THE EMPLOYEE FREE CHOICE ACT: THE EFFECT OF COMPULSORY INTEREST ARBITRATION ON ENTREPRENEURS

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I. INTRODUCTION

Imagine after all of the hard work and long hours to get a company up and running, your workers decide to unionize and it is time for you to begin negotiations for a collective bargaining agreement. The union decides that they would prefer not to reach an agreement through the traditional bargaining channels, believing instead that the workers would receive better terms if a third party imposed the initial agreement. Therefore, instead of following the typical protocol of using good faith bargaining to reach an agreement, the union stalls for ninety days. At this point, the government sends in an unaccountable third party with little knowledge of your business needs and desires or the needs and desires of the workers.[1] Now both the employer and union are stuck with the terms reached by this arbitrator for a two-year period.

Think about having the most important decisions about pay, hours, and benefits left in the hands of an unaccountable third party and the end-result is a collective bargaining agreement that neither involved party wants! These are the consequences of the impending passage of section (3) of the Employee Free Choice Act (EFCA).[2] The Employee Free Choice Act has been gaining steam as it moves through the legislative process, and if the employees and employers of America do not make themselves heard soon, it could be too late. The passage of this act would be the first time that Congress updated and amended the NLRA in over a half century.[3] When looking closely at the interest arbitration provision in section (3) of the EFCA, it becomes clear that this provision takes away the freedom to contract, an underlying principal in the economy. Instead, the statute favors a "more-efficient" system that forces the choice upon the employees and

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[1] Employee Free Choice Act of 2009 (EFCA), H.R. 1409, 111th Cong. § 2 (2010).

[2] James Sherk & Paul Kersey, *How the Employee Free Choice Act Takes Away Worker's Rights*, EXECUTIVE SUMMARY BACKGROUNDER 13 (Feb. 27, 2009).

[3] J. Kevin Hennessy et al., *Recent Developments in Labor-Management Relations*, 802 PLI/Lit 377, 379 (2009) (other major federal statutes, like the Fair Labor Standards Act and the Civil Rights Acts, are updated more frequently).

employers. Should we allow an unaccountable third party with limited knowledge of the business and workers' demands to make the ultimate decision? Before deciding, this paper will examine the act itself and the common problems that could arise under it.

II. OVERVIEW OF SECTION THREE OF THE EMPLOYEE FREE CHOICE ACT: FACILITATING INITIAL COLLECTIVE BARGAINING AGREEMENTS

The Employee Free Choice Act (EFCA) is a hot button issue today. With all of the political parties pushing and pulling in different directions in an attempt to get their point across, much of the focus is on the card check provisions of the EFCA. These provisions would do away with the traditional "secret ballot" system in place for union representation elections. With this being such a serious issue with very serious implications on rights to privacy, coercion, etc., the other provisions of the EFCA are often brushed over and not given the full and proper attention they deserve. While it is true that the card check provisions are the start of it all, because without unionization, there will be no collective bargaining, it is important for the country to be aware of the serious concerns that section (3) of the EFCA brings about.

In fact, it is quite possible that the finalized version of the EFCA, if signed into law, will not even have the card check provision at all, but will retain the compulsory arbitration clause.[4] Senator Arlen Specter has recently said that he believes the bill will get the requisite sixty votes after some negotiating has led to a change in the card check provision of the EFCA, but that the proposed bill will retain the compulsory arbitration provision without any material changes at all.[5]

If passed, section (3) of the currently proposed EFCA would amend section eight of the National Labor Relations Act (NLRA) by adding a number of provisions to the end of the current act.[6] The EFCA would add subsection (h)

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[4] James A. Burns, Jr., *"EFCA Lite": Revised Version of Employee Free Choice Act Moves Forward*, EMP. LAW WATCH, Sept. 17, 2009, http://www.employmentlawwatch.com/articles/employment-us/labor-relations/.

[5] *Id.*

> Any revised version of EFCA would not include the widely attacked "card check" provision found in the current version of EFCA...The bill would retain the binding interest arbitration found in the current version of EFCA, so that if an employer and union failed to reach agreement on a first contract within so many days following the election, federal arbitrators could step in and impose an agreement on the parties dictating employees' wages, benefits, hours, layoff procedures, and so on.

Id.

[6] *See* National Labor Relations Act, 29 U.S.C. § 158 (2006).

to the act, modifying current subsection (d) when collective bargaining is used to establish an initial agreement following certification or recognition.[7] In these circumstances, which are particularly likely to arise in the context of entrepreneurial ventures, the act would take control of the collective bargaining process.[8] Under the current system, negotiations on an initial contract with a newly formed union receive the same treatment as any other collective bargaining. Both parties negotiate, with a good faith duty, until they reach amenable terms. If they do not agree on a contract, then either party is free to use self-help measures to facilitate an agreement, by either implementing an employee strike, an employer lockout, or a last chance offer. Currently, sixty-eight percent of newly formed unions enter into a first contract with the employer within one year of recognition of the union.[9] This leaves less than one third, thirty two percent, without a contract in place after one year. This, of course, could force employers and employees to turn to a number of means of economic self-help under the current system: lockouts, strikes, slowdowns, etc.

Section (3) is the most troubling provision in the act. By providing for arbitration upon request of *one* of the parties after a mere thirty day period, not long when compared to typical negotiations periods, the statute removes the long standing and traditional method for negotiating first agreements between companies and unions. This new method would

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[7] H.R. 1409.

[8] *Id.* The EFCA § 3 states:

> (2) If after the expiration of the 90-day period beginning on the date on which bargaining is commenced, or such additional period as the parties may agree upon, the parties have failed to reach an agreement, either party may notify the Federal Mediation and Conciliation Service of the existence of a dispute and request mediation. Whenever such a request is received, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.
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> (3) If after the expiration of the 30-day period beginning on the date on which the request for mediation is made under paragraph (2), or such additional period as the parties may agree upon, the Service is not able to bring the parties to agreement by conciliation, the Service shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service. The arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties.

Id.

[9] David Broderdorf, *Overcoming the First Contract Hurdle: Finding a Role for Mandatory Interest Arbitration in the Private Sector*, 23 LAB. LAW. 323, 331 (2008).

forcefully impose initial agreements upon both parties. The arbitrations would be handled by a panel appointed by a government agency, the Federal Mediation and Conciliation Service (FMCS) who is not an interested party in the fairness of the agreement, but rather in the efficiency of the process and its effects on the labor force of the country as a whole.[10] Additionally, section (3) mandates that the arbitration panel's decision bind both parties for a period of two years, unless both parties agree to amend the decision in writing. This provision goes against the freedom to contract and detracts from the effectiveness of labor negotiations that are a backbone of the American economy.

Another troubling aspect of the proposed EFCA is that the bill does not specify the procedure for selecting the arbitration panel, how big the panel will be, or what criteria they should focus on. The only indication is that the FMCS will have control over the process.[11] This is extremely troubling because it leaves the process in the hands of the administrator of the FMCS, an appointed position. This allows the interest arbitration process to become partisan and could have disastrous results.

The EFCA is oft debated and popular today, in part because the government has been struggling to find a way to preserve the union while decreasing the occurrence of work stoppages (be it strikes or lock-outs) that put a strain on the economy and cause loss. This act aims to prevent lockouts and strikes during the initial bargaining by providing an alternative route to reach a binding agreement through arbitration and then hoping that after reaching the initial agreement, the parties will be able to extend these agreements without resorting to measures of economic self-help. While this looks good in theory, it comes at a cost. It is counter to the traditional views of our capitalistic society and the freedom to contract.

III. PROBLEMS WITH THE SYSTEM: EXAMPLES

Often times it is difficult to understand how a system will function without seeing it in place. Fortunately, for the labor industry, we have the advantage of being able to look at a number of examples, in both the private and public sectors, of legislative compulsory arbitration provisions in use. By examining a few case studies, the glaring deficiencies in the systems come to the forefront, saving the nation as a whole from having to use a "trial and error" method with so many careers and businesses at stake. Below, a number of examples will be examined and compared to the binding arbitration proposed in section (3). Interest arbitration is much

[10] *See* F. Vincent Vernuccio, *A Primer on the Employee Free Choice Act's Arbitration Provision*, 157 COMPETITIVE ENTER. INST. 1 (2009).

[11] Richard A. Epstein, *The Case Against the Employee Free Choice Act* 55 (Univ. of Chi. John M. Olin Law & Economics, Working Paper No. 452, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1337185.

more common in the public sector, where the employees' right to resort to economic self-help, like striking, is limited or non-existent. Some states, however, have attempted to use interest arbitration in the private sector as well.

A. *Public Sector Examples*

A number of states already have interest arbitration in place through their public employee labor relations acts.[12] Using public sector examples is important in this discussion because they are the most common example of interest arbitration in action. While many public sector employees have forfeited their right to strike in most of these statutes, due to the potential societal costs of striking, they still have the ability to negotiate for a collective bargaining agreement that would benefit both parties.[13] Additionally, the public sector issues parallel private sector issues in a number of ways, from the efficiency concerns to the accountability and impartiality of the arbitrators. These examples of the Michigan act applying to public safety workers and the provision specifically applying to police and firefighters will illustrate how the interest arbitration system can affect these issues. Massachusetts also dabbled in the interest arbitration for the public sector and after a mere two years of watching its ineffectiveness; the voters approved a ballot initiative that scrapped the provision.[14]

1. *Michigan Public Safety Workers*

A system of compulsory binding arbitration is already in place in Michigan for public safety workers.[15] The language in the EFCA is parallel to the language of the Michigan act in a number of ways.[16] The Act in Michigan supposedly makes arbitration move smoothly and quickly, with the statutory language providing that the parties reach an agreement within

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[12] David B. Lipsky & Harry C. Katz, *Alternative Approaches to Interest Arbitration: Lessons from New York City*, PUB. PERSONNEL MGMT., Winter 2006, http://www.entrepreneur.com/tradejournals/article/160542398.html.

[13] *See generally* MICH. COMP. LAWS ANN. § 423.236 (West 2010).

[14] Peter List, *EFCA's Binding Arbitration: Putting Workers on the Path to Serfdom*, MFG CRUNCH, July 13, 2009, http://mfgcrunch.ning.com/profiles/blogs/efcas-binding-arbitration.

[15] Sherk & Kersey, *supra* note 2, at 13.

[16] MICH. COMP. LAWS ANN. § 423.236 (West 2010); H.R. 1409. Both statutes give parties a set time to reach an agreement through collective bargaining, next they are referred to binding arbitration if the two parties are at an impasse. However, the EFCA does not require the employees to forfeit their right to strike, while the Michigan law does.

eight weeks from the initial commencement of the proceedings.[17] In reality, however, binding arbitration for Michigan public safety workers takes an average of almost fifteen months, with only twenty-five percent being resolved within three hundred days.[18]

Additionally, there are a number of problems with the procedural aspects of the Michigan system of interest arbitration for public safety workers. The most serious procedural problem relates to the selection of the arbitration panel. Because this panel will be able to force a binding contract upon both parties for an extended time, it is important that they be not only intelligent and experienced, but impartial as well. Under the current law, the union and the employer each appoint a member to the panel, while a third member, the chairperson of the panel, comes from a state-provided list.[19] The union and the employer select a member from this list by alternating turns, striking names off the list until only one remains.[20] This third member plays a crucial role, because the opposing parties select the other two members, and these members generally represent their respective parties' interests at the meetings. This process for selecting the arbitration panel is typical among states with interest arbitration provisions.[21]

Furthermore, in action, the Michigan system of compulsory arbitration has sent a number of Michigan cities, including Highland Park and Hamtramck, into bankruptcy.[22] "In 1999, an arbitration panel awarded Hamtramck police officers $2.1 million in pay raises and back pay, pushing

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[17] MICH. COMP. LAWS ANN. § 423.236.

> Upon the appointment of the arbitrator, he shall proceed to act as chairman of the panel of arbitration, call a hearing, to begin within 15 days and give reasonable notice of the time and place of the hearing...The hearing conducted by the arbitration panel may be adjourned from time to time, but, unless otherwise agreed by the parties, shall be concluded within 30 days of the time of its commencement. Its majority actions and rulings shall constitute the actions and rulings of the arbitration panel.

Id.

[18] Sherk & Kersey, *supra* note 2, at 13 (citing Mackinac Center analysis of arbitration rulings). These rulings are available at the Michigan State University Labor and Industrial Relations Library. COLLECTION OF FACT FINDING REP. & ARBITRATION AWARDS 312 (1969), *available at* http://turf.lib.msu.edu/awards.

[19] Paul Kersey, *The Arbitration Gamble* (Mackinac Ctr. for Pub. Policy, Card Check, Binding Arbitration and Employee Free Choice, No. 3 of 6, 2007), *available at* http://www.mackinac.org/8326.

[20] *Id.*

[21] *Id.*

[22] Shikha Dalmia, *Checking Workers, Binding Employers: Union Bosses will be the Only Winners Under the Employee Free Choice* Act, REASON FOUND, July 14, 2009, http://reason.org/news/show/the-employee-free-choice-act-a.

it into state receivership. Under receivership, which is only used in extreme situations, the state government takes over the city's finances and appoints its own manager to run the city."[23] In Hamtramck's case, this combination of service cuts and tax hikes led to an exodus of its residents.[24]Some recent studies have estimated that removing binding arbitration from this act could result in a three percent to five percent reduction in local government expenditures compared to non-arbitration states.[25] This decrease in budget expenditures on public safety could save over one billion dollars per year statewide in Michigan alone.[26]

This type of danger could multiply exponentially if the EFCA becomes law and forces private businesses to use compulsory interest arbitration. This could raise the unemployment rate and cause a number of companies to go out of business or declare bankruptcy because they may have unaffordable expenses forced upon them by an unaccountable third party arbitrator. Even more importantly, the compulsory arbitration provision of section (3) will infringe upon the core American values of capitalism and a free market economy.

Unlike a local government, a business cannot raise taxes or turn to a higher level of government for financial assistance if an arbitrator's decision favors the employees, in turn harming the company's bottom line. Competition in the free market means that if an arbitrator miscalculates and raises wages too high, a company cannot raise its prices to compensate for the decision without the risk of losing customers. An ill-advised arbitrator's ruling can easily lead to financial difficulty and layoffs. Yet arbitrators face no penalty if a miscalculation sends a company into bankruptcy or cheats workers out of a wage increase they would have earned. Unlike binding arbitration, with collective bargaining, both sides have a stake in making the final agreement work.[27]

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[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] Sherk & Kersey, *supra* note 2, at 13.

2. *Detroit Police Scenario*[28]

Another example that stems from the Michigan law discussed above involved the Detroit Police Department. Binding arbitration cost police in Detroit their cost-of-living allowance, threw the city budget out of balance and forced the police department to lay off twenty-five percent of the employees.[29] Because there is no appellate process in place, this result had no effect on the arbitrator who imposed the agreement upon the parties.

The compulsory interest arbitration used in Detroit in the late 1970s provides a concrete example of interest arbitration gone wrong, and exemplifies the long lasting negative effects it can cause. By the late 1970s, the city of Detroit had seen a renaissance of the city's downtown area.[30] Crime rates dropped as much as nineteen percent in 1977 alone.[31] The city had a balanced budget but little room for discretionary spending, as the finances were very tight.[32] Then mayor, Coleman Young, was able to reach contracts with the great majority of public city employees through collective bargaining, but was unable to reach an agreement with the police and fire unions.[33] The bargaining with the police union came to an impasse, and the city and the union were forced into interest arbitration under Public Act 312.[34] The arbitrator levied his decision soon after the process began, siding with the police union by increasing pay and other benefits.[35] This decision forced the city to pay forty-six million dollars in cost-of-living adjustments; in turn putting the city's spending way over budget.[36]

Unfortunately, the city was unable to afford this and stay within the budget, so it responded by "removing 350 officers and cutting 2,300 employees from other departments."[37] Because there is no procedure in

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[28] MICH. COMP. LAWS ANN. § 423.321 (West 2010).

> Sec. 1. It is the public policy of this state that in public police and fire departments, where the right of employees to strike is by law prohibited, it is requisite to the high morale of such employees and the efficient operation of such departments to afford an alternate, expeditious, effective and binding procedure for the resolution of disputes, and to that end the provisions of this act, providing for compulsory arbitration, shall be liberally construed.

Id. This provision specifically extends the mandatory arbitration provision from the Michigan law to police and firefighters.

[29] Sherk & Kersey, *supra* note 2, at 14.

[30] Kersey, *supra* note 19.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] Dalmia, *supra* note 22.

[37] Kersey, *supra* note 19.

place that requires courts to accept appeals and intervene in this type of situation, the mayor turned to even more layoffs, eventually dropping the force from 5,400 officers to only 4,000 for the entire city of Detroit, a drop of over twenty-five percent of the force.[38] Because of the layoffs and the lessened presence of police in Detroit, the crime rates began to reverse course once again, skyrocketing to an increase of over 15% in 1980.[39] Sensing how much the arbitration decision was hurting the city of Detroit, as well as the individual police officers, the union agreed to a three-year wage freeze in 1981.[40]

The statistics cited above show precisely how detrimental an impact forced interest arbitration can have. In Detroit, the arbitration decision left the city of Detroit, the mayor, the police department, and the police officers in a worse position than they had been in prior to the forced arbitration. A substantial portion of the police force lost their jobs, the rest of the police department had to work longer hours with less assistance, and crime rates began a steady climb. In the aftermath of this disaster, former Mayor Young, an original drafter of the statute as a state senator, summed up the state's experiment with interest arbitration best.[41] In 1981, he told the *National Journal*, "We now know that compulsory arbitration has been a failure...Slowly, inexorably, compulsory interest arbitration has destroyed sensible fiscal management and has caused more damage to the public service than the strikes it was designed to prevent."[42] The people of Michigan showed that they agreed with the mayor in 2002 when they voted down the union sponsored ballot initiative to extend compulsory arbitration to all state employees, not just public safety workers.[43] Both liberal and conservative media outlets supported the defeat of this initiative.[44] This is one example of a disastrous result stemming from interest arbitration, and it is likely to be even worse in the private sector if the EFCA passes because the private employers and employees do not have the same assistance from the government and public backing that public safety workers have.

Businesses, unlike government taxpayer funded police departments, may not be able to overcome such a disastrous scenario and may need to close down, forcing all of the employees to lose their jobs. The situation in Detroit is a prime example of the ineffectiveness of the compulsory binding interest arbitration system. It left both parties in a worse position than they were in when they entered negotiations; there was no one to hold

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[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] Dalmia, *supra* note 22.
[42] *Id.*
[43] *Id.*
[44] *Id.*

accountable for the deficiencies of the process, and it harmed all parties involved, including the public, who now has to entrust their safety and well-being to a smaller, poorly funded police department.

B. *Private Sector Examples*

Recently, the private sector has used interest arbitration in limited circumstances as well, though it is usually not accompanied by a ban on striking as is customary in the public sector. Looking at these examples and the problems they have caused is beneficial when studying the effectiveness and potential problems of section (3) of the EFCA. This is helpful because they are very similar in a number of ways; mainly that both will apply to private sector workers, an area traditionally left to the businesses and employees themselves. The cases below provide examples of what problems the EFCA section (3) could cause, but by no means are the EFCA problems limited to the discussion below. The fact that the EFCA section (3) will apply to all employees rather than a select few (railway, airline, and agricultural workers in the case studies) will illustrate how much more problematic these efficiency and resource problems will be under the EFCA, when the number of people using the interest arbitration will be exponentially greater.

1. Illinois Public Labor Relations Act - Public Act 96-0598[45]

On August 18, 2009, Governor Pat Quinn of Illinois signed Public Law 96-0598 into effect as an amendment to the Illinois Public Labor Relations Act (IPLRA).[46] The new law now requires bargaining units with

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[45] ILL. COMP. STAT. ANN. 5/315 (West 2010). Relevant language reads:

> (3) If after the expiration of the 30-day period beginning on the date on which mediation commenced, or such additional period as the parties may agree upon, the mediator is not able to bring the parties to agreement by conciliation, either the exclusive representative of the employees or the employer may request of the other, in writing, arbitration and shall submit a copy of the request to the board. Upon submission of the request for arbitration, the parties shall be required to participate in the impasse arbitration procedures set forth in Section 14 of this Act, except the right to strike shall not be considered waived pursuant to Section 17 of this Act, until the actual convening of the arbitration hearing.

Id.

[46] Seyfarth Shaw LLP, *First Contract Interest Arbitration Now Applies to Illinois Non-Public Safety Employees*, MGMT. ALERT (2009), http://www.seyfarth.com/index.cfm/fuseaction/publications.publications_detail/object_id/b6ba74d0-5efc-4504-b1df-b7853fa79ef4/FirstContractInterestArbitrationNowAppliesToIllinoisNon-PublicSafetyEmployees.cfm.

less than thirty-five non-public safety employees to use interest arbitration as a way to resolve first contract labor disputes.[47] The law, which went into effect on January 1, 2010, allows either party to submit a request for binding arbitration after thirty days of collective bargaining has failed to produce an agreement.[48] At this point, the procedure outlined above under Section fourteen of the Illinois Public Labor Relations Act will govern the arbitration process with one major exception.[49] Unlike under the IPLRA (where there is no right to strike for the public employees), here the "union will enjoy the best of both worlds" by retaining their ability to strike until the "actual convening" of the interest arbitration proceedings.[50]

Because this Act just recently went into effect, there have been no instances of the law forcing interest arbitration on non-public employees. However, there has been a large amount of protest and uprise in the community about the new law because it takes the freedom to contract away from the businesses and employees. Under the proposed law, the employees have the upper hand because they retain their right to strike in addition to being able to force interest arbitration.[51] This is similar to section (3) of the EFCA because it applies to private employers and employees, and they retain the right to strike or use other economic self-help measures in spite of the new found right to force arbitration.

2. *California Agricultural Labor Relations Act – 2002 Amendments*[52]

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[47] *Id.*
[48] *Id.*
[49] *Id.* at 2.
[50] *Id.*
[51] *Id.*
[52] CAL. LAB. CODE § 1164 (West 2010).
The important provisions of the California ALRA are as follows:

> (a) An agricultural employer or a labor organization certified as the exclusive bargaining agent of a bargaining unit of agricultural employees may file with the board, at any time following (1) 90 days after a renewed demand to bargain by an agricultural employer or a labor organization certified prior to January 1, 2003, which meets the conditions specified in Section 1164.11 or (2) 180 days after an initial request to bargain by an agricultural employer or a labor organization certified after January 1, 2003, a declaration that the parties have failed to reach a collective bargaining agreement and a request that the board issue an order directing the parties to mandatory mediation and conciliation of their issues. "Agricultural employer," for purposes of this chapter, means an agricultural employer, as defined in subdivision (c) of Section

The California Agricultural Labor Relations Act (ALRA) is another example of compulsory arbitration[53] in the private sector. Because the NLRA excluded farm workers, the California Legislature created a similar statute to apply to their many agricultural workers in 1975.[54] The ALRA was similar to the NLRA, but it included a so-called "make whole" provision to overcome the problems associated with bad-faith bargaining efforts seen in other private sector collective bargaining situations under the NLRA.[55] Under the NLRA, the board cannot award lost wages to employees because of failure to bargain in good faith.[56] The only remedy available under the NLRA is to issue a Gissel Bargaining Order.[57] Clearly, this is not an effective remedy because it imposes no punishment on the businesses for continuing to bargain without good faith and fails to deter other companies from similar bargaining techniques in the future.

The make-whole provision allowed affected workers to recover by transferring any monetary savings the employer earned by using bad-faith collective bargaining techniques.[58] Unfortunately, this solution was not too effective in action and often caused more trouble than it prevented, by producing "years of litigation."[59]

Due to the void in protection left by the ineffective make-whole provision, the California Legislature amended the ALRA in 2002 after

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> 1140.4, who has employed or engaged 25 or more agricultural employees during any calendar week in the year preceding the filing of a declaration pursuant to this subdivision.

Id.

[53] The act uses the word mediation rather than arbitration, however the practical effect is the same.

[54] Jordon T.L. Halgas, *Reach an Agreement or Else: Mandatory Arbitration Under the California Agriculture Labor Relations Act*, 14 S.J. AGRIC. L. REV. 1, 10 (2004). The theory commonly proposed by the laborers is that the NLRA did not apply to farm workers partially because at the time of the passage of the NLRA in 1937, "farms were primarily family and household enterprises." Because they were not traditional businesses, Congress felt that they did not need to have the NLRA apply to them. A contrasting theory thinks that the exemption was a political ploy used to get the bill to pass with less opposition.

[55] Philip Martin & Bert Mason, *Mandatory Mediation Changes Rules for Negotiating Farm Labor Contracts*, 57 CAL. AGRIC. 1, 13-14 (2003), *available at* http://californiaagriculture.ucanr.org.

[56] Halgas, *supra* note 54, at 16.

[57] *Id.* A "Gissel Bargaining Order" is an order requiring the employer to bargain with the union; the Board will issue such an order only in "exceptional cases" evidenced by outrageous, pervasive unfair labor practices and when there was a showing of union majority support. Nat'l Labor Rel. Bd. v. Gissel Packing Co., 395 U.S. 575, 610 (1969).

[58] Halgas, *supra* note 54, at 15.

[59] *Id.*

much pressure from the United Farm Workers union.[60] The new amendments provide that after one hundred and eighty days have passed after the newly formed agricultural union and the employer began initial collective bargaining, either party can request that the board issue an order mandating mediation.[61] This mediator in charge then considers the negotiations and can hand down a binding decision on both parties.[62]

The problems with the ALRA's compulsory arbitration are the same that will come from passage of the EFCA. The binding arbitration is "anti-business," the positions that were once private in negotiations between the parties may become public, and finally, a lack of data handicaps the unaccountable mediator or arbitrator.[63] In other words, the mediators and arbitrators are not in any position to make a decision that will bind both of the parties. They do not have enough information about the business finances or the employee habits and work life to make the proper decision by considering all relevant information.

The arbitrators tend to make their decisions by using wage rates and benefits commonly found in "comparable" businesses. However, different agricultural businesses have different needs and methods of cultivation, thus the work demand and conditions vary from farm to farm. By borrowing from comparable competitors, the arbitration provision begins to "standardize" the agreements. This takes away the ability of companies to recruit top-level workers by offering them better deals and it eliminates the ability to use progressive and creative business techniques because the standard contract will force businesses to follow the standard business model or face the possibility of bankruptcy. This is why the traditional form of collective bargaining is best; it lets both parties air out their issues and make compromises to ensure that they receive what is important to them.

C. Wrap-Up of Examples

The above examples paint a clear picture of how far from perfect compulsory interest arbitration is in practice. In theory, interest arbitration may sound like a good system. However, in action, the places that have enacted compulsory arbitration for public workers did not get what they bargained for. The examples provided above give us details and concrete examples of how slow the process is, often taking much longer than a

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[60] Martin & Mason, *supra* note 55.
[61] CAL. LAB. CODE § 1164 (West 2010).
[62] *Id.*
[63] Halgas, *supra* note 54, at 16.

normal collective bargaining process.[64] One thing that the first set of examples has in common, however, is that they only apply to public employees. Over twenty states have some form of compulsory arbitration system in place for public employees of certain sectors. The EFCA intends to expand this to *all* employees. If the system was so slow and backlogged when only public sector employees were governed by it, it is hard to imagine how much longer the process will take when the resources are spread even thinner and nearly all unionized workers in the U.S. are required to comply with the Act. Most of the acts mentioned above have provisions that prohibit workers from striking if they use the compulsory arbitration process. The EFCA, however, does not include any sort of provision requiring a prohibition against striking in exchange for compulsory mediation or arbitration.[65]

The private sector examples used are limited, because the government generally tends not to intrude on private sector business contracting. The EFCA will change this, and the government will have the opportunity to create binding two-year labor contracts in a large number of situations. These arbitrator-imposed labor contracts will affect the businesses, especially small businesses, in a number of ways. First, the decisions will provide for back pay from the time the negotiations started.[66] This means that the award applies retroactively and the companies need to spend the duration of negotiations, sometimes fifteen months or longer, preparing their business to be able to absorb the possible losses that the new wage increases will levy upon them, including back pay for the time of negotiations. Therefore, companies in labor negotiations cannot afford to use aggressive business strategies because they are uncertain where the government will force them to spend their funds after arbitration. An aggressive strategy upfront could leave these small businesses bankrupt after the arbitrator hands down their decision. On the contrary, workers have a similar predicament. They are unable to plan their spending and budget their money because they are often working for an undetermined wage during negotiations.[67]

Additionally, the language of the EFCA prevents the workers from getting rid of the union after certification due to a number of bars put in

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[64] Broderdorf, *supra* note 9. The amount of time the normal process takes can vary due to a variety of circumstances. On average, sixty-eight percent of unions reach an agreement on their first contract with an employer within one year.

[65] J. Kevin Hennessy, Vedder Price P.C., & Carrie A. Herschman, *Recent Developments in Labor-Management Relations*, 802 PLI/Lit 377, 380 (2009).

[66] PAUL KERSEY, CARD CHECK, BINDING ARBITRATION AND EMPLOYEE FREE CHOICE, MACKINAC CENTER FOR PUBLIC POLICY (2007), *available at* http://www.mackinac.org/8327.

[67] *Id.*

place by the language of the statute and prior NLRB decisions.[68] The certification bar presents the first hurdle.[69] The certification bar requires workers to wait a full year after certification before they can vote to remove the union.[70] This year grace period gives the union the opportunity to negotiate its first contract. It also acts to make sure the union is still in place when the interest arbitration provision of section (3) kicks in. Because the union cannot be removed during or for a number of years after the arbitration concludes, this gives the unions yet another incentive to request interest arbitration if negotiations seem to be going slow and may take more than one year.

The second obstacle that prevents removal of the union is the contract bar. Once the union agrees to a collective bargaining agreement or the arbitrator imposes one, the workers cannot vote to decertify that union for a period of up to three years, and certainly not before the contract expires after its two-year period.[71] A recent report from the Mackinac Center explains the problems that binding arbitration presents in the decertification process by saying,

> With binding arbitration in place, these rights are likely to be gone or rendered moot. EFCA does not provide for workers to terminate the arbitration process. No matter how long arbitration drags on the workers will remain stuck with it, even if it goes on for longer than a year — which is typical in Michigan. Once an arbitrator is called in, his or her word will be final, so a vote to reject the contract is out of the question.[72]

This provides an example of how dangerous section (3) of the EFCA could be to workers as well as employers. Before they know it, the workers could be locked into a contract for at least two years and may have to pay union dues to a union they do not support for up to three years.

Overall, the examples above, both of private sector and public sector interest arbitration, show a trend of problems with the process. In Michigan, the public voted against extending the policy to all public service employees.[73] In Massachusetts, the public voted against interest arbitration for the public sector in general, striking down the interest arbitration statute a mere two years after it went into effect.[74] One would hope that the

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[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*

Detroit police scenario is not a common occurrence under the EFCA; it is meant to provide an example of the possible dangers of interest arbitration and the effects that it can have. However, all of the examples show a lack of efficiency, deriving interest arbitration of its strongest selling point.

IV. COUNTERING THE PROPONENTS CLAIMS

A. *Claim One: The Public Sector and Other Countries have had Positive Experiences with Interest Arbitration*

Over twenty states, as well as the District of Columbia, currently have some form of interest arbitration for public sector employees.[75] Almost every single one of these statutes in place prevents the workers from striking. Taking away the right to strike for private sector employers would most likely be an unconstitutional intrusion on their individual rights, and the EFCA does not propose to do so. For this reason, one should be careful when comparing public sector and foreign interest arbitration statutes with the EFCA section (3) provisions. In the preceding section of this paper, public sector examples illustrated the opposite of what the proponents claim; the interest arbitration statutes are not working. These examples prove that interest arbitration can go horribly wrong with a no-strike provision. Without such a provision, the detriment can be exponentially greater because the unions will yield all of the power. If they are not happy with the mediation process prior to the binding arbitration, they can just strike, leaving the employer with little recourse.

Proponents of EFCA section (3) may also try to use evidence of interest arbitration in Canada, New Zealand, and Australia as an example of its effectiveness. All three of these countries, and any other country that uses interest arbitration, cannot easily be compared to the United States because they do not have the same constitutions in place as the United States. Over eighty percent of the Canadian workforce and residents of eight of the eleven jurisdictions are covered by first contract mediation and arbitration.[76] The American Rights at Work report claims that the EFCA will be effective, and claims, "there is no evidence that overall Canadian experience with the process has been detrimental to the employers or

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[75] David B. Lipsky & Harry C. Katz, *Alternative Approaches to Interest Arbitration: Lessons from New York City*, ENTREPRENEUR (2006).
Estimates used in sources range from twenty states, on the low end, to thirty states on the high end. Due to the turnover and change associated with this type of statute, as well as the variations on the arbitration that control whether it is truly mandatory, it is hard to quote an accurate number.

[76] SUSAN JOHNSON, FIRST CONTRACT ARBITRATION: EFFECTS ON BARGAINING AND WORK STOPPAGES (2008), *available at* http://www.lcerpa.org/papers/LCERPA_2009-01.pdf.

employees."[77] This over-generalized statement provides no assurance to the American private sector work force. This statement relies on the fact that parties rarely utilize these provisions to impose first contracts.[78] The EFCA section (3); however, will do exactly the opposite, as it will impose a number of first contracts on parties. The short timeframe of ninety days, during which the parties may negotiate without government interference, is almost certain to expire before the sides reach an agreement, and then the interest arbitration process will begin, leading to the imposition of first contracts between employers and newly formed unions.

B. *Claim Two: The Statute will not Affect Small Businesses and Entrepreneurs*

Another issue, of special importance in this paper, is the impact that interest arbitration in the private sector under the EFCA will have on small businesses and entrepreneurs. Small business owners are entrepreneurs who often use innovative business techniques to keep up with the big box stores and other competitors. These techniques can involve creative use of staff or creative payment and benefits packages. Proponents of the EFCA claim that the act will not affect small businesses and entrepreneurs of small startup companies because the EFCA, as proposed, will not apply to businesses that are traditionally exempt under the current NLRA. This means that the EFCA will not bind retail employers with sales under $500,000 annually and non-retail employers with under $50,000 in annual sales.[79] Their employees will not have rights under the EFCA and there will be no compulsory interest arbitration.[80]

The problem is that the monetary limits the NLRA sets do not adjust with inflation or market conditions, and therefore set a very low threshold. In fact, congress has not adjusted the amounts for inflation in over a half century, since 1959.[81] The EFCA contains no exemption for small businesses, so the NLRA standard will govern because the EFCA is a part of the larger NLRA. A study conducted by the Heritage Foundation helps to put this in perspective,

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[77] AMERICAN RIGHTS AT WORK, THE FACTS BEHIND THE EMPLOYEE FREE CHOICE ACT, 8, *available at* http://www.americanrightsatwork.org/dmdocuments/ARAWReports/araw_thefactsbehindefca_sh.pdf.

[78] *Id.*

[79] U.S. GEN. ACCT. OFFICE, COLLECTIVE BARGAINING RIGHTS: INFORMATION ON THE NUMBER OF WORKS WITH AND WITHOUT BARGAINING RIGHTS (2002); *see also* NAT'L LABOR REL. BD., NATIONAL LABOR RELATIONS BOARD CASEHANDLING MANUAL, PART I: UNFAIR LABOR PRACTICE PROCEEDINGS (2008).

[80] *Id.*

[81] National Labor Relations Act, 29 U.S.C. § 151, 164 (1935).

> To put those figures in perspective, the average private-sector worker costs his or her employer $56,000 a year in wages and benefits – before the cost of any capital needed to do the job. A business with one worker earning the average pay would not qualify. Consequently, the law has no meaningful small business exemption.[82]

This also means that a small business specializing in retail would not be able to have ten full time employees making the average private sector salary, and this is not even including the sales revenue from the retail products. Therefore, a retail business could not make any sales at all if they had nine or ten full time employees. This completely defeats the purpose of going into the retail business. The only small businesses that would not be covered would be some sole proprietorships and other businesses, such as a retail business with very few employees and a low level of sales. This system, as designed by the NLRA, is set up to hurt successful small businesses, as they would be subject to the NLRA and EFCA rules.

This minimal threshold means that the EFCA would affect 4,180,000 small businesses and over 38,934,000 of their workers.[83] Without an amendment to update the thresholds, the EFCA will cover nearly all businesses, meaning that the passage of the statute will affect almost all entrepreneurs. The EFCA will affect small business owners in a greater way than it affects larger corporations because often times they do not have the resources to cover wage increases put in place by the unaccountable arbitrator and absorb related losses.[84] This can cause the company to go out of business, hurting both the entrepreneur and the employees, who no longer have jobs. The small businesses also have the risk of being put out of business by the arbitrator's decision because the awards allow for back pay for work done during the negotiation and

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[82] James Sherk, *EFCA Authorizes Government Control of 4 Million Small Businesses*, HERITAGE, Mar. 12, 2009, http://www.heritage.org/Research/Labor/wm2341.cfm. The Heritage Foundation based their calculations on data from the Department of Labor's Bureau of Labor Statistics. The typical private sector worker earns $27.02 an hour in wages and benefits as of the third quarter of 2008. This equals $56,306 for 2080 hours of work in one year.

[83] *Id.* The Heritage Foundation calculations are based on data from the Department of Commerce. Census Bureau, http://www.census.gov/csd/susb/susb02.htm (last visited Mar. 11, 2009). The figure is the number of firms and employees at businesses with gross receipts of between $100,000 and $10 million a year in the non-retail sector and between $500,000 and $10 million a year in the retail sector and excluding industries not subject to the NLRA. Those industries are agriculture, railway, and airlines. Workers in the management of companies and enterprises sector were also excluded because supervisors are not subject to the NLRA.

[84] *Id.*

arbitration period. The arbitrator can take the businesses' ability to pay into consideration but the EFCA does not state that they have to.[85]

The vast amount of control the government will have over the day-to-day operations of small businesses is yet another cause for great concern. The arbitrator will have the authority to hand down their own version of a labor contract, which will be binding on both parties for two years.[86] Labor contracts do more than set wages and benefits for employees; they often control employment levels, retirement and health care plans, business operations, promotion schedules, work assignment, subcontract, and closure, sale, or mergers.[87] Because the contracts will bind the parties for two years from the date of the initial contact, the entrepreneur may never be able to implement his or her business strategy. Instead, they must "manage" the arbitrator's business operations policy. This is a critical time in the formation of a new business and it is very rare that a business that struggles to get off the ground during its first few years survives and continues to operate. For these reasons, the EFCA will have a devastating and insurmountable effect on entrepreneurs and small businesses.

C. *Claim Three: The EFCA is Different from Prior Attempts to Force Contracts on Parties and Would Not Violate the Constitution or go Against Supreme Court Precedent*

In *H.K. Porter*, the Supreme Court held that the NLRB did not have power under the NLRA to compel employers or employees to agree to any substantive contractual provision of a collective bargaining agreement.[88] Prior to that ruling, in 1937, the Court also noted in dicta of the *NLRB v. Laughlin Steel* decision that if the NLRA had included binding arbitration provisions, then it likely would have been an unconstitutional infringement on the right to contract.[89] Nothing has changed in the past seventy years that makes this dictum any less important. Section (3) of the EFCA will likely be an unconstitutional infringement on the right to contract. The proponents of the act claim that this is not so because Congress already has power to use binding arbitration for private disputes that affect the national interest and also because the Congressional Research Service said that "judicial challenges to this legislation have been unsuccessful."[90] Both of these points hold little weight in relation to the currently proposed EFCA.

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[85] H.R. 1409.
[86] *Id.*
[87] Sherk, *supra* note 82.
[88] H.K. Porter Co., Inc. v. Nat'l Labor Rel. Bd., 397 U.S. 99, 108 (1970).
[89] Nat'l Labor Rel. Bd. v. Laughlin Steel Corp., 301 U.S. 1, 101 (1937).
[90] AMERICAN RIGHTS AT WORK, *supra* note 77, at 8.

First, the EFCA is not limited to private sector businesses that affect the national interest or even situations that may affect the national interest. It will apply to all private businesses above the low thresholds that determine which small businesses are exempt. History shows us that the President and Congress often have great power in matters that affect the national interest, but the courts are reluctant to let congress use these powers when they are not necessary.[91] In this regard, section (3) of the EFCA is unconstitutionally over broad. It will provide for binding interest arbitration in all situations, even if there is no national interest in the issue.[92] A strike in a clothing manufacturing plant in rural Iowa is not likely to affect the national interest in a manner sufficient for congress to be able to intervene. However, if the EFCA passes, they will not only be able to intervene, they must intervene and create a first contract between the parties.

Second, the claim that judicial challenges to this type of legislation have been unsuccessful is unfounded. The statement referenced in the American Rights at Work report related to the Railway Labor Act and its relation to private airline businesses.[93] The airline and rail industries are closely connected to the national interest because the movement of products and people has a substantial effect on interstate commerce. For this reason, congress has more leeway to control this type of activity, as seen in the "commerce clause" Supreme Court cases. In addition, the Railway Labor Act does not impose the same type of binding interest arbitration on private employees that section (3) of the EFCA will.[94] As mentioned above, the

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ARAWReports/araw_thefactsbehindefca_sh.pdf (last visited Mar. 25, 2010); ANGIE WELBORN, CRS REPORT FOR CONGRESS: THE RAILWAY LABOR ACT: DISPUTE RESOLUTION PROCEDURES AND CONGRESSIONAL AUTHORITY TO INTERVENE (2002).

[91] U.S. CONST. art. I, § 8. Article one, section eight enumerates the powers of Congress. The section provides examples of Congressional power during wartime. The courts have commonly allowed Congress to exercise control over the labor industry when a national interest was at stake, e.g. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[92] Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2010).

[93] Welborn, *supra* note 90.

[94] Railway Labor Act, 45 U.S.C.A. § 18 (West 2010). The pertinent language of this provision reads:

> When, in the judgment of the National Mediation Board, it shall be necessary to have a permanent national board of adjustment in order to provide for the prompt and orderly settlement of disputes between said carriers by air, or any of them, and its or their employees, growing out of grievances or out of the interpretation or application of agreements between said carriers by air or any of them, and any class or classes of its or their employees, covering rates of pay, rules, or working conditions, the National Mediation Board is empowered and directed, by its order duly made,

Railway Labor Act provides for a mediation period and a possible referral to a binding arbitrator, however the private airline employees retain their right to strike, it is just limited.[95] The union may implement a strike if negotiations have failed and they have exhausted all remedies available under the statute, including waiting for the thirty day cooling off period to expire before striking.[96] This law differs from section (3) of the EFCA in a number of ways, and its purpose is to protect the national interest by discouraging strikes, and in the event that they do occur, giving the employer enough time to prepare for this strike without allowing it to affect the national interest or interstate commerce. The proponents are comparing apples to oranges, and trying to fool the blind.

D. *Claim Four: The EFCA Will Lead to More Voluntary Collective Bargaining Agreements: Arbitration is More of a Threat than Anything Else*

People in favor of the EFCA continue to put forth three reasons why section (3) will be more of a threat, meant to encourage collective bargaining, than a way for the government to end labor disputes and force parties into a contract. First, they say that the public sector examples show that the vast majority of contracts are resolved without using interest arbitration.[97] Second, they claim that the Act does not favor the union over the employer, and therefore there is no reason for the union to stall negotiations in order to force the interest arbitration procedure to start

> published, and served, to direct the said carriers by air and such labor organizations of their employees, national in scope, as have been or may be recognized in accordance with the provisions of this chapter, to select and designate four representatives who shall constitute a board which shall be known as the "National Air Transport Adjustment Board." Two members of said National Air Transport Adjustment Board shall be selected by said carriers by air and two members by the said labor organizations of the employees, within thirty days after the date of the order of the National Mediation Board, in the manner and by the procedure prescribed by section 153 of this title for the selection and designation of members of the National Railroad Adjustment Board. The National Air Transport Adjustment Board shall meet within forty days after the date of the order of the National Mediation Board directing the selection and designation of its members and shall organize and adopt rules for conducting its proceedings, in the manner prescribed in section 153 of this title.

Id.

[95] Railway Labor Act, 45 U.S.C.A. § 151 (West 2010).

[96] *Id.*

[97] AMERICAN RIGHTS AT WORK, *supra* note 77, at 7.

because the contract terms that result from arbitration tend to be similar to those reached through collective bargaining in the public sector.[98] Finally, proponents claim that the process will take less time than traditional bargaining, and that any delays caused by this process will be negated by the incentives to bargain that it creates.[99]

Once again, all of these rationales focus on public sector examples, and fail to take the absence of striking as a viable option into account. While the public sector examples can provide us with examples about how long the process will take, or how the organization will work, it is not a good indicator of how often parties chose to avoid arbitration by agreeing to a labor contract. It is not a good indicator because, in the public sector, the parties do not have economic self-help measures at their disposal. This means that public sector employees may decide that agreeing to terms with the employer prior to arbitration is the lesser of two evils because they have no other options. In the private sector, the union could organize a strike to push their position, without having to make a quick decision because the deadline for interest arbitration looms over them.

Another major issue with this justification is that the time limits of the proposed section (3) of the EFCA do not allow the parties enough time to give collective bargaining a fair shot. Because either party may request interest arbitration after ninety days of negotiations, the Act does not give the parties enough time to reach a voluntarily settlement.[100] It is much easier for one of the parties to bargain to impasse, hoping that the arbitrator will come down in their favor. Ultimately, the threat of arbitration is much more than an idle threat, as proponents of the Act claim.[101] Instead of encouraging parties to settle, the parties are able to see the "light at the end of the tunnel," the interest arbitration, and hold out until the arbitration forces a contract. Unions are able then able to submit the matter for mediation and ultimately interest arbitration at this point, without a vote from the workers who will actually be locked into this two-year labor contract.

V. THE SOLUTION: POSSIBLE AMENDMENTS TO "FIX" THE ACT

A. *Government Provided Mediator for Non-Binding Session*

As many people are aware, there is an important distinction between binding interest arbitration as provided for in section (3) of the EFCA, which has the power to create and enforce agreements without either party's consent, and a non-binding mediation process. If it were the

[98] *Id.*
[99] *Id.* at 9.
[100] H.R. 1409.
[101] AMERICAN RIGHTS AT WORK, *supra* note 77, at 9.

government's true intent to facilitate fair deals between employers and employees and to lessen the effect of work stoppages and other labor related negotiation techniques, then it would be much better off providing unions and employers with a cost-free mediation service to help facilitate an initial agreement within a reasonable period. The FMCS, which would continue to assist negotiators as it does today, though with no binding power, could still oversee this method.

In fact, the FMCS, which was established by what is regarded as the most influential labor legislation in U.S. History, the Taft-Hartley Act,[102] was created specifically to do just what is mentioned above.[103] The FMCS regulations specify that the FMCS has no power to: "(1) compel parties to appear before an arbitrator; (2) enforce an agreement to arbitrate; (3) compel parties to arbitrate any issue; (4) influence, alter, or set aside decisions of arbitrators on the roster; or (5) compel, deny, or modify payment of compensation to an arbitrator."[104] Enacting the EFCA as written would be a complete overhaul to this system that would go against the principles established by the Taft-Hartley Act and would be in direct contrast to the regulations promulgated by the FMCS itself.[105] There is no reason to do this and create a binding arbitration process, when mediation services combined with other incentives and programs listed below would have a more positive effect on getting employers and employees to reach their first agreement in a fair and timely manner.

B. *Use Financial Incentives to Entice Parties to Reach Initial Agreement Quickly*

Rather than forcing parties to enter into agreements that have the potential to be detrimental to both parties and could even lead a company into bankruptcy, the government should amend section (3) of the EFCA to allow for tax breaks and other financial incentives to facilitate a quicker agreement between employers and employees. The proposed EFCA arbitration provision will prove costly to taxpayers, as described above, by requiring government intervention in the collective bargaining process and causing delays in the time it takes to reach an agreement. Taking a hands-off approach, while still providing an opportunity for low or no-cost mediation assistance, could complement an incentives program very well. This could lead to agreements between both parties, without governmental interference, in a shorter period and thus avoid work stoppages that are costly to the national economy. This solution would help achieve the

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[102] 29 U.S.C.A. § 172 (West 2010).
[103] Vernuccio, *supra* note 10, at 4.
[104] 29 C.F.R. § 1404.4(d) (2010).
[105] Vernuccio, *supra* note 10, at 4-5.

policy goals underlying the EFCA, while not violating the traditional principals of freedom to contract.

C. *Allow the Courts to Punish Employers and Employees for "Bad Faith" Bargaining Under the Current System*

Not all of the principles behind the interest arbitration provision of the EFCA are bad. However, the proposed method of implementation is far too broad. Only thirty-two percent of unions fail to reach a first contract within one year.[106] Most of these failed negotiations, according to labor advocates, are due to bad faith efforts by one party, which is a violation of the NLRA as it currently stands.[107] Subjecting both employers and unions alike to the possibility of compulsory interest arbitration after a ninety-day period provides perverse incentives to wait out the ninety-day period instead of giving a good faith effort in the traditional collective bargaining context. There are a number of alternatives to this overly broad EFCA approach discussed throughout this section. Another very feasible alternative would be to amend the NLRA to allow punishment for bad-faith negotiations in collective bargaining, and override the *H.K. Porter* decision by the Supreme Court.[108] Under the Court's current interpretation of the NLRA, Congress does not have the power to compel parties to enter into a contract.[109] Here, the court said:

> One of those fundamental policies is freedom to contract. While the parties' freedom of contract is not absolute under the Act [NLRA], allowing the Board to compel agreements when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based – private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.[110]

The NLRB took this one-step further in *Ex-Cell-O*, and said that the NLRA even prohibits the implementation or use of "make-whole" provisions.[111]

If Congress were to amend the Act to allow punishment in the small number of cases where bad faith bargaining is to blame; it would eliminate the need for forced arbitration. The proposed Act negatively affects parties who negotiate in good faith and are successful in negotiations a majority of the time, but cannot reach agreement in this

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[106] Broderdorf, *supra* note 19, at 325.
[107] *Id.* at 331.
[108] *Id.* at 327.
[109] H.K. Porter Co., Inc. v. Nat'l Labor Rel. Bd., 397 U.S. 99, 108 (1970).
[110] *Id.*
[111] Ex-Cell-O Corp. & Int'l UAW, 185 N.L.R.B. 107, 108 (1970).

particular instance. Because only thirty-two percent of unions fail to reach an agreement within a year under the traditional method, the EFCA section (3) is analogous to punishing a room full of ten people to make sure the three guilty parties are punished.

D. *Implementation of Baseball's Last Shot Arbitration*

Major League Baseball (MLB) uses a system of binding arbitration dubbed "final offer arbitration."[112] While the MLB does not use this method for collective bargaining with the players union, the Major League Baseball Players Association, it does use it for individual salary arbitration with players.[113] This is more analogous to private sector binding arbitration because the individual teams are privately owned and the players are their employees.[114] In this system, when the two parties cannot agree on a contract after negotiations break down, each party is required to submit their final offer.[115] At this time, the arbitrator is required to select the more reasonable of the two submitted offers.[116]

This system works well because it takes away the damaging incentives often seen in situations where binding arbitration is used. Binding arbitration has a "chilling effect"[117] on parties' incentive to bargain in good faith because it gives the opposing parties an incentive to make extreme demands in the hope that the arbitrator will try to split the difference between the proposals in their favor.[118] The MLB final offer system, on the other hand, eliminates this incentive because the parties understand that if their final offer is too extreme, the arbitrator will most likely select the other party's offer. In fact, this final offer system provides an incentive for the parties to reach an agreement as close to the middle ground as possible, in order to protect themselves in the event that they lose in the arbitration.

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[112] William B. Gould IV, *New Labor Law Reform Variations on an Old Theme: Is the Employee Free Choice Act the Answer?*, 70 LA. L. REV. 1, 24 (2009).

[113] SPENCER B. GORDON, FINAL OFFER ARBITRATION IN THE NEW ERA OF MAJOR LEAGUE BASEBALL (2006), http://works.bepress.com/spencer_gordon/1.

[114] All thirty MLB teams are privately owned, unlike in the NFL where the Green Bay Packers are a publicly owned team.

[115] *See* Gordon, *supra* note 113.

[116] *Id.*

[117] Elissa M. Meth, *Final Offer Arbitration: A Model for Dispute Resolution in Domestic and International Disputes*, 10 AM. REV. INT'L ARB. 383, 387 (1999). The chilling effect generally says that the availability of binding arbitration as a form of dispute resolution decreases the parties willingness to negotiate in good faith.

[118] Gould, *supra* note 112, at 24.

William B. Gould IV has suggested implementing this style of arbitration into the EFCA instead of the currently proposed interest arbitration.[119] There are issues with this proposed solution, however, and Gould's article only involves one issue as opposed to the multitude of issues involved in traditional collective bargaining. While the final offer arbitration may facilitate good faith bargaining, it still provides an incentive for parties to hold out and wait for the arbitrator to impose an agreement. This undermines the basic principles of freedom to contract, as the parties are not voluntarily agreeing to this arbitration method.

VI. CONCLUSION

The Employee Free Choice Act is likely to pass through the legislative branch and the President will sign it into action in the near future.[120] This legislation will have a profound effect on all business owners and workers, especially entrepreneurs or those working for small startup companies. The EFCA will have a greater effect on these people because the arbitration provision of section (3) applies only to parties negotiating initial agreements. If an entrepreneur intends to start a company that will utilize unionized labor, he or she will have to pay particular attention to the EFCA when negotiating with unions for the first time. Section (3) of the EFCA places an unfair burden on the parties during initial collective bargaining and creates a system where a disinterested or self-interested third party has the power to bind both the union and the employer for a two-year period.

The passage of the bill, as currently proposed, would go against the fundamental concepts of capitalism and the free-market that are the foundation of the United States economy. It is important to make some changes before the EFCA, the largest amendment to labor law in the country since the passage of the Taft-Hartley Act in 1947, is enacted. The EFCA should not contain a compulsory arbitration provision. There is no reason to place an unaccountable third party arbitrator, designated by the government, in a position where he or she can impose a binding multi-year contract upon two parties, neither of whom has agreed to the terms.

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[119] *Id.*

[120] The House bill passed the full House in the 110th Session of Congress with a vote of 241 to 185. However, the Senate did not have the requisite votes to invoke cloture. *Id.* The bill was introduced in the 111th Congress on March 10, 2009 and referred to the subcommittee on Health, Employment, Labor and Pensions. At the time of writing, Republican Senator Scott Brown was recently elected in Massachusetts, taking away the supermajority from the Democratic Congress, allowing for a possible filibuster to delay the Act's passage. H.R. 1409. However, with a President in office who supports the bill and the majority of both the House and Senate in favor of passage, the bill seems as though it will inevitably become law.

Proponents of the process continually praise its effectiveness and efficiency, but we have seen how efficient this type of system is in reality. In Michigan, compulsory arbitration routinely takes over seven times the estimated amount of time quoted in the legislation. We should not sacrifice the fundamental concepts of our economy for supposed efficiency. Furthermore, when there is no proven gain in efficiency, we should not even consider taking the right to bargain for a contract out of the hands of the employers and employees whom it will affect.

Congress must do something to protect the freedom to contract in the American private sector. While there is no surefire solution, a combination of the proposed amendments and changes to the EFCA would be a good starting point. The government needs to protect citizens' contract rights and promote small business entrepreneurs by encouraging voluntary agreements and providing for punishment when parties break the law by bargaining without good faith. Section (3) of the EFCA takes all power out of the involved parties' hands and entrusts their livelihood to the government. This is not the proper solution to the collective bargaining problem in America. The parties need to resolve these issues amongst themselves, with little government interference, in order to foster a positive working environment that will lead to a productive relationship between the parties, and hopefully a good future relationship.

APPENDIX I – FULL TEXT OF PROPOSED EFCA AS INTRODUCED

A BILL

To amend the National Labor Relations Act to establish an efficient system to enable employees to form, join, or assist labor organizations, to provide for mandatory injunctions for unfair labor practices during organizing efforts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Employee Free Choice Act of 2009'.

SEC. 2. STREAMLINING UNION CERTIFICATION.

(a) IN GENERAL- Section 9(c) of the National Labor Relations Act (29 U.S.C. 159(c)) is amended by adding at the end the following:

'(6) Notwithstanding any other provision of this section, whenever a petition shall have been filed by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wish to be represented by an individual or labor organization for such purposes, the Board shall investigate the petition. If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the Board shall not direct an election but shall certify the individual or labor organization as the representative described in subsection (a).

(7) The Board shall develop guidelines and procedures for the designation by employees of a bargaining representative in the manner described in paragraph (6). Such guidelines and procedures shall include--

(A) model collective bargaining authorization language that may be used for purposes of making the designations described in paragraph (6); and

(B) procedures to be used by the Board to establish the validity of signed authorizations designating bargaining representatives.

(b) CONFORMING AMENDMENTS-

(1) NATIONAL LABOR RELATIONS BOARD- Section 3(b) of the National Labor Relations Act (29 U.S.C. 153(b)) is amended, in the second sentence--

(A) by striking 'and to' and inserting 'to'; and

(B) by striking 'and certify the results thereof,' and inserting ', and to issue certifications as provided for in that section,'.

(2) UNFAIR LABOR PRACTICES- Section 8(b) of the National Labor Relations Act (29 U.S.C. 158(b)) is amended--

(A) in paragraph (7)(B) by striking, 'or' and inserting 'or a petition has been filed under section 9(c)(6), or'; and

(B) in paragraph (7)(C) by striking 'when such a petition has been filed' and inserting 'when such a petition other than a petition under section 9(c)(6) has been filed'.

SEC. 3. FACILITATING INITIAL COLLECTIVE BARGAINING AGREEMENTS.

Section 8 of the National Labor Relations Act (29 U.S.C. 158) is amended by adding at the end the following:

'(h) Whenever collective bargaining is for the purpose of establishing an initial agreement following certification or recognition, the provisions of subsection (d) shall be modified as follows:

(1) Not later than 10 days after receiving a written request for collective bargaining from an individual or labor organization that has been newly organized or certified as a representative as defined in section 9(a), or within such further period as the parties agree upon, the parties shall meet and commence to bargain collectively and shall make every reasonable effort to conclude and sign a collective bargaining agreement.

(2) If after the expiration of the 90-day period beginning on the date on which bargaining is commenced, or such additional period as the parties may agree upon, the parties have failed to reach an agreement, either party may notify the Federal Mediation and Conciliation Service of the existence of a dispute and request mediation. Whenever such a request is

received, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(3) If after the expiration of the 30-day period beginning on the date on which the request for mediation is made under paragraph (2), or such additional period as the parties may agree upon, the Service is not able to bring the parties to agreement by conciliation, the Service shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service. The arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties.'.

SEC. 4. STRENGTHENING ENFORCEMENT.

(a) INJUNCTIONS AGAINST UNFAIR LABOR PRACTICES DURING ORGANIZING DRIVES-

(1) IN GENERAL- Section 10(l) of the National Labor Relations Act (29 U.S.C. 160(l)) is amended--

(A) in the second sentence, by striking 'If, after such' and inserting the following:

'(2) If, after such'; and

(B) by striking the first sentence and inserting the following:

'(1) Whenever it is charged--

' (A) that any employer--

'(i) discharged or otherwise discriminated against an employee in violation of subsection (a)(3) of section 8;

'(ii) threatened to discharge or to otherwise discriminate against an employee in violation of subsection (a)(1) of section 8; or

'(iii) engaged in any other unfair labor practice within the meaning of subsection (a)(1) that significantly interferes with, restrains, or coerces employees in the exercise of the rights guaranteed in section 7;

while employees of that employer were seeking representation by a labor organization or during the period after a labor

organization was recognized as a representative defined in section 9(a) until the first collective bargaining contract is entered into between the employer and the representative; or

' (B) that any person has engaged in an unfair labor practice within the meaning of subparagraph (A), (B), or (C) of section 8(b)(4), section 8(e), or section 8(b)(7);

the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred.'.

(2) CONFORMING AMENDMENT- Section 10(m) of the National Labor Relations Act (29 U.S.C. 160(m)) is amended by inserting `under circumstances not subject to section 10(l)' after `section 8'.

(b) REMEDIES FOR VIOLATIONS-

(1) BACKPAY- Section 10(c) of the National Labor Relations Act (29 U.S.C. 160(c)) is amended by striking `*And provided further,*' and inserting `*Provided further,* That if the Board finds that an employer has discriminated against an employee in violation of subsection (a)(3) of section 8 while employees of the employer were seeking representation by a labor organization, or during the period after a labor organization was recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract was entered into between the employer and the representative, the Board in such order shall award the employee back pay and, in addition, 2 times that amount as liquidated damages: *Provided further,*'.

(2) CIVIL PENALTIES- Section 12 of the National Labor Relations Act (29 U.S.C. 162) is amended--

(A) by striking `Any' and inserting `(a) Any'; and

(B) by adding at the end the following:

(b) Any employer who willfully or repeatedly commits any unfair labor practice within the meaning of subsections (a)(1) or (a)(3) of section 8 while employees of the employer are seeking representation by a labor organization or during the period after a labor organization has been recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract is entered into between the employer and the representative shall, in addition to any make-whole remedy ordered, be subject to a civil penalty of not to exceed $20,000 for each violation. In determining the amount of any penalty under this

section, the Board shall consider the gravity of the unfair labor practice and the impact of the unfair labor practice on the charging party, on other persons seeking to exercise rights guaranteed by this Act, or on the public interest.'.