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LEADERSHIP FOR GREATER PURPOSE

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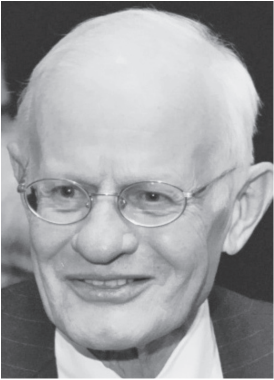
COLLEGE INTRODUCES NEWEST MEMBERS – CLASS OF 2009

The following distinguished persons were elected as Fellows of the College of Labor & Employment Lawyers in the Class of 2009 and will be inducted in the Fourteenth Annual Induction Ceremony on the evening of Saturday, November 7, 2009. Please plan to join us in Washington, DC at the Ronald Reagan Building/International Trade Center to celebrate with our newest Fellows. Formal invitations will be mailed in late August.

Deborah S. Adams, Cincinnati, OH
Paula Graves Ardelean, Jackson, MS
Beverly P. Baker, Birmingham, AL
Charles B. Baldwin, Indianapolis, IN
Michael L. Banks, Philadelphia, PA
A. Neal Barkus, Martinsburg, WV
Peter Bennett, Portland, ME
Barry M. Bennett, Chicago, IL
Elise M. Bloom, New York, NY
Theodore C. Borromeo, Menlo Park, CA
Brian W. Burkett, Toronto, Ontario, Canada
Harry F. Burnette, Chattanooga, TN
Joseph M. Burns, Chicago, IL
James W. Carroll, Jr., Pittsburgh, PA
Arthur T. Carter, Dallas, TX
Bradley T. Cave, Cheyenne, WY
Arnold S. Cohen, Newark, NJ
David M. Cook, Cincinnati, OH
Harriet E. Cooperman, Baltimore, MD
Gilbert A. Cornfield, Chicago, IL
Joseph J. Costello, Philadelphia, PA
Lisa Damon, Boston, MA
George N. Davies, Birmingham, AL
Donald A. Donati, Memphis, TN
Susan E. Dunnings, Bethesda, MD
Gary B. Eidelman, Baltimore, MD
Joan Engstrom, Golden Valley, MN
Gloria F. Flentje, Wichita, KS
Angelo J. Genova, Newark, NJ
Douglas Gilbert, Toronto, Ontario, Canada
Robert B. Gordon, Boston, MA
John W. Griffin, Jr., Victoria, TX
Catherine C. Harris, Sacramento, CA
Gerald T. Hathaway, New York, NY
Linda O. Headley, Houston, TX
R. Ann Huntrods, Minneapolis, MN
James Katz, Cherry Hill, NJ
F. Curt Kirschner, Jr., San Francisco, CA
David A. Kotzian, Farmington Hills, MI
Matthew W. Lampe, New York, NY
J. Michael Lightner, Newark, NJ
Thomas M. Lucas, Norfolk, VA
Mark N. Mallery, New Orleans, LA
Thomas Y. Mandler, Chicago, IL
Gary Mathiason, San Francisco, CA
James A. McCall, Washington, DC
Stephen A. Meck, Tallahassee, FL
Susan R. Meredith, New Haven, CT
Alan M. Minsky, Toronto, Ontario, Canada
Neal D. Mollen, Washington, DC
John R. Mooney, Washington, DC
Lawrence J. Murphy, Grand Rapids, MI
Michael G. Okun, Raleigh, NC
Joseph J. Pass, Pittsburgh, PA
David M. Prouty, New York, NY
Rosemary Pye, Boston, MA
Ruth D. Raisfeld, Scarsdale, NY
James S. Rosenfeld, Detroit, MI
David B. Ross, New York, NY
Jay D. Roth, Los Angeles, CA
Jack D. Rowe, Kansas City, MO
Clifford D. Sethness, Los Angeles, CA
Richard F. Shaw, Pittsburgh, PA
Wayne L. Slitt, Hartford, CT
Nina G. Stillman, Chicago, IL
Matthew E. Swaya, Seattle, WA
Donald J. Veldman, Muskegon, MI
Christopher H. Whelan, Gold River, CA
Daniel G. Wilczek, Minneapolis, MN
Kathleen Wilson-Thompson, Battle Creek, MI
David L. Wing, Kansas City, MO
Michael L. Wolfram, Camarillo, CA



PRESIDENT'S PERSPECTIVE

The year 1996 was a very good year! Steve Tallent, Charles "Butch" Powell and Don MacDonald, with the great help of others, opened the College of Labor and Employment Lawyers for business. Now, in the year 2009, the College has elected as new Fellows seventy-two distinguished men and women who have contributed significantly to the advancement of Labor and Employment Law. We number more than one thousand strong. But, we are more than just a collection of numbers. We are more than just a collection of Fellows who enjoy each other's company on an annual basis at the College installation dinner, always an elegant black tie affair. While those are not unimportant, we are more than that. Collectively, we are distinguished members of the Labor and Employment Law community who, for at least twenty years of practice, have contributed significantly to the advancement of justice and equality in the workplace. We have developed and published a Code of Professionalism and Civility for those who practice Labor and Employment Law. We have sponsored regional programs throughout the nation that bring College Fellows together in an atmosphere of cordiality, collegiality and education. The College has accomplished all of those things and more.

Under the visionary leadership of former President Lonny Dolin, the College embarked on a branding initiative which has brought the College not only into the present, but into the future with a new logo and a new motto: Leadership For A Greater Purpose, which describes the College and its mission now and for time to come. By this time, each of you has received correspondence, in one form or anther, including our College Membership Directory which displays the new College branding components. This is a result of a great deal of thought, as well as the significant and invaluable assistance of our consultant Marc Romano, President of Ignyte, Inc. Marc has worked diligently with the Board and its various committees in putting together this outstanding branding initiative. That initiative also includes the development of an exciting website which will have both an intranet and an extranet; the former for the benefit of the Fellows, and the latter for the benefit of those who visit the College website. By the time you receive this note, the website should be up and running for your benefit and that of all who have an interest in Labor and Employment Law everywhere.

Collectively, we are distinguished members of the Labor and Employment Law community who, for at least twenty years of practice, have contributed significantly to the advancement of justice and equality in the workplace.

As part of this overall initiative, the College Board is working on a strategic plan which will clearly state the College's mission and how it can best be accomplished within stated periods of time. At the same time, the Board of Governors is working to design and implement a regional board structure which will extend the reach of the College throughout the nation in ways never before realized.

Meanwhile, our Video History Project has been more fully developed and has yielded an amazing documentary depicting the work of the early pioneers holding the office of the United States Secretary of Labor. Those prominently featured include the Honorable Willard Wirtz and the Honorable William Usury, both outstanding Americans and contributors to the advancement of Labor and Employment Law in our nation, and both of whom generously agreed to participate in the Video History Project. The outcome is a compelling story that you will not want to miss. In that regard, the College has arranged for this astonishing film, "Working for American Workers," to be shown during the Annual CLE Conference of the ABA's Labor and Employment Law Section, convening in Washington, D.C. Be sure to attend the showing on Saturday afternoon, November 7th, and bring your colleagues and friends who will not only enjoy it, but be introduced to the great work of the College which we hope will inspire them as well as cause them to aspire to the high standards of professionalism and civility for which the College stands.

To recap,

- the branding initiative is up and running;
- our new motto, "Leadership For A Greater Purpose" is being established;
- the new College website is up and accessible;
- a strategic plan that will direct the College into the future is underway;
- regional boards will be organized;
- the Video History Project of the College has yielded an awesome film; and
- an oral history of the College is being undertaken.

As to the latter, each living Past President will be interviewed. Their opinions, views and experiences will be compiled and the package

will be made available on the website for those who are interested.

While all of this has been taking place at predominantly at the Board of Governors level, for the College to succeed in its mission and to make a difference over time to the advancement of Labor and Employment Law and the assurance of justice and equality as is the promise of our Declaration of Independence and Constitution, those admirable and noble objectives can and will only be achieved through the participation of each and every Fellow in the work of the College. This is your call to action. Become involved in the work of the College; in developing and participating in regional programs; in developing and participating in the credentialing process which is the lifeblood of the College; participate and become involved in outreach to law students and to younger lawyers; be proud of our association and membership in the College and practice the principles of professionalism and civility everywhere, every time, and always.

It is with great honor that I have been privileged to serve as President of the College in the year 2009. At the end, when the sun sets on my administration, I hope that we will have accomplished much to make you as proud of being a Fellow of the College as the College is of having you a Fellow.

With best wishes and warm personal regard, I am,

Maurice Wexler

COLLEGE TO PREMIERE "WORKING FOR AMERICAN WORKERS" FILM –

In our last newsletter article, we described our efforts to produce a film about former US Secretaries of Labor Willard Wirtz and Bill Usery. With the help of another generous donation from Mr. Usery, the film has now been completed and "Working for American Workers" will be previewed in conjunction with the ABA's Section of Labor & Employment Law's CLE Conference this coming November in Washington, DC. Plans are in the works for a premiere of the film on Saturday, November 7th at 2:00pm at the Grand Hyatt Hotel. Further information about this showing, which will be open to all College Fellows, will be distributed soon.

The film, which is 55 minutes in length, is based on the Video History Project interviews of both Secretaries Wirtz and Usery and includes extensive period footage and stills including a tape recording of the call made by President Kennedy to Willard Wirtz asking him to be Secretary of Labor. It has already been shown at the Second Circuit/Northern New Jersey Regional meeting and received great reviews. It is available for use by Fellows in making presentations to students or other groups. We particularly recommend it for use at a local meeting of Fellows. If you are interested and want a copy, call Susan Wan.

In the meantime, we are working on distribution of the film to cable network stations as well as local cable access stations. If you think one of your local stations might be interested in a showing, please let us know. It would be a wonderful Labor Day show.

The next Video History interview will be of Tim Cleary, former Chairman of the Occupational Safety and Health Review Commission. Tim was appointed to the Commission on July 6, 1973 by President Nixon and later designated Chairman by President Carter on August 31, 1977. He will be interviewed by his son and College Fellow Rich Cleary.

These efforts cost money and we urge all Fellows to support this project as it makes a valuable contribution to the area of labor and employment law. The Project Committee, comprised of Joel Glanstein, John Higgins and Don Sapir, continues to accept your suggestion for subjects for future interviews. Contact any of them or Susan Wan if you have ideas for the Project or would like to get involved with this very valuable endeavor.

The film, which is 55 minutes in length, is based on the Video History Project interviews of both Secretaries Wirtz and Usery and includes extensive period footage and stills including a tape recording of the call made by President Kennedy to Willard Wirtz asking him to be Secretary of Labor.

The response to the request for comments on EFCA might best be described as partisan and spirited as well as reasoned. It is clear that all arguments, pro and con, have been well represented and a balanced point of view has resulted. Unfortunately, limited space in the newsletter has made it impossible to print all of the comments received in their entirety. Accordingly, while it is a representative selection that appears in the newsletter, all comments, in their entirety, will appear on the College website.

We are most grateful for the willingness of Fellows to submit articles for publication on such short notice and regret we were unable to include all submissions in the Newsletter.

EMPLOYEE FREE CHOICE ACT – WHOSE BUSINESS IS IT ANYWAY?

By Bruce Miller
Miller Cohen, PLC, Detroit, MI

Employer's and their supervisors may not belong to unions. Unions are for the self organization of workers. And these workers organize to pool their resources so that they can level the playing field between themselves and the employer and improve their wages, hours and working conditions. Yet employer's insist on sticking their noses in the efforts of workers to organize, not out of great love and affection for their purposes, but to prevent them from having an effective instrument to meet their own needs. If unions sought to set rules for membership in the Chamber of Commerce, they would be told to mind their own business, and that would be correct. Now workers are saying we want to set the rules under which we can form a union. Employer's have been sticking their nose in our business for a too long: firing union organizers, holding captive meeting we have to attend, being forced to watch anti-union movies, being threatened about the dire consequences that will occur if a union wins, etc., etc. We think it is time that the decision on whether there is to be a union election should not longer be under the control of the employer whose only interest is preventing union organization. A card check system under the supervision of the NLRB to prevent abuses is a way to bring an end to this employer interference. And, it is more democratic. Card checking is an open procedure where the issue is debated, the decision is individual and the process if free from the kind of interference no democratic society would permit in the election of public officials.

A card check system under the supervision of the NLRB to prevent abuses is a way to bring an end to this employer interference.

EFCA – WHAT'S WRONG WITH THIS BILL?

By Richard A. Ross
Fredrikson & Byron, P.A., Minneapolis, MN

The **Employee Free Choice Act (EFCA)**, recently referred to by some commentators as the Employee *Forced* Choice Act, is proposed legislation that would overturn nearly 60 years of traditional labor law by amending the National Labor Relations Act (NLRA), in several unprecedented and extremely significant ways. In a nutshell, companies that are not currently unionized will have a substantially increased possibility of becoming organized without having the opportunity to inform employees of why they do not need a union. More significantly, if passed in its current form, it will end employees' ability to have a secret ballot election.

The EFCA, if passed in its current version, would permit Unions to become the certified representatives of employees merely by submitting 50% plus one card, signed by the employees, to the NLRB. Because union organizing is frequently "below the radar," it is likely that many employers will find themselves "organized" without an opportunity to campaign against the union. The pundits who claim that the bill will give employees the choice between a card check and a secret ballot election obviously have not read it. Specifically, the bill provides that after a petition is filed alleging that a majority of the employees in an appropriate unit wish to be represented by a union:

> If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the [union] specified in the petition as their bargaining representative . . . the Board **shall not direct an election** but shall certify the [union] as the representative described in subsection (a).

Emphasis added. Nowhere in this bill is there a provision where the petitioner chooses

either a card check or a secret ballot election. Even if there was such a provision, we all know that the petitions will be filed by the union, not by the employees it seeks to represent. Do we actually believe that any union will select a secret ballot election over a card check? Get real.

In addition to creating the possibility of "stealth" organizing efforts, the EFCA, as currently drafted, provides that a Union can demand bargaining over terms and conditions of employment to begin within ten (10) days. If an agreement with the Union is not reached within ninety (90) days, the Union can request the Federal Mediation and Conciliation Service (FMCS) to mediate the terms of a collective bargaining agreement. If an agreement still cannot be reached after an additional thirty (30) days, the negotiation can be referred to an arbitrator or arbitrator panel of the FMCS and the arbitrator(s) determines all remaining contract issues, including pay, benefits, hours, or work. Experience teaches us that first contracts are rarely finished in 120 days. Thus, it is very likely that many of the terms of a new contract will be decided by an arbitrator(s), effectively depriving not only the employer, but also employees, from having a say in many of the terms of the contract. Indeed, unions may want to rethink this provision, as it is also possible that they will not get what they want; unless of course, unions want to hide behind the arbitrator's decision, and blame the arbitrator for not giving the employees what the union promised them.

The potential implications of such an arrangement are frightening at best. For example, an arbitrator could rule that the employer must participate and contribute to a multi-employer pension fund. Any employer who is or becomes a participant in a multi-employer pension plan opens itself up to outrageous potential liability, if it chooses to withdraw from the fund at some point in the future.

Also, the authors of the bill obviously did not consult with anyone at the NLRB or the FMCS. Conversations with representatives of those government agencies reveal that they acknowledge that they do not have any resources to enforce and apply many of the provisions of the bill, as currently drafted. Where are all of the mediators and arbitrators going to come from? How will they be funded? Where will the Board find the resources to enforce the penalty provisions of this bill? How will it be funded? Where will the Board find sufficient Administrative Law Judges to handle the anticipated tsunami of unfair labor practice charges?

This bill is so "one-sided" that it doesn't even pretend to be fair – for employers or employees. This is nothing more than a revenue generating bill for a failed and failing enterprise – labor organizations! Indeed, this bill, if passed as currently drafted, will be the equivalent of the AIG, Banks and Car Manufacturers' "bail-out."

This bill is so "one-sided" that it doesn't even pretend to be fair – for employers or employees.

THE DEVASTATING IMPACT OF EFCA'S FIRST CONTRACT - COMPULSORY ARBITRATION PROVISIONS

By R. Theodore Clark, Jr.
Seyfarth Shaw LLP, Chicago, IL

While most of the debate over the euphemistically titled Employee Free Choice Act ("EFCA") has centered on the use of card checks instead of secret ballot elections to determine whether employees want union representation, EFCA's compulsory interest arbitration provisions for first contracts deserve at least the same, if not more, critical scrutiny. On that score, EFCA is anything but free choice for either employees or employers.

Unlike grievance arbitration where arbitrators interpret the parties' contract, EFCA's interest arbitration provisions direct arbitrators to write the parties' labor contract in all areas where the parties are at impasse. Arbitrators' powers in interest arbitration are thus infinitely greater than in grievance arbitration. In grievance arbitration, arbitrators are limited to interpreting the previously agreed to terms of the contract; in interest arbitration, arbitrators dictate those terms without any real limit on their authority.

EFCA's compulsory arbitration provisions are a radical departure from the underlying premise of the National Labor Relations Act ("NLRA"), i.e., free collective bargaining. As the Supreme Court noted in its *H.K. Porter* decision, "[t]he object of [the NLRA] was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could

The reason why first contract interest arbitration is contrary to free collective bargaining is because it denies both employees and employers alike the right to say "no."

work together to establish mutually satisfactory conditions. … But it was recognized from the beginning that agreement might in some cases be impossible and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement."

They are also a sharp departure from the long held position of the AFL-CIO. For example, George Meany, the former president of the AFL-CIO, stated that "compulsory arbitration … just will not work because it is an abrogation of freedom. The crucial difference between voluntary and compulsory arbitration is the difference between freedom and its denial."

The reason why first contract interest arbitration is contrary to free collective bargaining is because it denies both employees and employers alike the right to say "no." Thus, employees would have no right to ratify an arbitrated contract and employers would lose their right to say "no" to disputed union proposals. The right that employers currently have to reject costly or nonproductive union proposals would be lost. It is difficult to overemphasize how radical this change is.

Three other fundamental flaws with EFCA's compulsory arbitration provisions deserve mention. First, as Derek Bok, the former President of Harvard, and John Dunlop, the former Secretary of Labor, have so correctly observed, "Compulsory arbitration … tends to undermine an important ingredient in productive labor-management relations, namely the willingness of the parties to bargain conscientiously over their differences." This concern is especially present in first contracts, where the number of issues that can be advanced to arbitration is virtually unlimited.

Second, in addition to wages and economic fringe benefits such as health insurance and pensions, unions are likely to advance to compulsory arbitration issues such as:

- Restrictive work rules
- Elimination of pay based on performance
- Prohibitions or limitations on subcontracting and/or the performance of bargaining unit work by non-union employees.
- Promotions based solely on seniority or heavily weighted towards seniority.

These issues involve significant policy considerations, the resolution of which can vitally affect an employer's ability to successfully compete in a global marketplace. While employers are legally obligated to negotiate over these issues, it is an entirely different matter to compel that such issues must be decided by arbitrators who have no stake in the business or any accountability for the consequences of their decisions.

Third, in an economy where the only constant is the need for change, sometimes literally on a daily basis just to survive, the clearly predictable effects of compulsory arbitration of first contracts include the following:

- Lengthy delays lasting up to a year or more between the commencement on arbitration and the issuance of an award, during which the time the employer may be required to maintain the status quo on all existing terms and conditions of employment.
- It will foster a "one size fits all" mentality, thereby stifling an employer's ability to innovate and respond to new circumstances.
- Without control over labor costs, employers and their investors will be less willing to make capital investments and/or hire more employees.

Even in the best of economic times, compulsory arbitration of first contracts poses serious risks to the economy. But for an economy in that is in dire straits and in disparate need of encouragement, it would be, in a word, disastrous.

RESTORING EMPLOYEE FREE CHOICE WHILE SUPPORTING THE ECONOMIC RECOVERY: THE ECONOMIC CASE FOR EFCA

By Marilyn Teitelbaum

Schuchat, Cook & Werner, St. Louis, MO

Ms. Teitelbaum would like to thank Rochelle Skolnick of Schuchat Cook & Werner for her input in this article.

The opposition's primary battle cry is that the Employee Free Choice Act ("EFCA")

will take away the employees' right to a secret ballot—a sacred American right. The problem with this argument, however, is that it is totally untrue. EFCA only takes away the employer's "right" to a secret ballot, and returns to employees the right to decide whether and how they form a union, thereby reinstating the original intent of the National Labor Relations Act ("NLRA").[1]

But EFCA will do more than this: it will help stimulate the economy by revitalizing the middle class and restoring the economic balance which has eroded over the years with the erosion of union representation. At this moment, more than at any time since the enactment of the NLRA in 1935, this country needs such legislation and Congress should move forward with its passage as an essential element of the nation's economic recovery.

To understand why this is the right time to restore labor's ability to organize workers and advocate on their behalf, one need only look at the parallels between the conditions that produced the NLRA and those we face today. Bank failures, plunging markets, record levels of unemployment, shocking wage and class disparities—these were all as familiar to the drafters of the NLRA as they are to us today. FDR and Congress responded to these conditions with New Deal legislation, a critical component of which was the NLRA, or Wagner Act.[2]

An important purpose of the Wagner Act, codified in its preamble, was to bring about labor peace and put an end to the "industrial strife" that burdened or obstructed commerce.[3] This rationale, that Congress was empowered to protect interstate commerce even when the "source of the dangers which threaten it" was intra-state labor disputes, was central to the Supreme Court's determination that the Act was constitutional.[4] However, an arguably more important purpose of the Act is also memorialized in the Act's preamble: a reduction in the inequality of bargaining power between employees and employers that "tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries."[5]

The New Deal policies, including and perhaps especially the Wagner Act, sought to stimulate the economy by inviting the participation of individuals at all levels of society, including those hardest hit by economic downturn. As Leon Keyserling explained, these policies "were all aimed toward watering the tree at the bottom, which is the best thing for America economically as well as socially because of the kind of economy we are."[6] These policies succeeded in fostering a substantial middle class and a workforce of which nearly a third was unionized shortly after World War II.[7]

Since the passage of the Wagner Act, subsequent amendments and decisions of the National Labor Relations Board and the courts have stripped the law of much of its already limited capacity to equalize bargaining power between workers and employers. That imbalance is nowhere more apparent than in union organizing campaigns. At least partly in result, union membership had declined by 2008 to only 12.4%.[8] One casualty of this statistic has been what Harley Shaiken calls the "Great Disconnect" between productivity and profits on the one hand and wages on the other.[9] As Shaiken points out, although productivity grew by 20% between 2000 and 2006 and corporate profits more than doubled between 2001 and 2007, real wages crept up by only 2% during that period.

There can be no doubt that unions improve wages for those they represent. In 2008, union members earned a median weekly wage of $886, $195 per week more than their non-union counterparts. Over the course of the year, that put over $10,000 more into the budgets of those families fortunate enough to have a union member contributing to household income.[10] This is exactly the sort of increase in purchasing power the Wagner Act was intended to accomplish.

And despite employer fears that a unionized workforce will drive them out of business, recent studies show that there is absolutely no causal relationship between union recognition and insolvency.[11] This fact simply supports the common-sense observation that unions and their members have a direct stake in keeping employers in business, not driving them out of it. Further, research shows that when workers are paid a fair wage, productivity increases.[12]

Despite this compelling evidence that unions are good for workers, corporations

To understand why this is the right time to restore labor's ability to organize workers and advocate on their behalf, one need only look at the parallels between the conditions that produced the NLRA and those we face today.

As the Wagner Act was in 1935, EFCA is an important component of a strategy to rebuild the middle class and resuscitate America's ailing economy—from the roots up.

and the economy as a whole, many employers continue to engage in egregious anti-union conduct. In recent studies of union organizing campaigns, 30% of employers fired workers for their union activities and half of employers threatened plant closings.[13]

With its provisions allowing workers, rather than their employers, to choose either a secret ballot election or simple majority card signing as the route to union representation, EFCA would simply allow workers to bypass many employer abuses that currently plague organizing campaigns. EFCA would also provide for stiffer remedies in the event employers do engage in misconduct, including treble damages and the possibility of union injunctions. Finally, EFCA's provisions allowing either party to seek mediation after 90 days of bargaining for a first contract and binding arbitration after 30 days of mediation would limit employers' current ability to render Pyrrhic a union certification victory.

These elements of EFCA would help restore our labor law's capacity to reduce the power imbalance between workers and employers, as the drafters of the Wagner Act intended. As the Wagner Act was in 1935, EFCA is an important component of a strategy to rebuild the middle class and resuscitate America's ailing economy—from the roots up.

1/ The original Wagner Act provided merely that the National Labor Relations Board, in the process of certifying a bargaining representative, "may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives." 29 U.S.C. §159(c) (1935). In 1947, the Taft-Hartley Act amended the NLRA to eliminate this provision and establish for the first time that an employer could petition the Board for an election.

2/ Leon Keyserling, who drafted the Act and shaped other New Deal legislation as Senator Wagner's legislative aid admitted: "I have always thought rightly or wrongly that both economically and politically…it [the Wagner Act] was the most influential act of the New Deal." Jerry N. Hess, Oral History Interviews with Leon H. Keyserling 12 (May 3, 1971) *available at*: http://www.trumanlibrary.org/oralhist/keyserl.htm.

3/ *See* 29 U.S.C. § 151.

4/ *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37-38 (1937).

5/ 29 U.S.C. § 151. Keyserling observed that even the Wagner Act did not accomplish true equality of bargaining power but simply placed labor "in a position nearer to equality." Kenneth Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. Miami L.Rev. 285, 319 (1987). Keyserling continued: "We [Keyserling and Wagner] never accepted the view that labor had equal bargaining power, much less the frequently heard view that the pendulum had swung the other way and that labor had all the power. Labor has never had any equality of bargaining power." *Id.*

6/ Stephen Goodell, Interview with Leon Keyserling (January 9, 1969) *available at*: http://web2.millercenter.org/lbj/oralhistory/keyserling_leon_1969_0109.pdf.

7/ *See* Harley Shaiken, Economic Policy Institute, Unions, the Economy, and Employee Free Choice 3 (2007) *available at*: http://www.sharedprosperity.org/bp181/bp181.pdf.

8/ United States Bureau of Labor Statistics, Table 1. Union affiliation of employed wage and salary workers by selected characteristics (Jan. 28, 2009) *available at*: http://www.bls.gov/news.release/union2.t01.htm.

9/ *See* Shaiken, *supra* note 6 at 3.

10/ United States Bureau of Labor Statistics, Table 2. Median weekly earnings of full-time wage and salary workers by union affiliation and selected characteristics (Jan. 28, 2009) *available at*: http://www.bls.gov/news.release/union2.t02.htm.

11/ John DiNardo, Economic Policy Institute, Still Open for Business: Unionization Has No Causal Effect on Firm Closures (Mar. 20, 2009) *available at*:http://epi.3cdn.net/86c7a36112348f4103_dgm6bhgpf.pdf.

12/ Shaiken, *supra* note 6 at 5.

13/ Chirag Mehta and Nik Theodore, Ctr. for Urban Economic Development, University of Illinois at Chicago, Undermining the Right to Organize: Employer Behavior During Union Representation Campaigns 9 (2005) *available at*: http://www.americanrightsatwork.org/dmdocuments/ARAWReports/UROCUEDcompressedfullreport.pdf.

THE EMPLOYEE FREE CHOICE ACT – LESSONS LEARNED FROM THE CANADIAN EXPERIENCE

By Danny Kaufer

Heenan Blaikie, LLP, Montreal, Quebec

The history and development of Canadian labour laws has allowed Canadian legislators to fully assess the benefits and disadvantages of both the secret ballot and card check union certification procedures. The Canadian experience clearly shows that when given the option between the secret ballot or card checks, a clear and convincing majority of Canadian legislations have chosen to abandon card check certification procedures and instead choose the secret ballot vote as a reliable and impartial method of determining the level of support for a trade union. In this respect, the *Employee Free Choice Act* seeks to turn back the clock and implement a method of union recognition, card check, which has been discarded by several Canadian jurisdictions in recent years and instead usher in an era in which a secret ballot is replaced by the propaganda and influence peddling of a card check system.

Canadian attorneys practicing labour law will notice that the *Employee Free Choice Act*

draws significant inspiration from the laws of the Province of Quebec relating to union recognition and first contract arbitration. In this regard, it is not surprising that Quebec boasts the highest rate of private sector unionization in the United States or Canada. Its current card check system is without parallel in North America in favouring unions. The *Employee Free Choice Act* reproduces essential elements of Quebec labour law with the intention of adding an extra layer of complexity to determining whether a trade union has truly attained the required level of support from a given group of employees.

Most importantly, the *Employee Free Choice Act* sets a precedent by which employer freedom of speech will be dramatically reduced or limited, much as it is in the Province of Quebec. Subsection 7, subparagraph b) of the Act, does exactly this. By allowing the National Labor Relations Board to "establish the validity of signed authorizations", serving as the basis for designating bargaining representatives, the Board is also given the mandate for determining the very guidelines and procedures by which such validity may be established. In the humble view of this author, this is tantamount to excluding the employer from any questions relating to the validity of signed authorizations. Questions relating to the validity of employee signatures or to the reality of a consent given by an employee would, amongst other matters, fall within the Board's procedures. Hence, all questions would be resolved to the exclusion of the employer, much as they are in the Province of Quebec. This is unacceptable. It inevitably gives rise to employer doubts as to whether a card majority is a true majority, given that the employer will not be able to discover how genuinely representative the union is. Further, several other issues remain unresolved under the *Employee Free Choice Act*, and, in fact, are brought to light solely by examining the Canadian experience. In this regard, it is worth noting what the Act does not state. Its deliberately vague wording now extends the debate over the validity of card check certifications to an entirely different level altogether. The Act is completely silent on a number of very crucial issues that must be addressed in order for any card check certification procedure to function. For example, and without providing an exhaustive list, the Act does not deal with the following issues:

- What is the duration of the authorizations (the signed card) validity?
- As of what date is the majority status of the trade union determined?
- Are employees able to revoke their signatures? If so, how?
- If a petition for certification is dismissed, within what timeframe can the trade union file a subsequent petition?

Each of these questions raises a whole host of other legal issues. However, as has been the case in the Province of Quebec, the Act, as worded, will allow the Board to develop precedents which gradually exclude and reject any employer participation in this debate.

Finally, the *Employee Free Choice Act* provides for a significant departure from the long standing principle of American labour law that the parties are not obligated to reach a collective agreement. In this regard, providing for first contract arbitration will significantly affect employers, based on long and costly arbitration proceedings, while the employees may not even remain convinced of the trade union's true representative nature. Recent cases in Quebec illustrate the long delay between the commencement of arbitration and the actual arbitration award. This issue may be the reason behind the following statistics in Quebec: Only 47% of first collective agreements become second collective agreements. Only 24% of second collective agreements become third collective agreements.

An obvious question arises, how many initial collective bargaining agreements can there be? It would seem apparent that there could only be one initial collective bargaining agreement, but this may not be the correct answer under the Act, as presently drafted. The labour laws of the Province of Quebec clearly state that where a new trade union is able to displace an incumbent trade union, and continues to represent the very same bargaining unit, this will not allow the new trade union the right to request first contract arbitration. However, the *Employee Free Choice Act* has not been drafted in this way. On the contrary, the Act has been carefully drafted to allow each successive trade union the right to request first contract arbitration. This is borne out by, among other things, the language contained at section 8, paragraph h), subparagraph 1 of the Act, which states:

> Nor later than ten days after receiving a written request for collective bargaining from an individual or a

Canadian attorneys practicing labour law will notice that the Employee Free Choice Act draw significant inspiration from the laws of the Province of Quebec relating to union recognition and first contract arbitration.

> labour organization that has been newly organized or certified as a representative …

In other words, under the Act, the focal point is not the makeup of the group of employees contemplated by the certification. The issue is whether the labour organization going to represent these employees has been newly organized or certified.

Besides changing fundamental rules now existing under the National Labour Relations Act, the *Employee Free Choice Act* seeks to provide a complex procedure by which to gauge the true level of support amongst employees for a given trade union. The Canadian experience has demonstrated that one must look beyond the simple drafting of the *Employee Free Choice Act*, and must instead look at the source of inspiration which led to the introduction of this attempt to discard secret ballot voting. In this regard, Canadian jurisdictions have clearly chosen to abandon card check procedures in favour of a more neutral secret ballot measure, and this author sees no need to break this trend.

EMPLOYEE FREE CHOICE ACT – THE SANCTITY OF SECRET BALLOT ELECTIONS, FREE SPEECH AND THE DEMOCRATIC PROCESS

By John L. Quinn

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Mr. Quinn dedicates this article to the memory of John Kissack, Union Rep extraordinaire and damn fine human being.

The opponents of the Employee Free Choice Act point to the hallowed institutions of secret ballot elections and the protection of the rights to free speech in democratic societies. In support of these principles, I think it would be appropriate to cite to two recognized authorities on the subject:

"People are free to campaign and they will be free to vote. … Anyone who has the right to vote is free to go and cast his vote anywhere in his own area, in his own constituency."

- Robert Mugabe

> "[C]reating facts and then selling them to the world as truths" – David Baldacci, in *The Whole Truth,* explaining the doctrine of Perception Management ("PM") in a tale about an arms dealer trying to improve his bottom line by fomenting a new "Cold War." [1]

Despite reports to the contrary, even the *Wall Street Journal* recognizes that the Employee Free Choice Act does not eliminate secret ballot elections in union organizing drives, it merely adds the option of majority sign-up, and lets employees decide which option to pursue. More importantly, however, the reason for creating this option for employees is that elections under the NLRA are neither free nor fair, and are dominated by Perception Management tactics that are the antithesis of free and informed debate. In its 2000 report, *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards,* Human Rights Watch concluded:

> "[W]orkers' freedom of association is under sustained attack in the United States, and the government is often failing its responsibility under international human rights standards to deter such attacks and protect workers' rights … [A] culture of near-impunity has taken shape in much of U.S. labor law and practice." *Id* at 12, 14.[2]

As a country, we are much better than this. Our citizens deserve no less than adherence to the minimal standards we expect of governments around the world. Otherwise, rather than perpetuate the current charade, the opponents of labor law reform should merely admit the truth – they are dedicated to eliminating the institution of free trade unions in the United States.

The NLRA was enacted almost 75 years ago, at a time when heavy manufacturing dominated the economy, when computers did not even exist, and when the term "global economy" had not even entered the lexicon. However, while technology and the economy have changed dramatically during this 75 year span, the only significant change to this seminal statute has been to provide for comprehensive regulation on union conduct. One commentator refers to

Despite reports to the contrary, even the Wall Street Journal recognizes that the Employee Free Choice Act does not eliminate secret ballot elections in union organizing drives, it merely adds the option of majority sign-up, and lets employees decide which option to pursue.

this problem as the "ossification" of American labor law. [3]

My experience with both the successes and failures of the NLRA began as a young organizer with the old Textile Workers Union of America in 1970 during the height of the J.P. Stephens campaigns. Following law school, I began my legal "apprenticeship" as counsel to Member Howard Jenkins at the NLRB in 1977 and then continued as a Field Attorney in Region 10 until 1981 when I entered private practice representing unions and employees. I have observed first-hand, the downward spiral of the effectiveness of the NLRA which has paralleled the decline in union density and growing disparities in income between the "middle" class and the very wealthy. I remember a time when unions could actually win elections and bargain first contracts, even when dealing with the notorious cotton mill and saw mill lawyers of the time. The sad reality today is that such outcomes are on the verge of extinction. In the five-year period between 1999 and 2004, 22,000 election petitions were filed. This means that they were supported by at least 30% of the potential bargaining unit, but probably more, as most unions now require better than a 50% showing of interest before filing a petition. Yet, in only 12.9% of these cases did employees win an election and achieve a first contract within the certification year. The following is an outline of the well-established current model adhered to by astute management lawyers, including many that are Fellows of our esteemed College:

(1) Employers assert their 8(c), legally protected, "free speech" right to engage in a one-sided and unrelenting perception management campaign from the date the petition is filed. The medium includes mandatory large group meetings at work, one-on-one sessions in the boss' office, videos, letters and the like. The message includes "we don't have to agree to anything in bargaining," "unions cause strikes and violence," "unions cause plant closures and loss of jobs," "unions are corrupt and only want your dues," blah, blah, blah…. And, if this is not enough, fire the ring-leaders (this happens in one in five campaigns).[4]

(2) In order to obtain sufficient time to guarantee success of the perception management process, employers delay the election by insisting on going to a hearing on frivolous unit determination issues.

(3) In the rare event the union "wins" the election, the anti-union campaign merely continues, disguised as frivolous employer objections to the election or as a "technical 8(a)(5)" violation to "test" the legitimacy of the certification. The employer can then insist on a final determination by the Board, and possibly the Court of Appeals, because Board remedial orders are not self-enforcing. All this is done in the name of "due process" and/or "protecting" employees from the usurpation of their individual "rights" by the union.

(4) Once the union "wins" this litigation and gets an enforceable bargaining order, the anti-union campaign just continues, now disguised as "good faith bargaining." Under current legal standards, it is OK to insist that there will be no arbitration, no seniority rights, no check-off and merit pay in a contract. And if the employer is found to have bargained in bad faith, after years of litigation the employer will only have to agree to go through the motions again, and "my gawd!!!!" post a notice for 60 days.

(5) Experience has shown that if the employer can string bargaining out over a one year period, and makes sure that nothing of substance is agreed to, employees will begin to blame the union. At this point, the employer has a legally protected right to engage in "free speech" and "protect" the rights of its employees to bargain singly, rather than collectively, by explaining to them how they can go about filing a decertification petition.

(6) Now, please return to step (1).[5]

The Employee Free Choice Act does three important things. First, it affords employees a choice of methods to designate a union as their bargaining representative, one of which affords reasonable protection from perception

"I remember a time when unions could actually win elections and bargain first contracts, even when dealing with the notorious cotton mill and saw mill lawyers of the time."

management campaigns and dilatory legal tactics, and respects both their intelligence and their dignity. Second, it creates meaningful sanctions to protect employees against unlawful terminations when they and their co-workers are most vulnerable – during an organizing campaign. Finally, it protects employees' right to collective bargaining by fixing the first contract problem. It removes any incentive to subvert the bargaining process by treating it as a continuation of the anti-union campaign. The Employee Free Choice Act seeks to achieve this fair and just objective by creating a three step process: the parties are free to engage in good faith bargaining to reach an agreement; if this is not successful, mediation services will be available; if this is not successful, borrowing from experience in public sector police and fire bargaining, final and binding arbitration will be available.

The Employee Free Choice Act is a reasoned and measured approach to fix the parts of the NLRA that are broken. Is this too much for working men, women and their families to ask?

1/ This term was first coined by the military to define a method to gain strategic advantage over enemies in foreign states. According to the *Dictionary of Military and Associated Terms*, PM involves "[a]ctions to convey and/or deny selected information and indicators to foreign audiences to influence their emotions, motives, and objective reasoning." PM is calculated to result "in foreign behaviors and official actions favorable to the originator's objectives." In sum, "perception management combines truth projection, operations security, cover and deception, and psychological operations."

2/ *See also,* Gordon Lafer, *Free and Fair? How Labor Law Fails U.S. Democratic Election Standards,* American Rights at Work, June 2005.

3/ Cynthia L. Estlund, *The Ossification of American Labor Law,* 102 Colum. L. Rev. 1527 (2002).

4/ Schmitt and Zipperer, *Dropping the Ax: Illegal Firings During Union Election Campaigns,* Center for Economic and Policy Research, January 2007.

5/ Some commentators believe that when Senator Franken is finally seated in the U.S. Senate, he will be a staunch Employee Free Choice Act supporter, not because of his party affiliation or economic philosophy, but because he is really pissed about his relatively brief but significant experience with being denied the benefit of winning a hard-fought election. He gets it!

In essence, EFCA takes away employers' present right to express views, arguments, or opinions during a pre-election campaign.

EMPLOYEE FREE CHOICE ACT – IT'S NOT "FREE" AND "CHOICE" IS ELIMINATED

By Frank T. Mamat
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Mr. Mamat would like to thank Stephanie Hicks of Foster, Swift, Collins & Smith, P.C. for her input in this article.

The Employee Free Choice Act ("EFCA") introduces the most radical changes in labor law since the passage of the National Labor Relations Act of 1935 ("NLRA"). EFCA alters the current realm of labor-management relations by dramatically changing the National Labor Relations Act ("NLRA") in three dramatic ways:

- it effectively abolishes the secret ballot process [while it still exists, no union will ever want to use it again]
- it imposes binding arbitration with respect to initial contracts, and
- it creates civil penalties for unfair labor practices

EFCA, by name, is nothing but deceptive. Where is the "free choice"?

Card Check System

The NLRA made collective bargaining mandatory between management and a union that was "certified" by the National Labor Relations Board ("NLRB"). In order for the workplace to organize under current labor law, union organizers obtain signatures on the blank union cards from colleagues. Once 30% of the proposed "bargaining unit" has signed the cards, the NLRB begins the process of holding a secret ballot election to see if 50% plus 1 want the organizing union "certified" as their collective bargaining representative. The NLRB regulates campaign conduct and both the union and the employer have the opportunity to present the advantages and disadvantages of unionization. If an employer demands an election, and the majority of votes in the election favor the union, the National Labor Relations Board will certify the union as the exclusive representative of the employees for the purposes of collective bargaining.

However, under EFCA, if a union collects signed cards from over 50% of employees, it can force unionization on an employer without

a secret ballot election. EFCA's adoption of a card check system allows a union to sidestep at will any secret ballot election supervised by the NLRB. In essence, EFCA takes away employers' present right to express views, arguments, or opinions during a pre-election campaign. The secret ballot election is virtually abolished, something that has been the preferred method of ascertaining whether a union has majority support. Indeed, multiple federal courts hold this view.

> [I]t is beyond dispute that secret election is more accurate reflection of the employees' true desires that a check of authorization cards collected at the behest of a union organizer. *NLRB v Flomatic Corp.*, 347 F2d 74, 78 (2nd Cir 1965).

A secret ballot is absolutely necessary in order to ensure that workers are not intimidated into voting for a union they might not otherwise choose;

> Workers sometimes sign union authorization cards, not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get that person off their back . . . *NLRB v. Village IX, Inc.*, 723 F2d 1360, 1371 (7th Cir 1983).

If union members are allowed to coerce, intimidate, and threaten employees into signing cards, where is an employee's "free choice"? For that matter, what opportunity does an employer have to even engage in dialogue with its employees prior to the union being "certified"?

Binding Arbitration

Once a union is certified, the employer and the union must negotiate in good faith on the initial contract until the employer and the union mutually consent to terms. If the parties fail to reach an agreement after 90 days of private negotiation, EFCA provides that either party may request mediation. If, after 30 days of mediation, the parties are still unable to settle on a contract, the dispute will be referred to an arbitration board. The board will then render a decision settling the contract dispute and that decision will be binding on all parties for a period of two years.

EFCA's binding arbitration is nothing by an improper intrusion of government into private business affairs. EFCA effectively eliminates "collective bargaining" with a government-imposed contract. In truth, EFCA also effectively does away with freedom of contract. Workers cannot ratify the decrees of the arbitration board, and the employer cannot challenge the decree's terms in court. EFCA strips workers of the right to vote on the terms and conditions of their employment, and puts the control of wages and working conditions in the hands of unaccountable government officials who know little about the employer's industry. Where is the "free choice" in that?

Civil Penalties for Certain Unfair Labor Practices

For the first time, an employer will be exposed to substantial civil penalties and liabilities for unfair labor practices. Currently, the "normal" remedy is back pay, or just posting a Notice. EFCA creates very large five-figure fines that an employer is required to pay when an employee is illegally discharged or discriminated against during an organization campaign. Additionally, the employer must pay two times back pay as liquidated damages in addition to the back pay owed, for a total of three times the back pay. EFCA also provides for civil fines of up to $20,000 per violation against employers found to have willfully or repeatedly violated employees' rights during an organizing campaign.

EFCA does not, however, increase penalties for unfair labor practices committed by unions against workers or employers. Why the differential treatment? As stated above, unions are also capable of intimidating and coercing workers during organizing campaigns. Union coercion is a real problem that the EFCA will only exacerbate. EFCA sends the message that union threats are less of an injustice than employer threats.

Card Check: A Bad Idea to Ruin a Proven System of Labor Relations

In over 70 years of experience under the NLRA, several truths have emerged:

1. Under the NLRA/NLRB system, union membership greatly increased for almost 25-30 years.

EFCA does not, however, increase penalties for unfair labor practices committed by unions against workers or employers. Why the differential treatment?

2. A body of expertise developed under the NLRB that helped employees, employers and unions live with each other and created industrial peace (for the most part).

3. Over the last 30 years, strikes have decreased, union membership (at least in the private sector) has decreased to an all time low (barely 8%) and labor disruptions (strikes, lockouts) are also at an all time low.

What was "wrong" with this picture? Relative labor peace? Declining number of litigated NLRB cases? More long term collective bargaining agreements contributing to labor stability?

Apparently, the tail that wagged the dog – "card check" – was labor's shrinking numbers and the barely 8% market share for the private sector. To "fix" this problem (a problem only from Labor's perspective), "Card Check" was invented and, in the goals of Big Labor, would:

1. Make resistance to union pressures, organization and tactics very expensive.

2. Make successful organizing easy and almost inevitable. By the time the an Employer's 51% of employees' (cards) are signed, there is no opportunity to "resist".

3. Strip away the mutual collective bargaining responsibilities from the Employer and the Union and give them an inexperienced arbitrator (or arbitrators) to write the "parties" contract for them. This would only happen if the parties didn't reach a "first contract" within 120 days – a typically unlikely scenario for a first contract.

Conclusion

EFCA is a move in the wrong direction. It exposes workers to intimidation and coercion by unions, strips their right to hear both sides of the issue on unionization and takes away their ability to vote on a contract. In reality, where is the "free choice"?

THE EMPLOYEE FREE CHOICE ACT

By Nancy Schiffer

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America needs an economy that works for everyone. Our middle class is in a frightening downward spiral, with stagnating wages, rising unemployment, skyrocketing foreclosure rates, an explosion of bankruptcies, and millions of Americans without healthcare. Those at the top have amassed outstanding wealth,[1] while, despite workers' productivity rising 75%, inflation-adjusted wages have flat-lined.[2] Workers have gone into debt in order to hang onto their place in the middle class. This debt has fueled our consumer-driven economy, but with disastrous results.

If we are to build a sustainable economy, we must "enhanc[e] the purchasing power of this key group of the nation's consumers and allow[] them to once again afford automobiles, mortgages and other consumer goods."[3] The Employee Free Choice Act can restore America's middle class and create an economy of shared prosperity. It has gained broad public support[4] and is poised for passage. This amendment to the National Labor Relations Act removes current barriers to unionization, guarantees workers a first contract, and increases penalties when employers violate workers' rights during organizing and first contract campaigns. Leading economists agree that restoring workers' freedom to form unions and bargain for their share in our economy is a critical step towards a sustainable economic recovery.[5] Unionization is a proven route out of poverty and into the middle class. It enables workers to "get their share of productivity growth" which "can again put the country on the path of wage-driven consumption growth, instead of growth driven by unsustainable borrowing."[6]

The Employee Free Choice Act can restore America's middle class and create an economy of shared prosperity.

Unions not only raise wages and benefits, they improve productivity, reduce employee turnover, raise workers' skill levels, and encourage investment in high-value jobs.[7] For small businesses in particular, unions stabilize wages in specific industries, provide a pool of well-trained labor, and offer health and retirement benefit options not otherwise available to these employers. Arguments by opponents of this critical legislation claim that it

will cause unemployment and business failures. Remarkably similar arguments were made in opposition to the Wagner Act, Social Security, minimum wage, the FMLA, OSHA, and other legislation designed to promote the interests of working families. These arguments were not true then and they are not true now.[8]

The rights guaranteed in the NLRA are not a reality in the workplace. When workers want to form a union, the NLRB election process, originally established as their means to this end, presents a virtually insurmountable series of practical, procedural and legal obstacles. The Employee Free Choice Act restores workers' right to form unions by providing that a union supported by a majority of workers can be certified on the basis of valid authorizations signed by workers. This process is already legal and widely used, but can be vetoed by employers. The change made by the proposed bill is to give back to workers the choice of how they demonstrate their union support. It makes no change to the existing NLRA election process. Majority sign-up procedures streamline the process for choosing collective bargaining, allow workers to decide whether to unionize on their own, and eliminate the coercion inherent with company-dominated NLRB elections. It has been shown to reduce conflict between workers and management, reduce employer coercion and interference, and allow workers to freely and fairly choose whether to unionize to bargain with their employer for a better life.

The current process of mandatory elections is no longer trusted by American workers. They know that employers are willing to use a vast arsenal of legal and illegal tactics to stop their efforts and to do so with impunity. Why? Because the current NLRB system allows employers to manipulate, dominate and control the process by which workers decide on unionization. In the past two decades, opposition to workers' exercising their legal right to choose union representation and collective bargaining has intensified, "with a greater focus on more coercive and punitive tactics designed to intensely monitor and punish union activity."[9] The election process has become a "ceaseless, in-your-face campaign of supervisors pressing anti-union rhetoric on their direct subordinates."[10] In 89% of worker campaigns, workers are required to attend one-sided anti-union meetings, in groups and individually. Supervisors keep track of and assess the union sympathies of each worker. In 63% of campaigns, companies interrogate workers about their or their co-workers' union activities; 47% threaten or predict the workplace will close if workers vote for collective bargaining.[11] One in five activists is discharged.[12] When a worker who has supported the union is fired, fear is instantly and inevitably injected into the workplace. This fear devastates the organizing campaign.[13] Companies "wear[] workers down through a prolonged campaign of fear, intimidation, and tension that serve both to scare workers away from union support and to convince them that management is omnipotent and organization therefore is futile." When workers finally vote, their vote reflects the level of fear the company has generated and not the level of workers' support for union representation.[14]

Opponents of the bill argue that it will encourage union coercion. Yet it is companies which have every means of coercing workers – they can fire, discipline, demote, change working hours and shifts, assign onerous jobs, etc.; unions cannot. In 2008, 86% of the NLRB's complaints were issued against employers and 14% against unions.[15] The Employee Free Choice Act maintains current law banning coercion, but also adds additional safeguards by directing the NLRB to establish procedures for clarifying the purpose of the authorizations and ensuring their validity. There is no evidence of union coercion in jurisdictions with majority sign-up.[16] Rather, "management's pressure on workers to oppose unionization was significantly greater than pressure from co-workers or organizers to support the union in both card checks and elections."[17]

The bottom line is that majority sign-up works. Responsible, profitable major corporations like AT&T have adopted it as an important element of their successful high-road business plans. The result is a workplace with better labor-management relations, less tension, more respect for employees and positive employee morale. Public sector workers in thirteen states have the legal right to decide to choose union representation through majority sign-up, some for many years.

Forty-four percent of newly formed unions never achieve a contract.[18] Of workers who petition for an election, only 12.9%

Majority sign-up procedures streamline the process for choosing collective bargaining, allow workers to decide whether to unionize on their own, and eliminate the coercion inherent with company-dominated NLRB elections.

reach a first contract; if unfair labor practices are committed, that number is even lower. Why? Because the Act rewards an employer that avoids reaching a contract. After twelve months, an employer can withdraw recognition. "Consultants advise management on how to stall or prolong the bargaining process, almost indefinitely" since delays "create employee dissatisfaction with the union."[19] The inevitable employee frustration, disillusionment and feeling of futility that accompanies the lack of progress at the bargaining table can be easily leveraged by an employer to eliminate the union.[20] What is the remedy if an employer for illegal bargaining tactics? The employer is ordered to bargain some more. And post an NLRB Notice. That's it.

The Employee Free Choice Act offers mediation and arbitration overseen by the Federal Mediation and Conciliation Service (FMCS). Either party can request mediation after 90 days of bargaining. If not successful in producing a contract, any remaining issues are referred for binding arbitration. Mediation and arbitration are not a substitute for collective bargaining. Rather, they incentivize bargaining by providing a process to guide the parties towards agreement and a safety net in the event bargaining fails.

Public and private sector jurisdictions with mediation and interest arbitration have been strikingly successful in encouraging collectively bargained agreements.[21] Evidence of private and public sector mediation and arbitration over the past 30 years in the U.S. and Canada reveals that only 10% or less of disputes require arbitration and that such awards are not unworkable, but comparable to similarly situated bargained agreements. Well-designed systems reduce the likelihood of use to less than 10%, maximize incentives on the parties to negotiate their own agreement, provide parties control over the final award, and reduce strikes and lockouts. As this research demonstrates, the Employee Free Choice Act can reverse the current 44% failure rate and ensure that workers who choose union representation in order to have a contract achieve that goal.

Weak NLRA remedies and delayed enforcement have emboldened employers.[22] NLRA remedies have been described as "paltry," "easy and cheap," and "the Achilles' heel of employee rights."[23] They are "ineffective," "generally toothless," "slaps on the wrist," and "weak" according to Senator Arlen Specter (D-PA).[24] Employers treat them as "a minor cost of doing business."[25] An employer that threatens, interrogates and spies on workers must post a Notice promising not to do it again. Illegally discharged workers are entitled to reinstatement and backpay, but not compensatory or other damages. Backpay averages $3500 - $4500 and most employees never return. None receive compensation for economic, psychological and emotional devastation to themselves and their families.[26] There is no remedy to the other workers whose organizing efforts have been destroyed or to the union whose campaign has been crushed. If the employer's misconduct has affected the results of an election a rerun election may be ordered.[27] Employers that illegally refuse to bargain are ordered to bargain some more.

These remedies don't sound like much because they aren't. Moreover, delays make them wholly ineffective. Workers see their co-workers being terrorized because of their union beliefs and watch their employer abuse their rights with impunity. They are afraid to support the union. Who can afford to jeopardize their family's welfare? Interest in the union is shattered. The Employee Free Choice Act would create meaningful remedies, including triple back pay to workers who have been illegally fired during organizing and first contract efforts, fines of up to $20,000, and injunctive relief against illegal employer conduct which significantly interferes with workers during organizing and first contract efforts. Currently, injunctive relief is only mandated for violations committed by unions with no parallel provision requiring injunctive relief to protect workers from illegal conduct by employers. The Employee Free Choice Act would correct this glaring imbalance. Injunctive relief is immediate and effective; it works.

Sixty million workers would like a union in their workplace, according to polls, so they can bargain for a better life.[28] The Employee Free Choice Act will reform the NLRA so that it will finally, and again, guarantee the rights it promises.

The Employee Free Choice Act will reform the NLRA so that it will finally, and again, guarantee the rights it promises.

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14/ Gordon Lafer, *Neither Free Nor Fair,* n. 10, supra.
15/ NLRB Annual Report, 2008.
16/ Robert Bruno, *Majority Authorizations and Union Organizing in the Public Sector: A Four-State Perspective* (2009);http://www.aflcio.org/joinaunion/voiceatwork/efca/upload/multistate_efca051409.pdf; John Logan, *Union Recognition and Collective Bargaining: How Does the United States Compare with Other Democracies?* Perspectives on Work, LERA, Spring 2009; (Preeminent Canadian labor law scholar Professor Harry Arthurs has reported that he does not know of a single case in which the employer had complained that the union had illegally coerced workers into joining a union): http://www.lera.uiuc.edu/Pubs/Perspectives/onlinecompanion/Spring2009Vol10/Logan.html; citingciting Jonathan Zasloff, *Card Check and Union Coercion*, 12.04.08; *The Reality-Based Community*, available at: http://www.samefacts.com/archives/2009_democratic_agenda_/2008/12/card_check_and_union_coercion.php.
17/ Adrienne Eaton and Jill Kriesky, *NLRB Elections Versus Card Check Campaigns: Results of a Worker Survey*, Industrial and Labor Relations Review, Cornell University Vol. 62, No. 2 (Jan. 2009), p. 170.
18/ John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives*, 62 Ind. Rel. Rev. No. 1, (Oct. 2008). [Recent studies document that only 38% of new unions are able to negotiate a first contract within one year of NLRB certification and only 56% ever negotiate a first contract.]
19/ John Logan, *Consultants, Lawyers and the "Union Free" Movement in the USA Since the 1970s,* Ind. Rel. J., Vol. 33 (2002); Ronald Meisburg, *First Contract Bargaining Cases, General Counsel Memorandum*, GC 06-05 (4.19.06) (during first contract negotiations, employees "are highly susceptible to unfair labor practices intended to undermine support for their bargaining representative.").
20/ Human Rights Watch, *"Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards* (Aug. 2000).
21/ Susan Johnson, *First Contract Arbitration: Effects on Bargaining and Work Stoppages,* Department of Economics, Wilfrid Laurier University, Waterloo, Ontario, Canada, Dec. 2008.
22/ Kate Bronfenbrenner, n. 9, supra.; John Schmitt & Ben Zipperer, n. 12, supra.
23/ Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527 (2002).
24/ Arlen Specter and Eric Ngujen, *Representation without Intimidation: Securing Worker Rights to Choose Under the NLRA,* Harv. J. on Leg., 45:311, 2008.
25/ Human Rights Watch, n. 20, supra.
26/ Brent Garren, n. 13, supra.
27/ In certain extraordinary circumstances, as that concept has been expanded and contracted by the Board, an employer can be ordered to bargain with a union when its majority support has been destroyed by the employer's egregious and pervasive misconduct; the Board also has discretionary injunctive relief available in Section 10(j) of the Act.
28/ Peter D. Hart Research Associates, December 2006.

The Newsletter Committee continues to strongly encourage all Fellows to submit for publication any honors, accomplishments or other notable relative information.

SPOTLIGHT ON FELLOWS

- **Fellow and past Board of Governors' Member Donald J. Capuano**, was honored for an extra-ordinary career advocating for the rights of working people. At the reception, held on June 10, 2009, he was given the Peggy Browning Fund Lifetime Achievement Award. The Fund was established in 1997 and sponsors workers' rights conferences and supports fellowships which have benefited hundreds of law students over the years. Don practices at the law firm of O'Donoghue & O'Donoghue in Washington, DC.

- **Fellow H. Leonard Court**, from the Crowe & Dunlevy firm in Oklahoma City, OK, has been selected as a member of the American Law Institute.

- **Fellow Michael Delikat**, along with his family, was honored with the Anti-Defamation Leagues' Daniel R. Ginsburg Humanitarian Award last November 9, 2008. A partner in the New York City office of Orrick, Herrington & Sutcliffe, Mr. Delikat is a past president of the UJA Federation of Greenwich, Connecticut, and a former board member of the Community Endowment Foundation, a Jewish charitable organization.

- **Fellows Gary L. Leiber and Edward R. Levin**, from the Washington, DC law firm of Saul Ewing LLP, have been named to the *2009 Washington, DC Super Lawyers List*. This list annually recognizes and honors the top five percent of lawyers in Washington, DC based on surveys with lawyers throughout the DC area and independent research by *Law and Politics*.

- **Fellow Peggy R. Mastroianni**, Associate Legal Counsel of the US EEOC in Washington, DC, received the Mary C. Lawton Outstanding Government Service Award for 2008, given by the American Bar Association. The award recognizes "government lawyers at the federal and state levels for outstanding contributions to the development, implementation, or im-provement of administrative law and regulatory practice that reflects sustained excellence in performance."

- **Fellow Robert B. Moberly**, Dean Emeritus and Professor of Law at the University of Arkansas, co-authored an article with Laura Levine entitled "The New Arkansas Appellate Mediation Program," 61 Ark. L. Rev. 429 (2008). In addition, Professor Moberly will be spending the 2010 spring semester on sabbatical in China and would be interested in speaking or corresponding with College Fellows who have an interest or experience in Chinese labor relations or conflict resolutions. He is also interested in speaking with any College Fellow whose firm has an office in China. He can be contacted by email at moberly@uark.edu.

- **Fellow James R. Mulroy II**, Resident Manager of Jackson Lewis' Memphis office, was recognized as a *2009 Mid-South Super Lawyer* and was also included in the current edition of *The Best Lawyers in America* for the fourth consecutive year. Additionally, Mr. Mulroy has been recognized by *Memphis Magazine* every year since 2006 as a "Top Attorney in Memphis."

- **Fellow Michelle Reinglass**, a plaintiff's lawyers from Laguna Hills, CA was named to *California Los Angeles Magazine's* annual list of "2009 Super Lawyers". In addition, she was listed as one of the "Top 100 Attorneys in Southern California," one of the "Top 50 Women Attorneys," and one of the "Top 50 Attorneys in Orange County, California."

- **Fellow Charles P. Rose**, formerly of the the Chicago law firm Franczek Radelet, PC was confirmed on May 1, 2009 as President Obama's choice for General Counsel for the Department of Education. He will serve as the chief legal officer for the Department and as the legal adviser to the Secretary of Eduction on all matters affecting the Department of Education's programs and activities.

FELLOW PUBLISHES BOOK OF ADVICE

Fellow and Board of Governors' member Paul H. Tobias is the co-author, along with Millard Mack, of a newly published book, "Advice to a Young Man at 70," which is a collection of letters and quotations from famous persons offering advice concerning the aging process. The book includes more than 150 letters sent on the occasion of the 70th birthday of both authors' fathers. Advice givers include Herbert Hoover, Carl Jung, Joseph P. Kennedy, Dean Acheson, Hugo Black, Felix Frankfurter, Alfred Landon, Walter Lippman, Chester Nimitz, JC Penney, Roscoe Pound, Arthur Schlesinger, Paul Dudley White and Harry S. Truman. Retail cost of the book is $25.00, but the publisher is offering a 10% discount to College Fellows. All of Mr. Tobias' royalties will be donated to the College. The book can be purchased through capstonelegacies.com.

FELLOW EMERITUS AUTHORS SECOND FICTIONAL BOOK

Fellow Emeritus James Harty, from Pittsburgh, Pennsylvania, spent almost fifty years practicing labor law. Beginning with the passage of Act 195 in Pennsylvania in 1970, he concentrated his legal career in the arenas of public school labor law and civil rights, successfully negotiating hundreds of contracts and disputes. Now in his second career as an author, he has written "Trying Times," a follow up to his first novel "Table Talk." Based on his experiences, and the subject of collective bargaining in the world of American public secondary education, this book details a teachers' strike in Raratan Township that causes recurring problems for educators, parents, lawyers and labor activists. Readers will enjoy Mr. Harty's well-observed rendition of how these crises play out, as the book offers a "nuanced, behind the scenes take on a perennial American rite of fall."

Mr. Harty says that "some have characterized the book as 'an easy read;' others have called it 'instructive,' 'challenging,' 'thoughtful,' 'satisfying' or even 'engrossing.'" He encourages all Fellows to read it and decide for themselves and gladly welcomes feedback. He is also happy to help any Fellow who is interested in purchasing his book. Mr. Harty can be reached at (412) 441-8881, or you can contact the publisher directly, EduPRESS in Pittsburgh, PA, at edupress12@hotmail.com.

REGIONAL MEETING UPDATES

NEW YORK/CONNECTICUT / NEW JERSEY MEETING

By all accounts, the semi-annual dinner meeting of the Second Circuit / Northern New Jersey of the College of Labor and Employment Lawyers on May 19th was a tremendous success. Thanks to Willis Goldsmith, his firm Jones Day and staff members Shannon Lydick and Lorena Whittington (assisted by Carole Milker of Epstein Becker & Green) for their hospitality and hard work in organizing and seeing to all of the details. Thanks also to our distinguished panelists and speakers, which included: (1) Fellows Don Sapir and Joel Glanstein who introduced and thereafter commented on a most stimulating video/oral history of the careers and contributions to the labor movement of Willard Wirtz and W.J. Usery, and (2) our panelists who dissected the quite recent decision of the U.S. Supreme Court in the case of *14 Penn Plaza v. Pyett*, and presented their views of what the decision means from union, management, employee/plaintiffs and arbitrators' perspectives. As you know, *Pyett* concerns mandatory arbitration of statutory discrimination claims under union collective bargaining agreements.

The *Pyett* panel consisted of Fellow Paul Salvatore of the Proskauer Rose firm, who actually argued *Pyett* before the Supreme Court, Carl Levine, a partner of Fellow Gwynne Wilcox at the union side Levy Ratner firm, prominent arbitrator/mediator and Fellow John Sands, Fellow Willis Goldsmith, from the host firm Jones Day, and Fellow Don Sapir, plaintiff/employee attorney. Fellow Evan Spelfogel of Epstein Becker & Green served as moderator.

Mr. Goldsmith and Jones Day arranged for a buffet dinner and for CLE credits. Approximately thirty-five persons attended, including several by telephone. Consistent with past practice in this Region, there was no charge to attendees for the program, papers, CLE credits or dinner. The next meeting will be held at Jones Day again as is scheduled for Monday evening November 9.

OHIO MEETING

In 2005, Paul Tobias (Plaintiff), Charlie Warner (Management) and Fred Cloppert

(Union) founded the Ohio "chapter" of the College. Since then the group has met twice a year regularly for lunch at a private club in downtown Columbus, Ohio. The attendance, which usually varies between ten and twelve guests, includes Fellows from Cincinnati, Cleveland and Columbus. The following is a list of past meetings and speakers:

November 29, 2005
Judge Jeffrey S. Sutton, U.S. Court of Appeals Sixth Circuit.

November 15, 2006
Gary Muffley, Regional Director of the NLRB, 9th Region, topic: "What's New at the NLRB."

May 16, 2007
Professor James J. Brudney of the Ohio State University Law School.

November 30, 2007
Matthew Miko, Chief Legal Counsel, Ohio Civil Rights Commission.

November 13, 2008
OSU Law Professor Ruth Colker, topic: "Recent ADA Changes."

May 27, 2009
Felix Wade and Kristen Watson, a discussion/debate regarding the proposed Employee Free Choice Act.

The College of Labor and Employment Lawyers remembers those distinguished Fellows and Emeritus Fellows who have passed away in the last year.
Their hard work and commitment to the field of labor and employment law set stellar examples for Fellows of the College.

Homer W. Keller

V. Scott Kneese

Sam C. Pointer, Jr.

Seymour Waldman

Sandra Zemm

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