The Employee Free Choice Act: Restoring the Middle Class Dream or Bolstering the Influence of Unions?

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The American labor movement has made significant contributions to the American economy and is rightly credited with helping the American middle class grow to create the most powerful and productive workforce in the world. Nevertheless, since the early 1980s, the American labor movement has suffered from a longitudinal decline in membership – that is, until recently.

On January 25, 2008, the Bureau of Labor Statistics (BLS) reported that union membership slightly increased in 2007, up 311,000 workers to 15.7 million or, as a percentage of the workforce, up 0.1 percent to 12.1 percent.[3] In January 2009, the BLS reported that union membership increased for a second straight year, up 428,000 workers to 16.1 million or, as a percentage of the workforce, up 0.3 percent to 12.4 percent.[4] This trend has halted the 23-year decline in union membership, at least temporarily.[5] Nonetheless, because unionized workers comprised 20.1 percent of the workforce in 1983 – the first year for which comparable data is available – unions still have a long way to go to regain their former prominence in the economy.[6]

According to at least one source, the Employee Free Choice Act (EFCA), which would essentially eliminate secret ballot elections and force a collective bargaining agreement upon employers and employees under certain circumstances, could become law in as little as five months.[7] But is the true purpose behind EFCA to restore the American middle class and fix the American economy, as its advocates claim, or is it simply to empower politically connected labor unions by swelling their membership rosters?

The causes of union membership decline have been hotly contested, but most observers agree that certain factors have contributed to this phenomenon. Specifically, the combination of global competition and deregulation in traditionally unionized industries has hastened the decline in union membership.[8] "[D]eregulated, heavily unionized industries, including the trucking, railroad, and airline industries," have suffered because deregulation has increased domestic and foreign competition.[9] As a result, "large-scale layoffs and growing insecurity for workers" have become commonplace in such industries, and unions have become less successful in raising their members' wages or benefits.[10] For example, deregulation in the trucking industry has impacted the International Brotherhood of Teamsters (Teamsters) particularly hard because increased competition has cut profit margins, making the Teamsters' comparative wage premiums unsustainable.[11] Moreover, the "competitive labor market [has] freed nonunion truckers" to get jobs and, as a result, "the share of truckers who belonged to unions [has fallen] by more than half, to 28 percent."[12]

Additional factors hastening the decline in union membership include structural changes in the American economy and shifting workforce demographics. With respect to the former, stagnation in the manufacturing sector of the American economy and a concomitant growth in the service sector of the economy (particularly in white collar occupations) have reduced union organizing.[13] With respect to the latter, an ever-increasing number of immigrant workers (both illegal and legal) have until recently[14] been joining the American workforce. Such workers are economically disinclined to object to substandard working conditions or to participate in union organizing.[15] Moreover, despite the American Federation of Labor – Congress of Industrial Labor Organizations' (AFL-CIO) 2000 decision to bring immigrant workers into the fold,[16] this immigrant workforce still stymies unions' ability to organize.

Unions have long been seeking a way to address their declining membership because, without strong membership numbers, their strength and influence will falter. The EFCA not only has the potential to pass, it has the potential to increase union membership significantly. Since a similar law went into effect in Quebec, 40 percent of that province's workforce has been unionized.[17]

Moreover, Congress has already demonstrated a possible inclination to pass the bill. In March 2007, the United States House of Representatives passed EFCA by a vote of 241 to 185.[18] The United States Senate then voted 51 to 48 on a motion to invoke cloture on the motion to proceed to consider the bill.[19] In other words, the bill only failed to pass during the 110th United States Congress because the bill's advocates could not garner the 60 votes required to prevent a filibuster. That might not be the case today. When EFCA was introduced in 2007, then-Senator Barack Obama was an original co-sponsor of the bill, and he urged his Senate colleagues to pass it during a 2007 motion to proceed:

I support this bill because in order to restore a sense of shared prosperity and security, we need to help working Americans exercise their right to organize under a fair and free process and bargain for their fair share of the wealth our country creates.

The current process for organizing a workplace denies too many workers the ability to do so. The Employee Free Choice Act offers to make binding an alternative process under which a majority of employees can sign up to join a union. Currently, employers can choose to accept—but are not bound by law to accept—the signed decision of a majority of workers. That choice should be left up to workers and workers alone.[20]

Today, polls show that 30 percent of the public is more likely to support EFCA if President Obama supports the bill.[21]

In assessing the true purpose behind EFCA, and its potential impacts upon employers and employees, it is worthwhile to consider the 2005 splintering of the AFL-CIO and the recent reunification effort. The AFL-CIO is a national trade union center and the largest federation of unions in the United States. Made up of 56 national and international unions, it represents more than 10 million workers. From 1955 until 2005, the AFL-CIO's member unions represented nearly all unionized workers in the United States. During the summer of 2005, however, the Teamsters and the Service Employees International Union (SEIU) notified the AFL-CIO that both unions intended to disaffiliate themselves from the AFL-CIO.[22] According to the Teamsters President, James P. Hoffa, there was "disappoint[ment] over the last 10 years that we have seen a decline in membership."[23] "Though [the Teamsters] suggested 'a number of changes,' including a $5 million rebate to help the Teamsters reorganize in their core industries, '[the AFL-CIO] said no.'"[24] Instead, "[the AFL-CIO's] idea [wa]s to keep throwing money at politicians."[25] Five other unions, including UNITE HERE (which represents textile and hotel workers), the United Food and Commercial Workers International Union (UFCW), the United Farm Workers (UFW), the United Brotherhood of Carpenters and Joiners of America (Carpenters), and the Laborers' International Union of North America (LIUNA) also left the AFL-CIO to join the Teamsters and SEIU in forming the "Change to Win Coalition."

Though the fracture of the AFL-CIO was deemed an important "sign of the troubles that have been plaguing organized labor for decades . . . [namely,] waning numerical strength and lost leverage in dealings with employers,"[26] the labor unions continue to rally around any issue affecting their call to serve all "working men and women across America."[27] One such issue is EFCA. Both the AFL-CIO and the Change to Win Coalition desire to pass EFCA, and this desire is a driving force behind their current reunification effort,[28] which only has a fifty-percent chance of success.[29] Put differently, despite their serious differences, both the AFL-CIO and the Change to Win Coalition have realigned and re-energized behind a public policy that could draw widespread public support. This is especially true in light of the current economic crisis and union claims that EFCA will improve the economy. For instance, the AFL-CIO says that the Employee Free Choice Act is the "best opportunity . . .to . . . restore economic fairness and rebuild America's middle class."[30] It claims that "[u]nion workers get more benefits and earn higher wages than workers who don't have a voice on the job with a union."[31] Moreover, it asserts that "[c]orporations and CEOs aren't treating workers fairly [because t]hey cut back on workers' health care and wages, while CEO pay skyrockets."[32] In short, the AFL-CIO characterizes EFCA as "part of a strategy for American economic revival." [33] The Change to Win Coalition says that passing EFCA would "restore the rights of private-sector workers to form unions," and that the bill would provide "a

livable wage, not just a higher minimum wage, as union workers get paid much better than comparable non-union workers, and . . . have much better health and retirement benefits."[34]

As the election cycle ramped up in 2008 and policymakers confronted a sharp decline in the American economy just before Election Day, the political viability of EFCA began to wax. Following President Obama's inauguration, the President initially focused on the size, composition, and length of what could be the largest stimulus program since the New Deal. Although the unions sidelined themselves during this debate, they are now poised to mobilize members of Congress to pass EFCA. In fact, with the middle class shrinking, with working families struggling to make ends meet, and with public rancor mounting over real or perceived excesses of Wall Street, a union-organized campaign to pass EFCA could convince voters that the bill is needed to keep wages on par with the cost of living, and to prevent job security, health coverage, and the promise of a secure retirement from vanishing. In addition, unions are poised to pitch EFCA on the basis of widespread economic insecurity rather than on the merits of the Act itself. In short, the unions are preparing to seize the political moment to grow their own membership.

There is already a broad array of new federal labor laws addressing working conditions and employment discrimination of various types – safety regulations, family and medical leave rights, antidiscrimination laws, and laws requiring notice of plant closings.[35] Though the new federal employment laws have been good for the worker, they have not uniformly been good for the unions.[36] The government has assumed greater responsibility over the employment relationship, thereby supplanting the role traditionally played by unions. The result has been a cultural movement toward legislative protections and away from unions and collective action in the workplace. In sum, increased labor protections have driven union membership down.

EFCA is legislation that will amend the National Labor Relations Act (NLRA). The NLRA was established with two primary goals in mind: (1) to ensure that employees may decide whether or not to join a union without coercion from either their employer or the union, and (2) "to ensure the fair negotiation of labor contracts."[37] EFCA makes dramatic changes to the original NLRA goals and will make it easier for employees to form, join, or assist labor organizations. EFCA will also provide for mandatory injunctions for unfair labor practices during organizing efforts, and for other purposes.

As it stands now, the NLRA requires a union attempting to organize to first obtain signed authorization cards from the employees in order to become the exclusive bargaining unit for the employees. Importantly, there is much freedom in the manner in which these cards are currently collected. Once a union obtains cards from at least 30 percent of the employees in the proposed bargaining unit, the union must then petition the United States National Labor Relations Board (NLRB) to direct that a secret ballot election be held within a specific time period. During that period, an employer typically campaigns against the formation of the union and the union, of course, campaigns in favor of formation. If a majority of the employees who vote in the secret ballot election vote in favor of the union, the union becomes the exclusive bargaining unit for the employees. Although an employer is then compelled to bargain in good faith with the union in an effort to work out a collective bargaining agreement, employers are not required to reach an agreement on any proposal under current law.

EFCA essentially eliminates the secret ballot election, despite polls showing that the public favors secret ballot elections.[38] The new law would allow for "card-check" certification of unions, despite the Supreme Court's declaration "that 'cards . . . [are] inferior to the election process' for determining employee sentiment."[39] Thus, once a majority of employees sign the authorization cards, a union is automatically recognized as the exclusive bargaining unit for employees. The NLRB would be required to certify a bargaining representative without directing an election. As a result, the employer could very well have no chance to argue why a union is not the best choice for its employees.

Unions claim that EFCA will eliminate employer coercion they allege is present in the secret ballot process.[40] What the unions fail to recognize, however, is that, when a secret ballot election is held, the union is successful approximately 60 percent of the time.[41] Studies suggest that the elimination of the secret ballot favors unions because, in a secret ballot election, employees are more free, with the promise of anonymity, to reject peer pressure to sign authorization cards.[42] It also prevents the use of unlawful threats or intimidation that have been associated with many union campaigns.

In addition to the foregoing, EFCA will permit a union to demand that an employer begin bargaining within ten days of certification of the union as the exclusive bargaining unit. Then, if the union and employer cannot agree upon the terms of a first collective bargaining contract within ninety days, either party may request federal mediation – which, if not successful within a short thirty days, could then lead to binding arbitration. Recall that under current law, an employer cannot be forced to agree on a collective bargaining agreement; employers are only required to bargain in good faith. The legislation provides no criteria by which the arbitrators are to make their determinations and the arbitrators are accountable to no one.[43] Under EFCA, if a federal arbitrator determines terms of the agreement, the arbitrator is not bound by any prior negotiations and the employees will lose their current right to ratify the terms of the agreement. Both sides could end up with terms they do not like. Moreover, binding arbitration is only mandatory for the first collective bargaining agreement.[44] If one side is particularly stung by the results of the first arbitration, "then all bets may be off" in subsequent negotiations.[45] Employers view this change as unnecessarily involving a neutral party who is not familiar with either an employer's business or its culture.

Finally, EFCA would impose penalties on employers who are found to have violated the NLRA during the union organizing campaign. Employers who discriminate against an employee during a union organizing campaign – because of that employee's union activities – must pay liquidated damages amounting to three times the employee's back pay. The Act also would impose a $20,000 penalty upon employers for each employer violation of the proposed legislation if the NLRB and/or a court deems the violation willful or repetitive. EFCA stands in stark contrast to current law, which simply requires an employer found to have violated the NLRA to hold another election or, in the case of discrimination, to pay back pay less any interim earnings.

What we have seen in just the first few months of the new President's administration reveals that President Obama and fellow Democrats in Congress will move to push through pro-labor initiatives. The AFL-CIO's dedication to politics, though a primary cause of the 2005 fracture, may not have been misplaced. "The AFL-CIO . . . weighed in heavily behind Democrats in national politics, with member unions contributing tens of millions to party candidates in 2004, according to federal campaign finance records."[46] Unions, on both sides of the schism, did the same in both 2006[47] and 2008.[48] And now Democrats control both Houses of Congress, as well as the Presidency. The Democrats will support the unions. Indeed, President Obama has already signed the Lilly Ledbetter Fair Pay Act, which reversed a 2007 Supreme Court decision that made it more difficult to sue for pay discrimination.

In short, some version of EFCA could very well become law soon. Although Senator Arlen Specter has announced that he will reverse his 2007 vote for cloture and oppose EFCA at the present time, he does favor some provisions in the bill.[49] Moreover, it appears more and more likely that Senator Norm Coleman will lose his seat to Al Franken in Minnesota.[50] That puts the Democrats only one vote away from cloture.[51] Plus, certain labor-friendly employers are proposing a compromise that could prove persuasive.[52]

There is no doubt that employers around the country are fearful of the proposed changes to federal law – even those seen as friendly to the labor movement.[53] Employers would be well advised to understand that it is critical to implement proactive and aggressive strategies today in an effort to maintain a union-free workplace. That can be done with an aggressive training

program reaching all levels of management and teaching managers to distinguish fact from myth, to understand the legal risks of certain conduct, and to educate the workers about the perils of union membership.

It is helpful to remember that today's workers are less interested in unionization in general, and that many of these workers come from non-union households – thus, they have no union members to look to as models.[54] Additionally, approximately 58 percent of the current workforce is under the age of 45.[55] These workers tend to gravitate toward the highly mobile, highly paid jobs of the white collar sector.[56] These workers tend to "care about wages, . . . career advancement, . . . and quality of life on the job."[57] In other words, they can be seen as more sympathetic to business because they have learned to appreciate the importance of business in creating jobs and, if they do unionize, they tend to seek out unions that are willing to cooperate with management.[58]

As for the union claim that EFCA will help America get out of the current economic crisis, employers need only point to the auto industry to prove that thesis incorrect. The ongoing turmoil of General Motors (GM) is necessarily "intertwined with the inefficient labor contracts that the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW) secured in decades past."[59] Over the last many months, prime-time media have showcased the problems at GM and serve as a beacon for the anti-labor movement's long time claim that the unions' "ideal business model is a bust."[60]

Employers should contact their political leaders, review their current wage and benefit programs to ensure they are competitive, and fully communicate with their employees in an effort to provide a voice to employees that fosters good morale. Finally, employers should always reward employees for productivity and find innovative ways to help foster a healthy work environment that encourages the dignity and respect of both the employees and their management team.

The challenges we face as a nation are intertwined with the challenges both employees and their employers face in the coming months and years. Nonetheless, how we react to these challenges is more important than the nature of the perils we face. Employers are encouraged to reach out and learn from experts about how to formulate the necessary strategy to address EFCA and other pro-labor initiatives that are sure to be proposed, debated, and perhaps, even become law in the months

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