



Government Would Impose Wages and Union Contract Terms Without an Employee Vote Under EFCA

The Employee Free Choice Act (EFCA) contains an unprecedented requirement imposing contract terms on private, unionized employers through a process of mandatory, binding interest arbitration. The bill provides that if an employer and a union are engaged in bargaining for their first collective bargaining agreement and are unable to reach agreement within 90 days, then either party may refer the dispute to the Federal Mediation and Conciliation Service (FMCS) for mediation. If the FMCS is unable to bring the parties to agreement after 30 days of mediation, then the dispute will be referred to arbitration. Results of the arbitration will then be binding for a minimum of two years. 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.

Workers Could Not Vote on the Union Contract

Typically, when the employer and union reach agreement on a first contract, employees then have the right to vote on acceptance of the contract. If the contract is unacceptable to employees, the employer and union must then return to the bargaining table to find a more acceptable agreement. EFCA's mandatory arbitration process removes employees from this process entirely and would let the arbitrator impose a binding contract without an employee vote.

Union Puffery Creates Unrealistic Expectations; Causes Delay

First contracts often take time for a variety of reasons. Frequently, a union's initial bargaining position may mirror those promises it made during the union recognition campaign, which may not be reflective of the economic realities of the employer's business. Indeed, it is not uncommon during a representational campaign for a union to make promises that are objectively unrealistic.

Perverse Incentives Created by Interest Arbitration

The incentive to reach agreement will be lessened considerably if the parties have reason to believe an arbitrator might be prevailed upon to select one proposal over another. In addition, even the best intentioned arbitrator will have difficulty in attempting to cut through the posturing inherent in bargaining and guess as to the needs of each party. Ultimately, the parties are the only ones that know their true needs and are adequately equipped to evaluate the merits of any particular proposal or counterproposal.

Could Force Employer Into Failing Pension Schemes

A good illustration of how interest arbitration might harm employees and the employer alike is in the area of multiemployer pension plans. Consider the case where an employer came to the bargaining table with a traditional defined benefit pension plan, but the union came with a proposal that would have the employer participate in an existing multiemployer pension plan. The arbitrator could force the employer to enter a multiemployer pension plan. If the plan were not well funded, the employer might face significant liabilities and a situation making it virtually impossible to withdraw from the plan. A less solvent plan would also be bad for the employees, who would have an increased risk of losing their retirement. A union might be motivated to force the employer into a failing multi-employer plan to effectively provide a subsidy for its existing members already in the plan.

Arbitration Was Rejected in Wagner Act and Taft-Hartley Amendments

When it passed the NLRA, Congress explicitly rejected binding arbitration as incompatible with the concept of collective bargaining. As the 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 has weighed in as well, noting that if the NLRA had included binding arbitration provisions, then it likely would be an unconstitutional infringement on the right to contract.¹ When Congress amended the NLRA in 1947 with the Taft-Hartley amendments, it reinforced its belief that binding arbitration is inconsistent with collective bargaining. Indeed, Congress was critical of the Board for “setting itself up as the judge of what concessions an employer must make” in its interpretation of good faith bargaining obligations. Consequently, it amended the NLRA to include explicit language that good faith bargaining “does not compel either party to agree to a proposal or require the making of a concession.”

Current Law Requires Negotiation in Good Faith

After a union is certified as the bargaining agent for the employees, the law requires the union and the employer to bargain in good faith. The NLRB has extensive case law setting the parameters of when employers or unions have refused to bargain in good faith. When violations occur, the NLRB has broad discretion to fashion a remedy including issuing bargaining orders and making employees whole through backpay and other appropriate relief. In serious cases, the NLRB can even force an employer to re-open a closed facility.² If a union is frustrated by an employer’s good faith disagreement, it has the very significant leverage of calling a strike. If the employer has not bargained or has bargained in bad faith, such a strike would be an “unfair labor practice” strike that would substantially increase the union’s bargaining power since employers are barred from hiring permanent strike replacement workers during such a strike.

¹ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

² *See, e.g., Mid-South Bottling Co. v. NLRB*, 876 F.2d 458 (5th Cir. 1989).