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## SHOULD CONGRESS PASS THE EMPLOYEE FREE CHOICE ACT? SOME NEIGHORLY ADVICE

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### ABSTRACT

American labour law is broken. As many as 60 percent of American workers would like to have a union, yet only 12 percent actually do. This is largely due to systematic employer interference, often in violation of existing laws. The Employee Free Choice Act (EFCA), currently before Congress, contains provisions to rectify this problem. Canada's experience with similar provisions can be helpful in evaluating the arguments surrounding this act. It suggests that the reforms proposed in EFCA can be expected to safeguard rather than deny employees' free choices. They will not alter the balance of power in collective bargaining, but only help to ensure that workers can exercise their basic right to meaningful representation at work and, potentially, to win gains that could help to reduce inequality and return America to prosperity.

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### FULL COMMENT

**C**ollective bargaining is an internationally recognized human right. Many view it as central to the ability of workers to achieve decent pay and fair treatment at work. When surveyed, a majority of

Americans say they support it.<sup>1</sup> Yet the American system of labour law, which workers rely on in order to exercise this right, is broken.

Research reveals that, although close to 60 percent of American workers would like to have a union, only 12 percent actually do.<sup>2</sup> Employers regularly resort to lies, threats, and coercion during a union organizing drive. They are found guilty of illegally firing employees in 25 percent of these drives.<sup>3</sup>

Things are so bad that four out of every five American workers believe employees actively seeking union representation will likely lose their jobs.<sup>4</sup> As one government committee has concluded: “fear is no doubt one cause of the persistent unsatisfied demand for union representation on the part of a substantial minority of American workers.”<sup>5</sup>

Even where workers succeed in gaining certification, recent research from the Massachusetts Institute of Technology shows there is only about a 60 percent chance of ever achieving a collective agreement.<sup>6</sup> Employers often refuse to bargain in good faith, and although this is against the law, it is difficult to establish and there are few legal remedies for ensuring an agreement is reached.<sup>7</sup>

The Employee Free Choice Act (EFCA), now before Congress, proposes to address these problems. Specifically, it would allow for reliance on signed union membership cards to establish whether workers wish to be represented by a union, give the National Labor Relations Board (NLRB) stronger remedial powers to deal with employer unfair labour practices, and allow either party to apply for first contract mediation and arbitration if a collective agreement is not reached within ninety days. Canadian labour law has included several of these features for many decades and this experience can be helpful in evaluating the arguments surrounding EFCA. Our commentary focuses on card certification and first contract arbitration.

Critics of card-based certification argue that it is undemocratic and would expose workers to deception and even coercion from union organizers and supporters. They insist a secret ballot election is the only way to ensure workers can exercise a free choice. The Canadian experience over several decades with card-based certification offers little support for such claims. Complaints against unions for undue pressure or coercion have been rare in Canada, and findings that unions have been guilty of such practices even rarer. The Canadian experience also indicates that certification based on union authorization cards is efficient and, where there has been uncertainty about the union’s majority support, labour relations boards have had the authority to conduct a certification vote.

Opponents rely on a political analogy to support their case. This analogy is false. Political elections are held to determine who will govern. Certification determines who will go to the bargaining table to negotiate working conditions with the employer. In addition, political elections allow competing parties relatively equal access to voters, and neither party has undue power over them.

Certification occurs in a context where neither is the case. Employers have much greater, day-to-day access than union organizers could ever hope to have, and are in a position to resort to various forms of intimidation, including threatening employees with their jobs and even firing them.

One option is to require a ballot, but to minimize the time between when a union applies for certification and the holding of that ballot. In theory, this lessens the opportunities for employer interference. In practice, however, it fails to resolve the democratic imbalance. A number of Canadian provinces now have just such a procedure, and normally hold votes within 5 or 10 days of a union application. In almost all, there are much stronger restrictions than in the US on what employers may legally communicate to employees during this period. Yet employers are still able to take advantage of their greater access to workers to dissuade them from unionizing. For instance, employer unfair labour practices have been shown to be twice as effective at discouraging unionization where certification votes are required.<sup>8</sup>

The research shows that unions are significantly less likely to become certified when these provisions are in place than when there is provision for automatic card certification. This is especially the case where the vote is delayed so that the election takes place outside of established time limits. Only where there are procedures in place to prevent their violation are time limits likely to be effective,<sup>9</sup> and such procedures may be difficult to legislate and enforce given U.S. legal norms and traditions.<sup>10</sup>

The second issue we wish to address is first contract arbitration. Opponents of this provision have expressed concerns that arbitration would be detrimental to the economic interests of employers and that unions will “hold out” rather than settle in the expectation they will get a more favourable outcome from an arbitrator. A system of first contract arbitration was first introduced in Canada in 1974. The rationale for first contract arbitration was to remedy situations where anti-union employers continued to resist the right of workers to engage in collective bargaining following their certification.

Research indicates that first contract arbitration is a last resort in settling disputes. Unions and employers are almost always able to successfully negotiate their first agreement without resort to arbitration, often with the assistance of mediation. Between 1986 and 2005, there were 35,585 certifications granted in those jurisdictions with FCA. In only approximately 4 percent of these cases was first contract arbitration applied for, and in less than 2 percent of these cases was it granted. This does not mean that an arbitrated first agreement actually resulted – the parties may well settle on their own before arbitration occurs or is concluded.<sup>11</sup>

Where arbitration does occur, arbitrators and labour boards have developed guiding principles ensuring that reasonable terms result.<sup>12</sup> These can be substantial if employees are receiving substantially less than others in their

industry. But in most cases they are not. For example, in a recent case in Quebec, involving low wage jobs at Wal-Mart (the US equivalent of \$7.00 an hour), the arbitrator awarded the US equivalent of only a 25 cent pay increase, along with minimal provisions found in virtually all collective agreements.<sup>13</sup>

The reforms proposed by the drafters of the EFCA are intended to protect the right of American workers to join a union and bargain collectively. Opponents are worried these proposed reforms go too far. We believe the Canadian experience provides assurance that this is not likely to be the case. Such reforms can be expected to safeguard rather than deny employees' free choices.

The EFCA will not alter the balance of power in collective bargaining, even though experts uniformly agree that this balance has tilted increasingly in favour of employers in recent decades. It will only help to ensure that workers can exercise their basic right to meaningful representation at work and, potentially, win well-deserved gains that many have long been denied -- and which could prove more effective than all the government schemes in the world for reducing inequality and returning America to prosperity.

The EFCA may be the most contentious piece of legislation before Congress this term. From where we sit, it will serve as *the* litmus test as to whether America has entered the new era promised by last fall's election.

As they say, "as America goes, so goes the world." As your neighbours and friends to the north, we very much hope that the direction will be forward.

## NOTES

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1. For example, in a 1996 Ipsos-Reid Survey (n=1750), 7 in 10 Americans stated that they approved of unions. See Seymour Martin Lipset and Noah Meltz 1998. "Canadian and American Attitudes toward Work and Institutions." *Perspectives on Work*, Vol. 1, No. 3, pp. 14-19.
2. These findings are based on a 2004 Hart Survey. See Richard Freeman, 2007. "Do Workers Still Want Unions? More Than Ever." EPI Briefing Paper #182. Washington, D.C.: Economic Policy Institute. <http://www.sharedprosperity.org/bp182/bp182.pdf>.
3. John Schmitt and Ben Zipperer, 2009. "Dropping the Ax: Illegal Firings During Union Election Campaigns." *Centre for Economic and Policy Research* <http://www.cepr.net/index.php/the-benefits-of-unionization>.
4. Commission on the Future of Worker-Management Relations, 1994. *Report and Recommendations*. Washington: US Department of Labor and Department of Commerce, p. 41.
5. *ibid.*
6. Ferguson, Jean-Paul, 2008. The Eyes of the Needles: A Sequential Model of Union Organizing Drives. *Industrial and Labor Relations Review* Vol. 62 (1): 3-21.
7. See pp. 58-59 of the 2000 Human Rights Watch report, *Unfair Advantage* (Washington)
8. Riddell, Chris (2001) "Union Suppression and Certification Success" *Canadian Journal of Economics*, Vol. 34, No. 2, 396-410.
9. Campoletti, Michele, Chris Riddell, and Sara Slinn, 2007. Labor Law Reform and the Role of Delay in Union Organizing: Empirical Evidence from Canada." *Industrial and Labor Relations Review*, Vol. 61 (1): 32-58
10. Godard, John, 2009. "The Exceptional Decline of the American Labor Movement." *Industrial and Labor Relations Review*, Vol. 63 (1): forthcoming.

11. These are based on labour board data collected and made available by Susan Johnson of Wilfred Laurier University.
12. See Joseph B. Rose, "Collective Bargaining Performance of Newly Certified Unions in Canada: Process and Outcomes," 2005. In Gregor Gall, ed., *The Fruits of Labour? Union Organizing and Bargaining Outcomes*. London: Routledge, 2005, pp. 198-214.
13. This award was issued in April 2009 for the Wal-Mart store in St-Hyacinthe, Quebec.