Restoring the Right to Organize: Impacts of the Employee Free Choice Act

There has been growing controversy over a proposed new labor relations law called the Employee Free Choice Act (EFCA), also known as the "card check" bill. This briefing paper provides an overview of the Employee Free Choice Act, its context and rationale, and its implications for both workers' abilities to organize and democratic rights in the workplace.

What is the Employee Free Choice Act?

In March of 2007, the U.S. House of Representatives passed an important and controversial bill, the Employee Free Choice Act. Although the bill had 233 cosponsors in the House, it has since been stalled in the U.S. Senate. This act promises to remove many obstacles to union organizing and to streamline the process of organizing by workers. Supporters of the EFCA argue that it will restore the original U.S. commitment to the rights of workers to organize and bargain collectively, established by the National Labor Relations Act (Wagner Act) in 1935. However, many critics, particularly business groups, argue that the Employee Free Choice Act will undermine workers' democratic rights since it provides for the bypassing of NLRB secret ballot union elections if a majority of workers sign union authorization cards.[1]

What does the Employee Free Choice Act do?

If passed in its current form, the EFCA would result in three major changes in labor relations law:[2]

- **Streamlining union certification**: The EFCA would allow unions to be certified as bargaining representatives for workers by the National Labor Relations Board (NLRB) in cases where a majority of eligible workers have signed union authorization cards. This "card check" process is a form of "voluntary recognition" of unions.
- **Facilitating initial collective bargaining agreements**: This bill would close existing loopholes in labor relations law which currently allow employers to engage in delays, and tactics of intimidation, against workers and union organizers. It provides for mediation and binding arbitration if an agreement is not reached within 90 days for a first contract.
- **Strengthening enforcement**: The EFCA would provide much greater penalties to be issued by the National Labor Relations Board against employers who engage in unfair labor practices while employees are attempting to organize or obtain a first contract.

Wouldn't the EFCA be undemocratic for workers, by not requiring NLRB secret ballot elections?

No. This question suggests that workers already have democracy through NLRB union elections. But much evidence suggests that NLRB elections are hardly democratic, either in substance or process. One study by Gordon Lafer, Ph.D., examines six basic elements of democratic elections, such as free speech. He concludes that none of these elements, except for secret ballots, are present in NLRB union elections:

> "At every step of the way, from the beginning to the end of a union election, NLRB procedures fail to live up to the standards of U.S. democracy. Apart from the use of secret ballots, **there is not a single aspect of the NLRB process that does not violate the norms we hold sacred for political elections.** The unequal access to voter lists; the absence of financial controls; monopoly control [by employers] of both media and campaigning within the workplace; the use of economic power [by employers] to force participation in political meetings; the tolerance of thinly disguised threats; the location of voting booths on partisan grounds; open-ended delays in implementing the results of an election; and the absence of meaningful enforcement measures – every one of these constitutes a profound departure from the norms that have governed U.S. democracy since its inception."[3] *[emphasis added]*

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[1] For example, some television ads in Maine have attacked the EFCA as unfree and undemocratic, drawing on crass stereotypes of "union bosses" while failing to acknowledge the issues of employer intimidation and violations.

[2] "Text of H.R. 800: Employee Free Choice Act of 2007;" www.govtrack.us/congress/billtext.xpd?bill=h110-800
A more detailed history of the bill can be seen here: http://www.govtrack.us/congress/bill.xpd?bill=h110-800

[3] Gordon Lafer, Ph.D.; "Free and Fair? How Labor Law Fails U.S. Democratic Election Standards;" American Rights At Work; June, 2005; p. 27; obtained from http://www.americanrightsatwork.org

As Lafer concludes in a summary, "the NLRB election system has come to be defined by intimidating, coercive, and undemocratic employer behavior – both legal and illegal. Current federal law fails to protect the rights that the U.S. Congress thought it had bestowed to workers more than 70 years ago."[4]

Are secret ballot elections necessarily eliminated by the Employee Free Choice Act?
No. Like the existing law, if more than 30 percent, but less than a majority of workers sign union authorization cards, a secret ballot election would still take place if requested by the employer. In addition, secret ballot elections could take place under certain other circumstances.[5]

Don't U.S. workers already have laws on labor relations that allow union organizing?
Yes, at least on paper. For more than 70 years, workers in the U.S. have had the legal right to organize unions to represent them in the workplace. The National Labor Relations Act clearly sought to establish a balance between the power of employers and the limited power of individual workers. This law declared that the policy of the U. S. is to guarantee to workers the rights to "**full freedom of association, self-organization, and designation of representatives of their own choosing**, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[6] *[emphasis added]*

In practice, however, the actual ability of workers to organize unions in the U.S. has been increasingly undermined through forceful and coercive anti-union strategies by many employers, aided by a growing industry of firms and contractors who specialize in preventing and opposing unionizing efforts. For example, the following quote is from the website of an anti-union consultant firm:

> "**Maintaining a Union-Free Work Environment --** Summary: Instruction to managers and supervisors on how to maintain a union-free work environment. Understand the different reasons why employees seek out unions, and learn how to identify early warning signs of potential union interest using a 'Manager/Supervisor Watch List'. Understand the dangers of union authorization card signing, and the need for early communication to preempt employee card signing. Seminar also gives highlights of the NLRB election process, and the dangers of collective bargaining." [7]

Is the proposed "card check" process in the EFCA a new and radical departure from past practice and law?
No. Voluntary employer/union agreements such as majority card checks for union recognition are already commonly used in the U.S. Currently far more workers are organized through this process than through NLRB secret ballot elections.[8] Many employers already accept card check organizing without requesting

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[4] Gordon Lafer; "Neither Free Nor Fair: The Subversion of Democracy Under NLRB Elections;" American Rights at Work, July 2007; p. 4. www.americanrightsatwork.org
Also see the discussion of employer intimidation by legal scholar James J. Brudney, in "Neutrality Agreements and Card Check Recognition: Prospects for Changing Labor Relations Paradigms;" *The Journal of the ACS Issue Groups*; American Constitution Society for Law and Policy; www.acslaw.org/node/4342.

[5] For example, some analyses of the EFCA suggest that in cases where an employer charges a union with unfair organizing practices, secret ballot elections could be ordered by the NLRB under the "Joy Silk" clause.

[6] "National Labor Relations Act;" U.S. National Labor Relations Board. The act explicitly states that it is intended to restore the "inequality of bargaining power" between employees and corporate employers.
http://www.nlrb.gov/about_us/overview/national_labor_relations_act.aspx

[7] Industrial Relations Consultants Inc.

[8] Anton G. Hajjar and Daniel B. Smith, "National Labor Relations Board Interference with Voluntary Recognition Agreements – Is Repeal of the National Labor Relations Act the Answer?"; Presented to the ABA Section of Labor and Employment Law, March 2, 2006; www.abanet.org/labor/newsletter/pp/fall06/index.html; p. 2.
They state: "Since the Wagner Act was passed in 1935, unions have gained recognition through both non-Board processes and Board-supervised elections…The Act does not require employees to designate a bargaining representative through a Board-supervised election." (p. 5-6) [*emphasis added*]

an election. In addition, up until 1966, "voluntary recognition" of unions without secret ballot elections was a standard practice under the National Labor Relations Act.[9] Legal scholars Anton Hajjar and Daniel Smith provide in-depth documentation of the history and widespread use of voluntary recognition agreements, through majority card check or through private non-NLRB elections. They point out:

> "This approach is hardly novel or untested…from 1935 until its decision in *Aaron Brothers*…in 1966, the Board relied on card check showings of majority support, and would only resort to conducting elections if an employer could demonstrate that it had a 'good faith doubt' as to a union's majority status... Despite the fact that recognition outside of the Board election process has long been a part of the nation's labor-management relations landscape, employers and their advocates are now attempting to impose tight federal regulation of all organizing campaigns."[10] [*emphasis added*]

In fact, Hajjar and Smith show that the National Labor Relations Board has increasingly "eroded employees' right to organize."[11] They argue that:

> "Unions now exist in the worst of both worlds: [National Labor Relations] Board law has increasingly frustrated unions' attempts to organize workers and federal courts are refusing to allow states and localities to enact any legislation that has the effect of leveling the uneven playing field that the Board has created…Under the Board and court precedent that has developed in the last decades, the Act has become an obstacle to workers seeking to organize." [12] [*emphasis added*]

How widespread is employer intimidation against union supporters?
Several recent studies document the substantial degree of intimidation and threats against workers considering unionization, particularly against union supporters and organizers. Here are two of them:

- Using NLRB data on illegal firings during union election campaigns, one study by Schmitt and Zipperer concluded that "almost one-in-five union organizers or activists can expect to be fired, as a result of their activities in a union election campaign."[13] [*emphasis added*]
- A study by American Rights at Work (ARAW) found that "when faced with organizing drives, 30 percent of employers fire pro-union workers, 49 percent threaten to close a worksite if the union prevails, and 51 percent coerce workers into opposing unions with bribery or favoritism."[14]

Such intimidation tactics have a real impact on workers' decisions regarding how to vote.

Why was this bill supported by a majority of U.S. Congressional representatives?[15]
The current hostile climate towards unions and workers who want to organize unions has resulted in a grossly lopsided legal environment. Under current conditions, where union supporters can be fired with little recourse, workers are increasingly unlikely to have a voice in determining their wages, hours and working conditions. This means that for millions of workers in the U.S., attaining democracy on the job through the processes of union organizing and collective bargaining remains only a hollow promise. In addition, despite the claims by EFCA opponents that workers would face union intimidation if it were

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[9] Aaron Brothers, 158 N. L. R. B. 1077, 1078 (1966), referred to by NLRB at: http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?friend=nytimes&navby=volpage&court=us&vol=395&page=600#t8
[10] Hajjar and Smith, *ibid*. p. 2-3.
[11] Hajjar and Smith, *ibid*. p. 4.
[12] Hajjar and Smith, *ibid*. p. 5.
[13] John Schmitt and Ben Zipperer, "Dropping the Ax: Illegal Firings During Union Election Campaigns;" Center for Economic and Policy Research; www.cepr.net/documents/publications/unions_2007_01.pdf
[14] Chirag Mehta and Nik Theodore, "Undermining the Right to Organize: Employer Behavior During Representation Campaigns;" American Rights at Work; cited in Beth Wellington, "Commentary: Labor Protections and the Role of Card-Check Agreements;" LLRX.Com: Law and technology resources for legal professionals; http://www.llrx.com/extras/cardcheck.htm; p. 2.
[15] The vote was 241 Yea, 185 Nay, and 8 Not Voting. http://clerk.house.gov/evs/2007/roll118.xml

passed, surveys of workers in recent organizing drives show that intimidation by employers is far more common. For example, in a phone survey of 430 randomly-selected workers from 2002 elections and card check campaigns, labor analysts Adrienne Eaton and Jill Kriesky found that nearly "four times as many workers reported management coerced them 'a great deal' as opposed to the union (22% vs. 6%)."[16]

In short, while it is illegal to fire workers for supporting unionization under the National Labor Relations Act, in practice this and other punitive practices are done routinely by anti-union employers. Many observers of U.S. labor law, particularly in the light of recent decisions by the NLRB and the U.S. Supreme Court, have charged that the current legal system governing union organizing is broken. It is abundantly clear that the hostile legal and political climate towards workers and unions in recent years has been a significant contributor to the decrease in the percentage of U.S. workers who are unionized.

Conclusion

Many observers and analysts feel that streamlining the process of union certification by using a card check process, where a majority of workers have signed cards, would greatly benefit both sides in the labor relations process. For workers, a card check process as outlined in the Employee Free Choice Act would substantially reduce the likelihood of intimidation, threats, and delays by recalcitrant employers. Studies also suggest that in card check campaigns, there is less pressure from employers, as well as less pressure on people from their coworkers.[17] In addition, according to the Eaton and Kriesky study, "employers who favored the card check process said it significantly reduces the cost vs. drawn-out conflicts that commonly surround the NLRB elections."[18]

In sum, the Employee Free Choice Act is not a radical departure from past practice in the U.S. Rather, it extends the option of the card check union recognition process to all workplaces where a majority of workers express their desire to organize by signing union authorization cards. It removes major obstacles to union organizing which have greatly eroded any semblance of democracy in most NLRB elections. This voluntary recognition process has been widely used in the past, and is often used now. The EFCA is fundamentally an attempt to create a more even-handed and simpler process of obtaining union recognition, by streamlining the process of union certification, facilitating collective bargaining agreements, and putting teeth into the enforcement of the law protecting the rights of workers.

Unfortunately much opposition to this bill has promoted widespread misconceptions and untruths concerning the Employee Free Choice Act and what it would accomplish. It is critically important for workers, employers and public policy makers to become familiar with what this act would and would not do, and to understand the realities which have necessitated the reforms called for in this proposed law.

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[16] Adrienne E. Eaton and Jill Kriesky, "NLRB Elections vs. Card Check Campaigns: Results of a Worker Survey," *Industrial and Labor Relations Review*, forthcoming 2008; cited in Wellington, *ibid*.; p. 2.
[17] Eaton and Kriesky, cited in Wellington, p. 2 (*ibid*.)
[18] *Ibid*.