover, union membership is declining globally, not just nationally.

(15) The NLRB's current election rules already require an employer to furnish detailed contact information to the union, containing the names and home addresses of its workforce, thereby providing it with ample access to bargaining unit employees. Similarly, the Board's notice-posting requirements effectively ensure substantial voter participation.

(16) Elections are not unnecessarily delayed by management. The average duration from petition to election has consistently declined in the absence of this legislation, and is down to a median of 39 days. Moreover, 95% of all alleged ULP violations are resolved through procedures that typically take from three and nine months. The vast majority of such charges were either withdrawn or dismissed in 2007. Between 2007 and 2008, less than 4% of all organizing campaigns involved an unlawful discharge.

(17) Union election victories are not endlessly tied up in challenges, as is often alleged. The percentage of certification challenges (through which an employer chooses not to bargain with the union, pending resolution of underlying bargaining unit issues at the Court of Appeals level) has also been declining, to approximately 1% of all union victories. Moreover, unions themselves contest a relatively small percentage of employer victories through the objections process.

(18) Our labor laws actually require union officers to be elected by secret ballot. What's "good for the goose," however, is not "good for the gander." In recent years, over three-dozen petitions were filed by one union, seeking to represent the staff of another. The petitioned unions apparently chose not to accept signed cards as a sign of their employees' intent, revealing at best, substantially hypocrisy on their part.

(19) The Canadian model on which EFCA is based has been a failure in its own country. In response, a majority of Canadian Provinces have reverted to a secret ballot model over the past twenty years. Half of those that retain card check require a super-majority prior to certification. Employees operating within those Provinces account for two-thirds of the nation's lost work days due to work stoppages, despite the fact that they only account for one-third of its population.

(20) Opinion polls suggest that a majority of Americans (75%) believe secret ballot elections are the most democratic method for choosing representation, while even more (87%) agree that "every worker should continue to have the right to a federally supervised secret ballot election." By contrast, only 12% believe that card check is the most fair and democratic method. A 2007 poll revealed that 64% of Americans would prefer to work in a non-union environment, while a 2006 poll showed that no more than a third expressed a preference for joining one. Not surprisingly, over a dozen major newspapers have editorialized against Card Check, including *The Miami Herald*, *The Washington Post*, the *St. Petersburg Times*, the *Orlando Sentinel*, and the *Wall Street Journal*.

EFCA's Mandatory Interest Arbitration Provisions

(1) The NLRA expressly states that the law does not require either party to accept a particular proposal or acquiesce to a particular demand. Consequently, neither Federal nor State law have ever allowed arbitration panels to impose detailed obligations on a reluctant party.

(2) The EFCA therefore represents the first occasion in peace-time history that our government would convey authority to a third party to decide what a private employer must provide in terms of wages and benefits, free from the checks and balances of bargaining unit ratification.

(3) As a result, the government would indirectly be deciding how many employees a business hires, how much it pays them, how it promotes them, and what it provides in terms of retirement and medical benefits. In the process, both sides could end up with a deal they don't want.

(4) EFCA essentially replaces collective bargaining with government-imposed contracts for newly organized companies, despite the fact that unions often fail to achieve a collective bargaining agreement as a result of their own ineptitude rather than management tactics.

(5) The term "contract" would itself be misleading under such circumstances, as a meeting of the minds typically signifying the presence of an agreement would by definition be lacking.

(6) In many cases, EFCA would eliminate collective bargaining altogether, as unions would see little incentive to do anything other than hold out for a government-imposed contract. Union intransigence during this period would do nothing to stave off the continued demise of businesses and unions alike under the present economic climate.

(7) Dictated terms of an initial agreement would lead to decreased stability, as employers seek to recoup losses during renewal bargaining, only to be met with increased strike probability.

(8) Given the state of the economy, thousands of small- to mid-sized businesses, which are traditionally the greatest source of new jobs, would be placed at imminent competitive risk.

(9) The arbitrary deadline of 120 days for imposing arbitration is unreasonable in light of surveys establishing the extensive average length of first-contract negotiations, even in the absence of bad faith bargaining. Scheduling meetings to avoid conflicts with pertinent negotiators, many of whom would have multiple commitments, would itself be challenging during this condensed period.

(10) The arbitrator's potential statutory authority to dictate a contract of two years' duration effectively circumvents the current one-year "decertification bar," thereby precluding employees from reversing their decisions following 12 months of representation.

Enhanced Employer Penalties

(1) EFCA is a rarity in that it would impose increased penalties against employers, going far beyond traditional "make-whole" remedies, with no corollary for wrongdoing unions.

(2) Consequently, there is no corresponding increase in penalties against unions for ULPs they might commit with regard to card solicitation or bad faith at the bargaining table.

(3) Unions already have substantial remedial relief available to ensure the sanctity of the representation process by virtue of injunctions brought under Section 10(j) of the Act.

(4) The Board may also issue a re-run election on the heels of objectionable employer (or union) misconduct. In extreme cases, the Board may even resort to the issuance of a *Gissel* bargaining order, compelling the employer to bargain with the union on the heels of a union defeat. These remedies are available right now for purposes of safeguarding laboratory conditions.

(5) The NLRB is already doing an effective job of policing employer compliance, as evidenced by the fact that we have seen a 500% increase in backpay awards over recent years, suggesting that vehicles are already in place to deter future violations.

Problem Areas Left Unaddressed by EFCA

(1) The EFCA is largely premised upon the assumption that it's passage will somehow result in a stimulation of the economy, yet there is not a shred of evidence in the form of empirical or other data to support that theory.

(2) EFCA offers no specific safeguards for collateral investigation into signature authenticity, fraud, revocation and coercion, leaving the Board's informal procedures in place. Under current law, employers cannot legally interrogate employees if they suspect forgery or intimidation, and the NLRB will not investigate a complaint absent such evidence.

(3) Unlike statutes such as the Older Workers Benefits Protection Act, EFCA makes no provision for signature revocation in the event that an employee has second thoughts within a short period of time following execution.

(4) There are no provisions imposing affirmative disclosure obligations on unions with regard to authorization cards and their actual purpose, nor are there any express limitations on representations that can be made in conjunction with their solicitation.

(5) EFCA allows unions to bypass representation elections on the front end of the process, yet there is no corresponding provision extending card check to the decertification proceedings that may follow. If it is fair for unions to win representation rights in this fashion, it's only fair for them to lose those rights the same way.

(6) Litigation surrounding authorization cards will only increase, as will a range of legal challenges pertaining to questionable arbitration decisions, "shotgun" unfair labor practice charges and fewer conciliations, against the backdrop of treble damages. Current procedures would leave the NLRB ill-equipped to deal with this scenario.

(7) The bill is completely silent with regard to challenging the appropriateness of the unit for which the union seeks recognition, which gives rise to unprecedented levels of ambiguity on a core representation issue.

(8) The NLRA already prohibits employers from threatening, coercing or interfering with employees in their right to select the representative of their choice. The EFCA, however, makes no provisions for "curing" union threats, misrepresentation and overreaching when it comes to signature procurement.

(9) EFCA threatens to remove a rigidly structured framework for evaluating workplace representation issues. The bill would essentially call for the NLRB to abandon the representation process, leaving an unregulated vacuum in its wake. That vacuum would be filled by opportunistic unions seeking to replenish organizing funds that have largely been drained by political contributions. Absent a structured beginning and end to the organizing process, employers would be confronted with the distracting prospect of perpetual activity, during which time their conduct would be closely scrutinized under heightened remedial provisions.

(10) There is a dearth of any legislative guidance pertaining to the proposed arbitration process, the method for striking an appropriate arbitrator or "board" (as yet undefined), and the manner for challenging any rendered decision.