



## **EFCA's Mandatory Arbitration Provisions Deny Workers the Right to Participate in the Bargaining Process**

The Employee Free Choice Act (EFCA) contains an unprecedented requirement that would mandate the federal government impose contract terms on private employers through a process of mandatory, binding interest arbitration. The arbitration requirement not only disrupts the careful balance established by our nation's labor laws, but also denies workers the ability to vote on their contract, creates disincentives to compromise, and is likely unconstitutional.

- **Current Law Requires Negotiation in Good Faith**
  - After a union is certified, current law requires the union and the employer to bargain in good faith.
  - How is the current “good faith” bargaining requirement enforced?
    - NLRB may issue bargaining orders to both sides; and order back-pay for wronged employees.
    - If a union is frustrated by an employer's good faith disagreement, it has the very significant leverage of calling a strike.
- **Workers Could Not Vote on the Union Contract**
  - Mandatory, binding arbitration removes union employees from this process and would let the arbitrator impose a binding contract without an employee vote.
- **Interest Arbitration Removes Incentive to Bargain**
  - The incentive to reach agreement decreases if the parties have reason to believe an arbitrator might be prevailed upon to select one proposal over another.
- **Binding Arbitration was Rejected in Wagner Act (1935) and Taft-Hartley (1947)**
  - When it passed the NLRA, Congress explicitly rejected binding arbitration as incompatible with the concept of collective bargaining.
    - The accompanying Senate Committee Report said, “the essence of collective bargaining is that either party will be free to decide whether proposals made to it are satisfactory.”
  - The Supreme Court noted that if the NLRA had included binding arbitration provisions, then it likely would be an unconstitutional infringement on the right to contract (*NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937))
  - When Congress amended the NLRA in 1947 with the Taft-Hartley amendments, it included explicit language that good faith bargaining “does not compel either party to agree to a proposal or require the making of a concession.”