

EMPLOYEE FREE CHOICE ACT
The Union's Perspective

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ABOUT THE AUTHOR

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Since 1973, as union membership has been declining, the wages of employees, adjusted for inflation, have also declined. *See Economic Report of the President: 2008 Report Spreadsheet Tables*, <http://www.gpoaccess.gov/eop/tables08.html>, see tables B-47 and 49. At the same time, the salaries of CEOs have increased from 40 times to 340 times the average workers' pay. *AFL-CIO Executive Pay Data Base*, www.aflcio.org/corporatewatch/paywatch. As Robert Reich, former Secretary of Labor under President Clinton and currently a Harvard Professor, stated in endorsing the Employee Free Choice Act, "[t]he way to get the economy back on track is to boost the purchasing power of the middle class. One major way to do this is to expand the percentage of working Americans in unions." *LA Times, January 26, 2009*.

Employee Free Choice Act would amend the National Labor Relations Act, 29 U.S.C. §151, *et seq.* It has three major components – 1) allow employees to choose how to form a union – through majority sign-up or election; 2) offers a process for newly formed union workplaces to reach a first contract through mediation and arbitration; and 3) increased penalties of employers who discriminate during organizing drive and first contract negotiations.

1. Employees' Right To Choose To Use Majority Sign-up or Election
 - a. Employee Free Choice Act: When a petition is filed seeking union representation and the NLRB finds that this petition is supported by authorizations designating the union as its representative are signed by a majority of the employees in a unit appropriate for bargaining, then the Board shall certify the union as the bargaining representative without an election. Law permitting employees to petition for an election with only showing 30% support continues.
 - i. Board shall develop guidelines and procedures for this process, including model authorization language.
 - b. Current Law: If a petition is filed with the NLRB, the Board conducts a secret ballot election in the appropriate unit and a union is certified by the NLRB if a majority of those voting select the union as the bargaining representative. Alternatively, the Employer can choose to recognize a union as the bargaining representative if it receives evidence, such as a petition or authorizations, that a majority of the employees in the unit designate the union as the bargaining representative. 29 U.S.C. 159(c)(1)
 - c. Reasons for Proposed Change:

- i. Though secret ballot election sounds like the free and unfettered way to determine majority choice, in union elections it is not. Unlike legislative elections, one of the participants in the election campaign -- the employer -- has complete control over employees' working conditions and ability to work and effectively wields or threatens to wield that power during an election campaign leading up to secret ballot election. This destroys the ability to have an unimpeded free and fair election
 1. During election campaign, 51% of companies threaten to close plant if union wins election. Kate Bronfenbreen, *"Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing"* September 6, 2000.
 2. 1 in 5 union supporters are fired during a union organizing campaign. See John Schmitt and Ben Zipperer, *"Dropping the Ax: Illegal Firings During Union Election Campaigns"*, Center for Economic and Policy Research, January 2007.
- ii. Employer can campaign during work time in work place and union does not have similar access to workers.
 1. 92% of companies force employees to attend mandatory closed-door meetings against the union. Kate Bronfenbreen, *"Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing"* September 6, 2000.
 2. 78% of companies require employees to attend one on one meeting against the union with their own supervisors during work. Kate Bronfenbreen, *"Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing"* September 6, 2000.
 3. Unions have no right of access to employees at workplace or during work time. See, for example, *Lechmere Inc. v. NLRB*, 502 U.S. 527 (1992).
 4. Employer can create work rules that prohibit employees from campaigning during work time for union. See *Republic Aviation v. NLRB*, 324 U.S. 793 (1945).

- iii. Majority sign-up recognition, as currently used by some employers, has proven an effective means to choose a bargaining representative without the threatened or actual adverse impact on employees' rights
 - 1. Large employers, like AT&T and Kaiser Permanente, have agreed to voluntary recognition through third party affirmation that a majority of the employees have designated the union as the bargaining representative. There is no evidence of employee complaints of undue intimidation or threats during the campaigns that led to majority sign-up recognition by these employees.
 - 2. 14 states have majority sign-up recognition for public sector employees. No evidence of undue influence in these campaigns.
- iv. Employers' argument that it is against this majority sign-up process because secret ballot election is sacrosanct in selecting a union representative is not true.
 - 1. Under current law (and even if Employee Free Choice Act passes), an employer can get rid of union without election so long as it has evidence that a majority of employees do not want union representative.
 - a. Employer has the right to unilaterally withdraw recognition from a union without any election so long as the Employer has preponderance of evidence that a majority of employees no longer want the union as their representative. *Levitz Furniture*, 333 NLRB 717 (2001); *NLRB v. Curtin Matheson Scientific Inc.*, 494 U.S. 775, 778 (1990).
 - b. Petition signed by a majority of the employees is an example of proof that would support such unilateral withdrawal of recognition. *See Levitz*, 333 NLRB at 725.
 - 2. No employer or any anti-Employee Free Choice Act group, such as any of the Chambers of Commerce or employer trade associations, has ever even suggested that this employer right to unilaterally withdraw

recognition should be denied because there is no secret ballot decertification election.

- v. Employee Free Choice Act majority sign-up process does not eliminate the secret ballot election but rather grants the employees, instead of the employer, the right to choose whether to have a secret ballot vote or seek recognition for the designated union through majority sign-up.

- 1. In the end, this is about employees' choice not employer choice. Employer should not have veto power to determine the process to be followed.

2. Binding Mediation and Arbitration For First Collective Bargaining Agreement If Employer and Union Cannot Reach Agreement

- a. Employee Free Choice Act: Requires employer and union to commence bargaining within 10 days or any other period agreed to by parties after newly certified union requests bargaining. If no collective bargaining agreement is reached within 90 days from date parties actually commence bargaining or any additional period that parties agree upon then either party may notify Federal Mediation and Conciliation Service ("FMCS") of existence of dispute and request mediation. If after 30 days from date of requested mediation to FMCS or any additional period that parties agree, parties have not reached a collective bargaining agreement, FMCS shall refer this dispute to an arbitration panel that shall render a decision.

- i. The collective bargaining agreement, as decided by the arbitration panel, shall be binding on parties for 2 years unless parties agree to amend by written consent.

- b. Current Law: Parties shall engage in good faith negotiations. 29 U.S.C. §158(a)(5). Even if employer engages in bad faith negotiations, the remedy is to bargain. *See H.K. Porter v. NLRB*, 397 U.S. 99 (1970).

c. Reasons for Proposed Change

- i. Under the current process, no incentive to reach a first contract. If no contract reached within first year after certification, the union can be decertified – through an election or unilateral withdrawal of recognition.

- 1. For the years 1999 - 2004, 44% of certified bargaining units fail to ever reach a first contract and

that number is even lower if the employer committed an unfair labor practice leading up to or during the negotiations. John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999 – 2004*, *Industrial and Labor Relations Review*, Vol. 62, No. 1 (October 2008).

- ii. On the other hand, the evidence suggests that looming interest arbitration leads to more mutually agreed-upon collective bargaining agreements.
 1. In New York state public sector negotiations where an interest arbitration process exists, between 1995 and 2007, only 7% of firefighter and 9% of police negotiations required arbitration and all others a contract was reached. Thomas Kochran, David Lipsky, Mary Newhart and Alan Benson, *The Long Haul Effects of Arbitration: The Case of New York State's Taylor Law*, Draft manuscript, January, 2008
 2. In Canada, which has a process similar to that proposed under Employee Free Choice Act in six provinces and the federal sector, the number of cases that result in arbitration instead of a contract varied between 1% and 8%. Susan Johnson, *First Contract Arbitration: Effects on Bargaining and Work Stoppages*, paper presented at the Labor and Employment Relations Association, January, 2008, available from author at Dept. of Economics, Wilfrid Laurier University, Canada.
- iii. Also, the interest arbitration process is more likely to eliminate the possibility of strikes or lockouts.
 1. In Canada the prospect of arbitration reduced strikes by over 50%. Susan Johnson, *First Contract Arbitration: Effects on Bargaining and Work Stoppages*, paper presented at the Labor and Employment Relations Association, January, 2008, available from author at Dept. of Economics, Wilfrid Laurier University, Canada.
- iv. Interest arbitration would not result in greater wage increases than those agreed to in good faith negotiations.

1. Since arbitrators in interest arbitration look to comparability among similarly situated workers as a basis for determining a reasonable result, studies have found, for example, no significant difference in police or firefighter settlements that are negotiated and those that are arbitrated. *See Orley Ashenfelter and Dean Hyslop, Measuring the Effect of Arbitration on Wage Levels, The Case of Police Officers, Working Paper #421, Industrial Relations Section, Princeton University, July 1999; Thomas Kochran, David Lipsky, Mary Newhart and Alan Benson, The Long Haul Effects of Arbitration: The Case of New York State's Taylor Law, Draft manuscript, January, 2008*
 - v. This mediation and arbitration process is not a substitute for collective bargaining. Rather, provides an incentive for both parties to reach an agreement in bargaining and having a process which makes first contracts achievable in all newly organized units.
3. Increased penalties of employers who discriminate during organizing drive and first contract negotiations.
 - a. Injunctions Against Employers
 - i. Employee Free Choice Act: Prioritize the handling of requested injunctions against employers under Section 10(j), 29 U.S.C. §160(j) so that it parallels the priority handling given to requests against unions for strike and boycott activity under Section 10(l), 29 U.S.C. §160(l).
 - ii. Current law: Section 10(l) expressly provides that such requests are “given priority over all other cases except cases of like character in the [regional] office.” Section 10(j) has no similar required priority.
 - iii. Reasons for proposed change:
 1. There is no logical reason that an employer’s unfair labor practices that warrant consideration of injunctive relief should have any less priority than union’s unfair labor practices that warrant consideration of injunctive relief.
 - b. Liquidated Damages

- i. Employee Free Choice Act: adds liquidated damages equal to two times the back pay amount if Board finds that an employer has discriminated against an employee in violation of Section 8(a)(3) while the employees were seeking union representation or during the period after union recognized until first contract entered. Also if find that employer “willfully or repeatedly commits Section 8(a)(1) or (3) unfair labor practices while employees seeking to organize or gain first contract, then that employer is subject to civil penalty not to exceed \$20,000 for each violation.
- ii. Current Law: employee receives back pay. There are no additional damages.
- iii. Reason for proposed change:
 1. When the only remedy is back pay (which equals lost pay less pay received in other employment) there is an incentive for employers to discharge the pro-union supporters as part of its effort to thwart the organizing drive or first contract. The cost to the employer under the current law is minimal compared to the perceived reward of not having a union.
 - a. “Many employers have come to view remedies [under the NLRA] ... as a routine cost of doing business, well worth it to get rid of organizing leaders and derail workers’ organizing efforts.” Human Rights Watch 2000, *Unfair Advantage: Workers’ Freedom of Association in the United States Under International Human Rights Standards*, New York: Human Rights Watch, p. 10.
 2. Other labor-related legislation already recognizes that the penalty for violating an employee’s rights needs to be greater than just repayment of lost pay.
 - a. Section 1981, 42 U.S.C. §1981 and Title VII, 42 U.S.C. 2000e, *et seq.*: both of which concern employment discrimination provide for compensatory damages such as emotional distress and punitive damages. *See* 42 U.S.C. §1981a.

- b. Fair Labor Standards Act, 29 U.S.C. §201, *et seq.*, provide for double damages for violations of the minimum wage and overtime provisions. *See* 29 U.S.C. §216