

## *The Employee Free Choice Act: The Biggest Change in Labor Law in 60 Years*

by Robert Quinn and John Leschak

One of the most contentious proposals of the 2008 Presidential campaign and of the current Congressional season in Washington is the Employee Free Choice Act (EFCA). Supported by President Obama and opposed by Senator John McCain and most other Republicans, EFCA would be the most significant change to federal labor law in over sixty years. First, EFCA would allow the National Labor Relations Board (“NLRB”) to certify a union without an election if a majority of workers voluntarily sign cards authorizing a union to represent them (this provision is also known as “card check”). Second, EFCA would impose new penalties on employers who violate workers’ rights during initial organizing campaigns. And third, EFCA would permit bargaining disputes between an employer and union to be decided by arbitration during first-time contract negotiations.

However, several powerful groups are opposed to any change. The U.S. Chamber of Commerce has launched a vociferous campaign against EFCA’s “Card Check” provision, which they claim will lead to intimidation and coercion in the workplace.<sup>1</sup> Congressional Republicans have also been outspoken opponents of card check. Last February, Republican Senators Jim DeMint (S.C.) and Mike Enzi (Wyo.) introduced the Secret Ballot Protection Act, S. 478. This bill would make it illegal for an employer to voluntarily recognize a union through card check and would require NLRB elections.

While many are opposed to EFCA, it cannot be denied that reform is needed. Congress passed the National Labor Relations Act (“NLRA”) in 1935 to protect employees’ “right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” The NLRA galvanized union organizing and, by 1945, 35% of private sector American workers belonged to a union.<sup>2</sup> Congress amended the NLRA in 1947, and again in 1959, but there have been no other major revisions to the Act since then.<sup>3</sup> Meanwhile, union membership has dropped to 7.6 % of the private workforce, far below levels prior to the NLRA when *no* federal laws protected the rights of employees to engage in concerted activity.<sup>4</sup>

Wilma Liebman, the current chairwoman of the NLRB, has written that the NLRA is a “doomed legal dinosaur” that has “failed to protect workers rights to organize.”<sup>5</sup> Some commentators argue that legislative reforms, like EFCA, are not necessary because the NLRB can change legal doctrine to better protect workers rights. But, this “solution” is a double-edged sword. While anti-labor decisions of the Bush-appointed Board may be flipped once an Obama Board takes charge, nothing prevents a future conservative-appointed Board from undoing the work of the Obama Board. It can even be argued that the Board never actually establishes precedent, as shown by how often the Board’s views change when new presidential administrations take over.<sup>6</sup>

The first part of our article pays particular attention to decisions by the Bush Board. These decisions highlight how labor law has become prone to disruption by political appointees, and suggest why the best way to preserve workers rights is to change the law. Our second section discusses how EFCA would change the NLRA and the procedures of the NLRB, and describes several models similar to EFCA that could be followed when reforms are implemented. In contrast to other legal analyses of EFCA, we look at *how*, rather than *why*, it should be put into practice.

## 1. The Current State of US Labor Law

The AFL-CIO and other leading unions believe that EFCA is a necessary reform for three reasons: (1) The current process for forming unions – NLRB elections – is badly broken, (2) Remedies for NLRA violations do not adequately deter employer unfair labor practices, and (3) Even if a union wins recognition, the good faith bargaining requirement is not enough to ensure a contract is created. The following sections examine the current state of U.S. labor law to analyze the validity of these allegations.

### a) The NLRB Election Process

Section 9 of the NLRA governs the election process by which unions can gain legal certification. If a union submits a petition to the NLRB and the Board finds that there is a question of representation affecting commerce (with at least 30 % of workers supporting the union), the Board will direct a secret ballot election. If the union wins the election it gets a presumption of majority status for at least one year, but if the employer prevails there can be no question of representation for one year.<sup>7</sup>

Opponents of EFCA's card check provision claim that the secret ballot is of central importance to the NLRA. However, historically card check has always been preferred to elections. The original NLRA, the 1935 Wagner Act, rejected the preference for elections and the vast majority of unions gained recognition voluntarily. Under Wagner, the purpose of elections was investigatory and Board elections generally only occurred when there was a conflict between two or more unions concerning who represented the majority of employees.<sup>8</sup> When elections were held, any employer interference was considered inherently coercive and illegal.<sup>9</sup>

In 1947, the Taft-Hartley amendments to the NLRA fundamentally changed the nature of elections. The amendments expanded employer free speech, limited union access to the electorate, and outlawed many union activities. But, the Board maintained a preference for voluntary recognition, holding in the case of *Joy Silk Mills* that an employer must recognize a union on the basis of card check unless they could objectively demonstrate to the Board that there was doubt as to whether the cards accurately represented the employees' wishes.<sup>10</sup> In 1974, the Supreme Court overturned *Joy Silk Mills*, holding in *Linden Lumber* that an employer had no obligation to recognize a union on the basis of card check alone. Under current law, if the employer refuses to recognize a petitioning union, the union must petition the Board for an election. Unfortunately, employers can now use the election process to secure time to defeat unionization efforts.

The current time frame between the filing of a petition and the election averages between 39- 56 days and over 90 % of elections take place within sixty days of the filing of the petition.<sup>11</sup> During this time, the employer enjoys unlimited access to workers, while the petitioning union is provided only the names and contact information of the affected employees within seven days following the scheduling of the election date.

Employers' advantages in a union campaign are further amplified by: (1) non-employee union organizers' lack of access to the workplace; (2) employer "free speech rights;" (3) increased opportunities for employers to discharge union supporters due to the Bush Board's narrowing of the definitions of "employee" and "mutual aid and protection;" and (4) the *Dana* notice requirement's restraint on voluntary recognition.

The seminal case of *Lechmere* (1992) has made initial union organizing campaigns much more difficult. In *Lechmere*, the employer prohibited non-employee union solicitation anywhere on the employer's property. As a result of the employer's ban, the union was unable to get in contact with 80 % of the employees. After obtaining only one authorization card, the union filed an unfair labor practice claim, arguing that the employees' right to self-organization, guaranteed by Section 7 of the NLRA, depended on their ability to learn the advantages of self-organization from others.

The Supreme Court majority disagreed with the union, holding that the NLRA confers virtually no rights on non-employees seeking to solicit on an employer's property. The results of *Lechmere* are that in all but the most isolated of workplaces, the employer maintains unlimited access to the electorate while the union may need to resort to methods as difficult as tracking license plate numbers, paying for expensive newspaper ads, or standing on dangerous roads.<sup>12</sup> It is hard to believe that the framers of the NLRA intended Section 7 to be interpreted in such a way.

Unions have tried to circumvent *Lechmere* through "salting" – where unions send organizers to companies to seek employment so once hired they can motivate employees to unionize.<sup>13</sup> However, the Bush Board made salting considerably more difficult in *Oil Capitol II*. In this 2007 case, the Board held that salts who are fired for engaging in union activity are not presumed to be entitled to backpay, the statutory damages award for unlawful discharges. The new evidentiary standard for the establishment of backpay awards makes salting more financially burdensome for unions.<sup>14</sup>

Employers have long understood that an effective method to combat a union election is to threaten employees with the closing or transfer of the plant, or a loss of pay and/or work hours.<sup>15</sup> The Taft Harley Amendments codified employers' right to engage in "free speech" under section 8(c), and courts have continuously expanded its scope to the detriment of workers' rights. Two recent examples of this expansion are *Crown Bolt*<sup>16</sup> and *St. Josephs News-Press*.<sup>17</sup>

The case of *Stanadyne Automotive* illustrates the extent to which an employer's "free speech rights" weigh more on the legal scales than employees' right to organize under the NLRA. In *Stanadyne*, in response to a union campaign, the employer instituted a rule that prohibited employees from discussing, soliciting, or distributing fliers on working time that discussed the union. The CEO organized seven compulsory meetings with his employees where he predicted strikes, plant closure, and violence in the event of unionization and stated "*threats, intimidation, and death*" are a reality of a union environment. The Board held that this conduct did not exceed the bounds of permissible campaign speech. But, then-Board-member and current-Board-chair Wilma Liebman argued in dissent that the ruling was based on "decisions that retreated from well-established principles of Board law and that weakened employees' protections under the act."<sup>18</sup>

While Ms. Liebman wants to overturn Bush Board decisions like *Crown-Bolt* and *Stanadyne*, she has also admitted that "even a Board firmly committed to a dynamic application of the law would be limited in what it could do."<sup>19</sup> That is because the Board is constrained not only by their own precedents, but by the text of the NLRA itself.<sup>20</sup> Section 8(c) of the NLRA effectively prohibits the Board from creating strict election speech guidelines like those adopted throughout Canada.<sup>21</sup>

The NLRA prohibits employers from firing employees for engaging in activities for workers' mutual aid and protection.<sup>22</sup> Despite this specific prohibition, workers are fired in one forth of organizing campaigns and overall 20% of union activists are terminated.<sup>23</sup> The number of discriminatory discharges has increased as the Board has narrowed the legal meaning of "*mutual aid and protection*," and "*employee*."

In a string of recent cases the Board has significantly narrowed what constitutes lawful mutual aid or protection, thus providing employers with the ability to discharge employees for activities formerly protected by the Act.<sup>24</sup> For example, in cases involving conflicts between organizing rights and property rights, the Board overturned a policy of "seeking a proper accommodation between the two," and created a bright-line rule that an employer's property rights, however minimal, outweigh any employee right to engage in union activity.<sup>25</sup> The Board has also greatly narrowed the definition of "employee," overturning precedent and declaring university professors, the disabled, graduate students, and "salting" applicants to be "non-employees."<sup>26</sup>

The definition of "employee" is of crucial importance because the Taft Hartley Amendments expressly excluded "non-employees" from NLRA coverage, allowing employers to fire them with impunity. Supervisors

are among those “non-employees” excluded by Taft Hartley. The Bush Board has not only narrowed the definition of employee, it has also expanded the definition of “supervisor.”<sup>27</sup>

Dissatisfied with the election process and the Board, organized labor is increasingly relying on card check agreements as the preferred means of organizing. A card check agreement between the union and an employer generally provides that the employer will voluntarily recognize the union, if the union can present signed authorization cards from a majority of workers.

From 1998 to 2003, the AFL-CIO organized nearly three million workers, but less than one-fifth of those employees’ unions were certified through NLRB elections. At the same time, between 1998 and 2003, the number of NLRB elections held annually declined by 30%.<sup>28</sup> Union success-rates are higher under card check agreements than during elections. Although the most recent NLRB statistics show that unions won 67 % of elections held in the first six months of 2008,<sup>29</sup> organizing campaigns in which parties entered card check agreements ended with union recognition 78% of the time.<sup>30</sup>

These agreements, also known as “majority sign-up agreements,” were approved by the NLRB in *Keller Plastics* in 1966.<sup>31</sup> However, the Board modified *Keller* in the 2007 *Dana* case, holding that when an employer recognizes a union voluntarily, the employer must post a notice in the workplace and that the Board will continue to process any employee-filed decertification or rival union petitions until 45 days after the posting of the notice.<sup>32</sup> *Dana* gives an employer less incentive to voluntarily recognize a union because its decision may be subject to second-guessing through a decertification petition.

#### b) The Lack of Strong Remedies

The NLRA vested the crafting of remedies primarily to the discretion of the Board. Currently, the Board maintains the remedies of back-pay, posting notice, and injunctions, as well as the ability to create “extraordinary” remedies. However, labor scholars have long recognized that these remedies no longer deter employers from committing unfair labor practices.<sup>33</sup> The staggering number of employer unfair labor practices bears testament to the weakness of the current assortment of remedies. According to a recent study by Cornell University labor specialist Kate Bronfenbrenner: “Employers threatened to close the plant in 57% of elections, discharged workers in 34%, and threatened to cut wages in 47% of elections. Workers were forced to attend anti union one-on-one sessions with a supervisor at least weekly in two-thirds of elections. In 63% of elections employers used supervisor one-on-one meetings to interrogate workers about who they or other workers supported, and in 54% used such sessions to threaten workers.”<sup>34</sup>

The back pay order is designed to make the employee whole for losses suffered on account of an unfair labor practice.<sup>35</sup> However, the legal test for determining eligibility for back-pay, known as the *Wright Line* test, leaves many employees like Humpty Dumpty – shattered and unable to be put back together again. Under the *Wright Line* test, the fired employee must initially show that the employer’s opposition to union activity was a motivating factor in their termination. The burden then switches to the employer who can concede anti union sentiment was a factor in the decision to fire the employee or argue that the employee was lawfully fired for a legitimate business reason. Even if the employer is unable to prove a lawful termination, he can still lessen his liability by showing that the employee could have mitigated their own damages.<sup>36</sup>

In *St. George*, the Board modified the *Wright Line* analysis by permitting an employer to relieve himself of his burden on mitigation by producing evidence that there were substantially equivalent jobs in the area during the back-pay period. Once the employer does this, the burden is then placed on the employee to prove the inability to mitigate their damages.<sup>37</sup> In *Grosvenor Orlando Associates*, the Board used this analysis to deny an unlawfully terminated worker back-pay because he waited *fourteen days* to seek new employment.<sup>38</sup> Prior to these decisions, the average backpay for an unlawfully terminated employee averaged only \$2,700. By placing the burden on the fired employee, the Board will likely make future back-pay awards even less.<sup>39</sup>

The Board can also order injunctions under section 10(j) of the NLRA. Section 10(j) injunctions allow the NLRB to temporarily intervene in a labor dispute to stop an employer's unlawful actions. The issuance of 10(j) injunctions can be essential to unions since the traditional enforcement process can take several years. However, since 2001, the Board's has issued an average of only 16 injunctions per year – a 388 % decline from the prior eight years!<sup>40</sup>

When the Board finds that an employer violated the Act during a union election campaign, it attempts to restore the electorate to “pre-violation status.” If the violations are perceived to be inconsequential to holding a fair election, the Board may order no substantive remedy. On the other hand, if the employer commits egregious violations that prevent the holding of a fair election, then the Board can use “extraordinary” remedies like a *Gissel* bargaining order or setting the election results aside.

The Board is supposed to issue a *Gissel* order in exceptional cases involving “outrageous” and “pervasive” employer unfair labor practices.<sup>41</sup> The remedy orders that the union be certified, over any employer objections, but only if the union had a majority of signed authorization cards. The ineffectiveness of the re-election remedy (employers prevail even more often in a re-election) makes the *Gissel* order an extremely important remedy. Unfortunately, the Bush Board rendered *Gissel* orders virtually obsolete.<sup>42</sup>

The 2004 case of *Hialeah Hospital* is illustrative of *Gissel*'s decline. In *Hialeah*, the employer committed many egregious unfair labor practices during an election campaign. Just hours after receiving the union's demand for recognition, the employer held a mandatory meeting where he threatened employees. The owner then punished those workers he suspected of being union supporters, and fired the two leading organizers. Finally, immediately before the election, the owner held another meeting threatening employees with discharge if they engaged in union activities and reminded them of the two employees already fired. The trial court issued a *Gissel* order, finding that the unfair labor practices made holding a fair election impossible. But, the Board vacated the order, holding that the situation could be remedied through a second election.<sup>43</sup> Even if the next Board revives the *Gissel* order and injunctions, and reverses *St. George*, they would still be limited in their ability to remedy by the NLRA's lack of punitive measures.

### c) Collective Bargaining

Winning a Board election represents only half the battle against an employer committed to defeating the union. Currently, forty five % of newly recognized unions fail to reach a contract with the employer in the two years following certification.<sup>44</sup> This shows that the NLRA's good faith bargaining requirement is an insufficient protection of employees' right to engage in collective bargaining.

Section 8(d) of the NLRA defines the duty to bargain collectively as the “mutual obligation of the employer and representative to meet at reasonable times and confer in *good faith* with respect to ....terms and conditions of employment.”<sup>45</sup> Section 8(d) also explicitly forbids the Board from imposing a contract provision on the union or an employer, regardless of a party's refusal to bargain in good faith. Courts have strictly adhered to this position. In *HK Porter*, the Supreme Court found that the employer intentionally and illegally delayed the bargaining process for eight years in an effort to destroy the union. Despite the Court of Appeals holding that the only way to rectify the situation was to enforce a contract based on union demands, the Supreme Court held that the Board had *no* authority to supervise over contract provisions.<sup>46</sup>

The practical result of *HK Porter* was to limit the Board, even when faced with a party that has clearly refused to bargain in good faith, to issue only an order to comply with Section 8(d) in the future. Without a more effective remedy, it is generally up to the employer or the union to place pressure on the other to succumb to their demands. The NLRA largely relies on the employer and the union to engage in self-help to achieve fair contract provisions. However, this premise has been subverted by the Taft Harley Amendments, which lessened the equality of bargaining power that is essential to the self-help approach.

A union's primary means of putting economic pressure on an employer is to engage in a strike. However, workers' ability to strike was severely limited by the Taft-Hartley and Landrum-Griffin amendments, which prohibited jurisdictional strikes, wildcat strikes, solidarity or political strikes, secondary boycotts, and "common situs" picketing. Unions also face various other obstacles in inducing employees to strike. The biggest of these obstacles is the employer's right to hire replacement workers to fill in for striking employees. If the union is engaged in an "economic strike" (one for better wages or benefits), the employer has no duty to rehire the strikers at the conclusion of the strike, although it must offer former strikers any available positions in the future. Thus, the consequences of replacement generally are as harsh as actually losing your job.<sup>47</sup>

The law has expanded the arsenal of economic weapons available to employers while limiting the arsenal available to unions. Employers maintain the power to order a lock out, hire replacement workers, or (upon reaching an impasse or good-faith deadlock) to unilaterally impose conditions on employees. The fact that a union won NLRB certification does not compel the employer to concede to any union demands. The employer must meet with the union but can take a hostile position on all union demands. Also, the employer may insist that employees waive rights protected under the Act. This intransigence could eventually entitle the employer to declare an impasse and implement their demands over the union's objection.<sup>48</sup> The employer can add additional pressure on the union by temporarily laying off or "locking-out" the employees once an impasse is reached. The employer can also prolong the lockout by hiring temporary workers to replace strikers.<sup>49</sup>

The laws concerning collective bargaining provide the employer far more bargaining power. This is entirely inconsistent with the first section of the NLRA, stating that one of its main purposes was "restoring equality of bargaining power between employers and employees."<sup>50</sup>

## 2. How EFCA would change the NLRA

EFCA would enact three major changes in the NLRA. First, EFCA would remove the employer's right to demand an election by allowing the NLRB to certify a union on the basis of card check. Second, EFCA would establish new penalties for employer violations of workers' rights during initial organizing or first contract campaigns. And finally, EFCA would facilitate initial collective bargaining agreements by allowing parties to submit bargaining disputes to binding arbitration.

### a) Card Check

Organized labor is increasingly relying on card check (a.k.a. "majority sign-up") instead of elections. However, under current US labor law, elections remain the primary way for a union to gain legal certification.<sup>51</sup> Although the NLRA states that the NLRB is only empowered to call an election if a "question" arises over a claim of majority support,<sup>52</sup> as the Supreme Court ruled in *Linden-Lumber*, an employer may "question" a union's claim of majority support for any reason or no reason at all.<sup>53</sup>

EFCA's card check provisions would overrule *Linden-Lumber* by amending NLRA section 9(c) to allow the NLRB to certify a union without an election if the Board finds that a majority of the employees signed valid cards designating the union as their bargaining representative and that no other union is currently certified as the employees' representative.<sup>54</sup> But, EFCA would not create the majority sign-up process.<sup>55</sup> Instead, it leaves the development of guidelines and procedures to the NLRB's discretion, although the guidelines and procedures must include model collective bargaining authorization language, and procedures to be used by the Board to establish the validity of signed authorization cards. In fulfilling EFCA's mandate, the NLRB could look to the *Joy Silk* doctrine, state labor law governing public sector workers, and Canadian and British labor laws.

Under the *Joy Silk* doctrine, "an employer may in good faith insist on a Board election as proof of the Union's majority but ... it 'unlawfully refuses to bargain if its insistence on such an election is motivated, not

by any *bona fide* doubt as to the union's majority, but rather by a rejection of the collective bargaining principle or by a desire to gain time within which to undermine the union."<sup>56</sup> Whereas under *Linden Lumber* an employer can insist on an election for no reason other than to gain time to undermine the union, *Joy Silks* conditioned an employer's election request on *good faith doubt*. A good faith doubt could be based on insufficient proof of majority support, or coercion in obtaining majority support. But, the employer did not need to have actual proof; instead, they only needed to show "some reasonable grounds for believing."<sup>57</sup>

If the Board used the *Joy Silk* doctrine as a guideline for the development of majority-sign-up rules, those rules might resemble the following:

- The Board shall not certify a labor organization as employees' representative without an election if:
- a.) there are reasonable grounds to believe that the authorization cards establish majority support for the labor organization in an inappropriate unit and in no appropriate units;
  - b.) there are reasonable grounds to believe that the labor organization does not have majority support from employees within an appropriate bargaining unit; or
  - c.) there are reasonable grounds to believe that the labor organization obtained majority support through coercion or fraud, and that majority support would not exist but for the misconduct.<sup>58</sup>

However, reliance on the *Joy Silk* doctrine would still leave several issues unanswered. For instance, what if an election petition and an EFCa petition are filed at the same time? Whose petition should prevail? To answer these questions, the Board could look to state labor laws for guidance.

There are now 22 laws in 12 states that grant certain public and private employees the right to form unions through the majority sign-up process.<sup>59</sup> The majority sign-up law of New York serves as a model for a federal card-check regime. The New York Public Employees' Fair Employment Act (the Taylor Law)<sup>60</sup> directs the N.Y. State Public Employment Relations Board (PERB) to ascertain public employees' choice on unions. Pursuant to Section 207.2 of the Taylor Law, PERB adopted Section 201.9(g)(1) of their Rules of Procedure, which authorizes PERB's Director to certify a union as the bargaining agent of a group of public employees without an election if a majority of employees support the union. This majority must be shown by documentary evidence, including dues deduction authorization cards and individual designation cards.<sup>61</sup> Section 201.9(g)(1) refers to these two types of documentary evidence, but PERB has held that this reference is merely descriptive; it does not restrict the Board from accepting 'other evidences' of majority support.<sup>62</sup> Finally, 201.9(g)(1) states that card check is only available when "the choice available to the employees in a negotiating unit is limited to the selection or rejection of a single employee organization."

Under section 201.2(b) of PERB's Rules, an employer or union can file a "unit clarification" or "unit placement" petition at any time. A unit placement petition may be filed with a certification petition or in response to a certification petition, and unit issues are generally considered before the director determines whether an election is necessary. In contrast, challenges to the validity or authenticity of the cards, as well as allegations of union coercion, can only be made in response to the Director's decision on whether or not an election is required.<sup>63</sup> If both an election petition and a card check certification petition are filed, the latter petition will always prevail over the former as long as 201.9(g)(1)'s majority status requirement is met.<sup>64</sup>

NY's PERB procedures highlight several principles for a US card-check system. First, majority sign-up should be available only in cases where only one union is involved. Second, majority support may be established by more than authorization cards. Third, if the Board determines that a union is eligible for certification without an election, the employer should have an opportunity to challenge the Board's determination. Fourth, since unit-decisions are normally made during pre-election hearings, the Board should create a unit placement petition<sup>65</sup> that can be submitted when the union is seeking card-check. And fifth, employees' petition for card-check certification should always prevail over an employer's election petition, except where the union is not eligible for card-check certification.

Canada and Great Britain have both adopted card-check. Canada's national labor code and four provincial labor codes permit card-check certification.<sup>66</sup> Labor boards investigate to ensure that no fraud or coercion has occurred, and the statutes require card signers to complete a membership application and make a small payment to the union to show that their choice was voluntary. Furthermore, some provincial boards will order an election when card signers are a relatively narrow majority, or where the outcome is closely contested.

Great Britain's Employment Relations Act of 1999 also encourages voluntary recognition, rather than elections.<sup>67</sup> Under this Act, if an employer refuses to recognize a union, the union can apply to the Central Arbitration Committee ("CAC"), a state agency that determines whether or not the union has majority support. The CAC can certify the union without an election, except: (1) when an election is in the interest of good industrial relations; (2) when a significant number of workers inform the CAC that they do not want the union; or (3) when "evidence" regarding the circumstances in which union members became members creates sufficient doubts about whether a significant number of workers really want the union to bargain for them.<sup>68</sup>

While developing procedures for majority sign-up under EFCA, the NLRB could adopt some of the additional safeguards used in Canada and Britain. First, the Board could require card-signers to complete a union membership application and make a small payment to the union to ensure that majority support is genuine. Second, like provincial labor boards in Canada and the CAC in Britain, the Board could direct an election even where there is majority support in an appropriate unit if there is only a simple majority, when an election would be "in the interest of good industrial relations," or other extenuating circumstances are present.

#### b) Quick Elections and Other Proposed Revisions

Opposition to card check has crossed party lines, with many so-called moderate Democrats criticizing the provision. It is rumored that the card check section might be removed to appease moderates, replaced by a "quick election" scheme requiring union elections to be held within five or 10 days after 30 % of workers sign cards favoring having a union.<sup>69</sup> To further address labor's concerns, Senators are also considering adding sections that would require employers to give union organizers access to company property (legislatively overruling *Lechmere*) and would bar employers from requiring workers to attend "captive audience meetings."<sup>70</sup>

Four Canadian provinces currently have similar "quick election" regimes.<sup>71</sup> All four of these provinces previously had card-check but moved to an "instant ballot" scheme requiring provincial labor boards to hold an election within five to seven days of receiving a petition supported by a card majority.<sup>72</sup> However, a quick timeframe is not the only thing that differentiates union elections in Canada from management-dominated NLRB elections. All Canadian provinces, including those that have replaced card-check with quick elections, have adopted restrictions on employer electioneering, and tough penalties for unfair management practices.

For example, in Ontario, which has quick elections instead of card check, the Ontario Labor Relations Board ("OLRB") regularly certified unions to punish employers for holding captive audience meetings.<sup>73</sup> This "mandatory certification" remedy is similar to NLRB *Gissel* orders. Although the OLRB was stripped of this power in 1998,<sup>74</sup> the Board can still issue remedies that are much more substantial than those normally issued by the NLRB. For example, in *Barons Metal* (2001), the OLRB not only ordered the election to be re-run, it also ordered the firm to pay compensation to employees and the union, provide the union with an office inside the plant, and to pay employees for regular meetings with the union on company premises.<sup>75</sup>

In the *Fieldcrest Cannon* case, the NLRB ordered "special access" remedies like those issued in *Barons Metal*. The Board ordered that the employer: grant union members a 5.5 % wage increase; grant the Union and its representatives reasonable access to all places where notices to employees are customarily posted, and to the employer's facilities in non-work areas during employees' non-work time; give notice of, and equal time and facilities for the Union to respond to, any anti-union address made by the employer to its employees; and give the Union the right to deliver a 30-minute speech to employees on working time prior to any Board election

which may be scheduled in which the Union was a participant.<sup>76</sup> All of these special remedies were upheld by a federal court after the employer challenged the decision, except for the 5.5 % wage-increase.<sup>77</sup>

Although the Board can issue special remedies, they languish in disuse.<sup>78</sup> The remedies' effectiveness is also limited by their reactive nature. Under *Lechmere*, union organizers are denied access to the workplace prior to the election. They can only be awarded access after the employer has already defeated their efforts. To address these concerns, EFCA may include sections giving union organizers access to employees *as of right*, rather than only as a remedy for past employer misdeeds.

### c) Stronger Remedies

The weakness of the NLRA's remedial scheme is apparent when it is compared to other federal statutes. If an employer violates NLRA section 8(a)(3), the employee is legally entitled to reinstatement and back-pay in the amount of back wages minus what the worker earned or could have earned in the interim.<sup>79</sup> In contrast, the Fair Labor Standards Act provides for *double* backpay without any subtraction for interim earned wages to workers who are not paid proper wages.<sup>80</sup> Anti-discrimination statutes, like Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act, also provide for damages for emotional distress and punitive damages.<sup>81</sup> Furthermore, it is much easier to prove an employer's violations of these acts.<sup>82</sup>

EFCA will strengthen NLRA remedies by: (1) requiring the NLRB to seek an injunction against any employer engaged in unlawful labor practices during an organizing or first contract drive; (2) providing for triple back pay when an employee is unlawfully discharged or discriminated against during an organizing or first contract drive; and (3) allowing the NLRB to impose civil fines of up to \$20,000 for each violation of NLRA sections 8(a)(1) and 8(a)(3) during an organizing or first contract drive.

Under the current version of NLRA section 10(l), an employer can seek a *mandatory* injunction against a union for violating NLRA sections 8(b)(4), 8(b)(7) or 8(e).<sup>83</sup> The Regional Director *must* request a temporary injunction in federal court if a charge is filed *against a union* for such violations and the Director believes the charge has merit. But, unions cannot seek 10(l) injunctions against any employer violations of NLRA 8(a). Instead, they are limited to seeking injunctive relief under NLRA 10(j). Under section 10(j), the NLRB has the option – *but not the requirement* – to seek a federal injunction against unlawful employer activity.

EFCA addresses this imbalance in injunctive relief by amending section 10(l) to state that investigation of charges of employer violations of NLRA 8(a)(1) or 8(a)(3) made during an initial organizing campaign or until the first collective bargaining contract is entered into “shall be made forthwith and *given priority over all other cases.*”

## 3. First Contract Mediation and Arbitration

Although NLRA 8(d) imposes a duty to bargain in “good faith,” employers often drag their feet during negotiations to avoid reaching a contract, especially during negotiations for a first contract.<sup>84</sup> In the U.S., 32 % of unions fail to reach a contract within one year after achieving recognition, while only 8 % of Canadian unions fail to do so.<sup>85</sup> This difference is likely due to the fact that Canadian labor law provides for first contract arbitration, whereas U.S. labor law does not.

Under current U.S. law, when negotiations come to a stand-still, the Federal Mediation and Conciliation Service (“FMCS”) may provide mediation and conciliation services upon the request of one or more parties to the dispute, if the dispute threatens a substantial interruption of commerce.<sup>86</sup> But, the NLRA does not provide for the use of binding arbitration to settle disputes.

EFCA would provide for more meaningful bargaining in first contract cases by amending section 8 to state the following: (h) Whenever collective bargaining is for the purpose of establishing an initial agreement following union certification: (1) the parties must start bargaining no later than 10 days after the employer receives a written request for collective bargaining from the union, unless the parties agree to a longer time period; (2) if the parties still have not reached an agreement after 90 days of negotiating, or such additional period as the parties may agree upon, then either party *may* notify FMCS of the existence of the dispute and request mediation; and (3) if FMCS is unable to bring the parties to agreement by mediation after 30 days, or such additional period as the parties may agree upon, then the Service “*shall* refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service.”

The third section of 8(h) provides for interest arbitration of collective bargaining disputes. Interest arbitration<sup>87</sup> developed in the public sector about 30 years ago in states that permit public employees to form unions and engage in collective bargaining. Some public sector employees in N.Y. have been using interest arbitration since 1974. N.Y.’s Taylor Law makes arbitration by a tripartite panel the final step in resolving bargaining impasses between the state and employees of police and fire departments.<sup>88</sup>

While relatively commonplace in the public sector, arbitration would be a drastic change to labor law in the private sector. NLRA 8(d) explicitly states that the duty to bargain in good faith “does not compel either party to agree to a proposal or require the making of a concession.” By requiring FMCS to refer disputes that are not settled to arbitration, EFCA essentially compels the party to agree. The conflict between EFCA and 8(d) raises the question of whether the proposed 8(h) integrates or excludes 8(d)’s duty to bargain in good faith.<sup>89</sup>

Parties may also be surrendering their right to resort to economic warfare by submitting to arbitration. NLRA section 8(d)(4) states that “[there] continues in full force and effect, *without resorting to strike or lock-out*, all the terms and conditions of the existing contract for a period of sixty days after [notice of a contract dispute is given to FMCS under Section 8(d)(3)] until the expiration date of such contract, whichever occurs later.” After FMCS is notified, “the parties must allow mediation efforts to take place for 30 days.”<sup>90</sup>

If parties cannot strike or lockout under 8(d)(4) until 30 days after FMCS is contacted, it seems that they would be similarly prohibited after FMCS is contacted under 8(h)(2) to mediate an initial bargaining agreement dispute, as well as when FMCS refers the dispute to arbitration under 8(h)(3). Furthermore, most public-sector employees who fall under interest arbitration laws, such as police officers and firefighters, do not have the right to strike, and the Supreme Court has interpreted binding arbitration clauses in collective bargaining agreements to waive the right to strike over matters subject to the arbitration clause.<sup>91</sup> EFCA is silent on employees’ right to strike while an arbitration proceeding is pending or currently taking place. Nevertheless, unions ought to consider the possibility that by accepting binding arbitration, they may be giving up their right to strike during negotiations for an initial collective bargaining agreement.

It is unclear how EFCA’s arbitral system would work. EFCA does not articulate any deadlines by which the arbitral panel must issue its decree, the standards governing the scope of any arbitrator-imposed terms and conditions, the subjects that may or may not be incorporated into any arbitration decision, the standards governing any appeal from arbitration, or how the “arbitration board” shall be selected. Instead, EFCA gives the FMCS the power to decide these substantive matters, stating that “the Service shall refer the dispute to an arbitration board *established in accordance with such regulations as may be prescribed by the Service.*”

Most arbitration panels are composed of three arbitrators, one selected by each party and the third selected by the two appointed arbitrators. Instead of letting the parties pick, FMCS could appoint all three by itself. Although EFCA does not seem like it would prohibit FMCS from doing that, selecting entire panels would likely lead to accusations of bias – either being too favorable to management or too favorable to labor. To avoid the perception of bias, FMCS could promulgate regulations that give each side control over selection of at least one arbitrator, reserving selection of the third arbitrator to the Service.

Opponents of EFCA are concerned about the scope of arbitration, claiming it would undermine private business decision-making. FMCS could appease these critics by adopting regulations based on NLRB case law that distinguish between mandatory and permissive bargaining terms and limit the scope of arbitration to mandatory subjects.<sup>92</sup> Such regulations may be necessary to uphold EFCA's explicit limitation of arbitration to establishing initial agreements. Federal court decisions show that the method of negotiating contract succession is a permissive subject.<sup>93</sup> Thus, extending arbitration to permissive subjects could possibly create a loophole in EFCA, allowing the use of initial arbitral decrees to extend arbitration to the negotiation of successor contracts.

However, limiting the panels' scope to mandatory subjects would still leave them with broad discretion. For example, contracting out of unit members' work is generally considered a mandatory subject,<sup>94</sup> so the panel could prevent the outsourcing of work. And pension plans for current employees is another mandatory subject,<sup>95</sup> so the panel could also require an employer to modify pension benefits.

#### 4. Conclusion

The need for reform of American labor law has increased as a result of the evisceration of long-standing NLRB precedent by the Bush-appointed Board. Although the Obama Board may reverse many of these decisions, workers' rights will remain in a precarious position if the law itself is not changed. Taft-Hartley's protection of employer "free speech" limits the Board's ability to prevent pre-election coercion. While the past Board was unwilling to use available remedies, a Board dedicated to aggressive enforcement will still have little to work with, owing to the weakness of the NLRA's remedial scheme. Finally, entering a collective bargaining agreement is too difficult due to the weakness of the "good faith" bargaining duty and the unequal ability to engage in economic warfare created by Taft-Hartley's restrictions on union activities.

EFCA's reforms must be viewed in the context of current and past law. The current election system gives employers too many advantages over unions. Card check could be implemented by the NLRB along the lines of the *Joy Silk* doctrine, as well as state and foreign law. The quick election scheme proposed in place of card check should also make it easier for workers to organize. Although EFCA only improves remedies available to workers, this "one-sided" reform is not so one-sided once you consider the current imbalance of available remedies between employers and employees. Lastly, EFCA's imposition of interest arbitration for initial collective bargaining disputes lacks details but these details can easily be filled in by FMCS through reliance on NLRB precedent.

If EFCA does not pass in the 111th Congress, labor is prepared for a long-term struggle to win its passage.<sup>96</sup> Thus, although EFCA may not pass this year, we hope that the foregoing legal analysis will remain relevant to the ongoing debate over the future of U.S. labor law.

---

*Robert Quinn and John Leschak are third-year students at the School of Law, Hofstra University.*

*REGIONAL LABOR REVIEW*, vol. 12, no. 1 (Fall 2009): 22 - 33.  
© 2009 Center for the Study of Labor and Democracy, Hofstra University

#### NOTES

<sup>1</sup> U.S. Chamber of Commerce. "The Employee Free Choice Act – The Card Check Bill." Retrieved July 11, 2009. <http://www.uschamber.com/issues/index/labor/cardchecksecrbal.htm>.

<sup>2</sup> Anne Layne-Farrar. "An Empirical Assessment of the Employee Free Choice Act: The Economic Implications." Retrived March 3, 2009. <http://ssrn.com/abstract=1353305>.

<sup>3</sup> Since 1959, all attempts to enact major reform of the NLRA have failed. See Estlund, Cynthia. "The Ossification of American Labor Law," *Columbia Law Review*, vol. 102 (2002): 1527 -1533. The Labor Law Reform Act of 1977, which had majority support in both Houses of Congress, "died after a five week Republican filibuster [in the Senate.]" *Id.* at 1540. Similarly, "[i]n 1992, and again in 1994, [labor law reform] bills gained majority support in both Houses of Congress, but succumbed to determined ...opposition in the Senate, where it takes sixty votes to end debate." *Id.* at 1541. See also Cox, Archibald, Derek Bok, Robert Gorman & Mathew Finkin. *Labor Law*. (14th ed., 2006) ("In July 1991, the House of Representatives ... passed H.R. 5, the Workplace Fairness Act, which would have amended the [NLRA] ... to prohibit the hiring of permanent replacements in most strike situations. The Senate failed to enact a companion bill, and efforts to do so came to a final defeat when in July 1994, S. 55 was dropped, in the face of a threatened filibuster.").

<sup>4</sup> Block, Richard N. "Rethinking The National Labor Relations Act and Zero- Sum Labor Law: An Industrial Relations View." *Berkley J. Emp. & Lab. L.*, vol. 18 (1997) : 30-31.

<sup>5</sup> Liebman, Wilma. "Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board." *Berkley Journal of Employment and Labor Law*, vol. 28 (2007): 569 – 590.

<sup>6</sup> Cooke, William N. & Gautschi, Fredrick H. "Political Bias in NLRB Unfair Labor Practices Decisions." *Industrial & Labor Relations Review*, vol. 27 (2006): 539. The five members of the NLRB are nominated by the President and confirmed by the Senate. The phenomenon of political bias on the Board is not new, as evidenced by a case study of the Eisenhower administration. See Scher, Seymour. "Regulatory Agency Control Through Appointment: The Case of the Eisenhower Administration and the NLRB." *Journal of Politics*, vol. 23 (1961): 667.

<sup>7</sup> 29 USC § 159.

<sup>8</sup> Dillard, Joel, Jennifer Dillard, "Fetishizing the Electoral Process: The National Labor Relations Board's Problematic Embrace of Electoral Formalism," *Seattle J. For Soc. Just.* Vol. 6 (2008): 819- 832. The intent of the original framers of the NLRA is also reflected in the text of the Act. "The employer's duty to bargain (Section 8(a)(5)) is subject not to Section 9(c), which deals with elections, but to Section 9(a), whose operative words 'designated or selected' unarguably mean more than elections." David Brody, *Why Labor Law Has Become a Paper Tiger*, NEW LABOR FORUM (2004).

<sup>9</sup> See generally Testimony of Jonathan P. Hiatt, Before the Committee on Education and Labor and the Subcommittee on Employment and Workplace Safety of the Senate Committee on Health, Education, Labor and Pensions, "The National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights." Retrieved March 18, 2009 (Nov. 14, 2007) <http://edlabor.house.gov/testimony/121307JonathanHiattTestimony.pdf>.

<sup>10</sup> See *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), 185 F.2d 732 (D.C. Cir., 1950), *cert denied* 341 U.S. 914 (1951).

<sup>11</sup> Anne Layne-Farrar, An Empirical Assessment of the Employee Free Choice Act: The Economic Implications. Retrieved March 19 2009. <http://ssrn.com/abstract=1353305>.

<sup>12</sup> See *Lechmere v. NLRB*, 502 US 527 (1991).

<sup>13</sup> Mabanta, Katie & Skloot, Alyson. "A Lower 'Salt' Content for Employers." *Hofstra Labor & Employment Law Journal*, vol. 26 (2008): 301 – 339.

<sup>14</sup> *Oil Capital Sheet Metal, Inc.* (Oil Capital II), 349 N.L.R.B. 118 (2007).

<sup>15</sup> Justice Warren noted in *Gissel* (1969) that in cases involving threats to close or transfer the plant, the Union won an election only 29 per cent of the time, while Unions had a 75 % winning rate in elections where the employer threatened to refuse to deal with the Union or reduce benefits.

<sup>16</sup> *Crown Bolt, Inc.* 343 NLRB 776, 777-778 (2004). In *Crown Bolt*, the Board held that statements by a manager threatening plant closure in the event of union victory were not illegal because the statements could not be presumed to have disseminated throughout the election. The Board shifted the burden to the union to provide affirmative proof that other employees were made aware of the threat.

<sup>17</sup> *St. Joseph News-Press*, 345 NLRB 474 (2005). In *St. Josephs News-Press*, the Board held that a supervisor's statement claiming that the employer might cut workers' hours if the union contract was certified did not amount to an illegal threat.

<sup>18</sup> *Stanadyne Automotive Corp.*, 345 NLRB 85, 86 (2005).

<sup>19</sup> Liebman, "Decline & Disenchantment," supra note 5, at 576.

<sup>20</sup> For example, NLRA Section 2, 29 U.S.C. 152(11), excludes "supervisors" from the coverage of the Act. When the NLRB tried to interpret this exclusion narrowly, they were reversed by the Supreme Court. In *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 720 (2001), Justice Scalia wrote that the NLRB's interpretation "cannot be given effect through this statutory text."

<sup>21</sup> See Logan, John. “How ‘Anti-Union’ Laws Saved Canadian Labour: Certification & Striker Replacement in Post-War Industrial Relations.” *Industrial Relations*, vol. 1 (2002): 129 – 158 (“When the U.S. Congress enacted the Taft-Hartley Act in June 1947, which included an employer free speech provision, [Canadian employer groups] campaigned for an identical provision in Canadian law. . . . But the Liberal government categorically rejected its demands for a Canadian Taft-Hartley, insisting that a free speech provision was unnecessary.”).

<sup>22</sup> In *Eastex v. NLRB*, 437 U.S. 556 (1978).

<sup>23</sup> “The Silent War: The Assault on Worker’s Freedom to Choose a Union and Bargaining Collectively in the United States.” Retrieved March 28, 2009. [http://www.aflcio.org/joinaunion/how/upload/vatw\\_issuebrief.pdf](http://www.aflcio.org/joinaunion/how/upload/vatw_issuebrief.pdf).

<sup>24</sup> In *Orchard Park Health Care*, 341 NLRB 642, 643 (2004), two nurses reported to a State agency that the nursing home was intolerably hot, without an air condition, and without bottled water for the staff and patients. The employer suspended one of the nurses and terminated the other. *Id.* The Court held that calling the hotline was concerted activity but too attenuated to come within the mutual aid or protection clause. *Id.* at 644. Likewise in *Holling Press Inc.*, 343 NLRB 301 (2004), an employee solicited another employee to testify in her sexual harassment case against a supervisor and the employer responded by terminating the employee. *Id.* at 302. The Board held that the employee’s action, although concerted, was individual in nature and thus fell outside the purview of section 7 of the NLRA. *Id.*

<sup>25</sup> The Board applied this bright-line rule in the *Quietflex* case, when eighty-three employees congregated in the employer’s parking lot seeking from management a pay raise, improved vacation, and better working conditions. The employer fired the employees when they attempted to return to work. Although the employees were at all times peaceful and engaged in a concerted fashion to present work-related complaints, the Board held that the employer could legally terminate the employees because his property rights outside the facility outweighed the employees’ right to engage in concerted activity to defend their labor rights. *Quietflex Manufacturing Co., L.P.* 344 NLRB 1055, 1058 (2005).

<sup>26</sup> See *Lemoine-Owen College*, 345 NLRB 1123 (2005) (holding that the faculty play a major and effective role in the formulation and effectuation of management policies at the college); *Brevard Achievement Center*, 342 NLRB 982 (2004) (holding that although disabled workers work the same hours, received the same wages and benefits, and perform the same task, under the same supervisors as non disabled workers, their relationship to the employer was primarily rehabilitative and not employer/employee); *Brown University*, 342 NLRB No. 483 (2004) (graduate students are admitted, not hired by a university, and those for whom supervised teaching or research is an integral component of their academic development are not employees for the purposes of the act) (overturning *New York University*, 332 NLRB 1205 (2000)); *Toering Election company and Foster Electrics, Inc.*, 351 NLRB No. 18 (2007) (“salts” are excluded from the act and in order to prove hiring discrimination the General Council bears the burden of establishing an individual’s genuine interest in seeking to establish an employment relationship).

<sup>27</sup> For example, in *Wilshire at Lakewood*, the Board held that the employer did not violate the NLRA by terminating two union supporters held to be “supervisors” based on one incident in which each of the men dismissed an employee from work early. The Board held in *Wilshire At Lakewood*, 345 NLRB 1050 (2005), that a nurse qualified as a supervisor because on two occasions she wrote up other nurses for egregious violations and on two other occasions allowed two employees to go home early in “isolated and exigent” circumstances.

<sup>28</sup> See James J. Brudney, “Neutrality and Card Check Recognition: Prospects for Changing Paradigms,” 90 IOWA L. REV. 819, 827-29 (2005).

<sup>29</sup> Union Win Rate in NLRB Elections Increased Substantially in First Half 2008, Daily Labor Report, Nov. 11, 2008.

<sup>30</sup> See Brudney, supra note 28, at 830 & nn. 49-50.

<sup>31</sup> *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966).

<sup>32</sup> *Dana Corporation*. 351 NLRB 434 (2007).

<sup>33</sup> Weiner, Michael. “Can the NLRB Deter Unfair labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement.” *UCLA L. Rev.* vol. 52 (2005): 1579-1579

<sup>34</sup> See Bronfenbrenner, Kate. “No Holds Barred: The Intensification of Employer Opposition to Union Organizing,” *EPI Briefing Paper 235* (May 2009).

<sup>35</sup> *Nathanson v. Labor Board*, 344 U.S. 25 (1952).

<sup>36</sup> *N.L.R.B. v Wright Line*, 662 F.2d 899, 903 (1981).

<sup>37</sup> *St. George Warehouse*, 351 NLRB No. 42, 5 (September 30, 2007)

<sup>38</sup> *Grosvenor Orlando Associates*, 350 NLRB No. 86 (September 11, 2007).

<sup>39</sup> Dau-Schmidt, Kenneth G. “The Changing Face of Collective Representation: The Future of Collective Bargaining”, *Chi-Kent L. Rev.* vol. 82 (2007): 903-916.

<sup>40</sup> Erin Johanson, “Key Enforcement Tool Collects Dust at Bush NLRB.” Retrieved March 19, 2009. <http://www.americanrightsatwork.org/eye-on-the-nlrb/editions/key-enforcement-tool-collects-dust-at-bush-nlrb.html>.

<sup>41</sup> *Gissel Packing Co. v. NLRB*, 395 US 575, 579 (1969)

<sup>42</sup> Bethel, Terry A. & Catherine Melfi, “The Failure of Gissel Bargaining Orders.” *Hofstra Lab. L. J.* vol. 14 (1997): 423, 426

<sup>43</sup> *Hialeah Hospital*, 343 NLRB 391-93 (October 29, 2004)

<sup>44</sup> The decline in unions reaching first contracts has progressed from only 14 per cent in 1962. See Gerald Mayer, Labor Union Certification Procedures, Use of Secret Ballots and Card Checks, Congressional Research Service (January 12, 2009), available at [www.crs.gov](http://www.crs.gov).

<sup>45</sup> Whether or not the Board finds a employer engaged in good faith bargaining determines whether a striking employee is entitled to reinstatement following a strike and whether the employer can declare an impasse and unilaterally impose their terms and conditions on the employees.

<sup>46</sup> *H.K Porter Company, Inc v. NLRB*, 397 U.S. 99, 1001 (1970).

<sup>47</sup> *Jones v. Local 520, International Union of Operating Engineers*, 603 F.2d 664 (7<sup>th</sup> Circuit 1979).

<sup>48</sup> Weiler, Paul. “Striking New Balance: Freedom of Contact and the Prospects for Union Representation.” *Harvard Law Review* vol. 98 (December 1984): 351-354, see also Weinger, Michael. “Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement.” *UCLA Law Review* vol. 52 (2005): 1579.

<sup>49</sup> *American Ship Building Company v. NLRB*, 380 U.S. 300, 309-10 (1965).

<sup>50</sup> 29 U.S.C. § 151

<sup>51</sup> The NLRB has ruled that “Board elections are the preferred means of testing employees’ support.” *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 725 (2001). And, the Supreme Court has stated that majority sign-up, or “card-check,” is “admittedly inferior to the election process.” *Gissel*, 395 U.S. at 602. This view is shared by several federal appellate circuits. See *NLRB v. Flomatic Corp.*, 347 F.2d 74, 78 (2d Cir. 1965); *NLRB v. S.S. Logan Packing Co.*, 386 F.2d 562, 565 (4<sup>th</sup> Cir. 1967); *J.P. Stevens & Co. v. NLRB*, 441 F.2d 514, 522 (5<sup>th</sup> Cir. 1971); *United Services for the Handicapped v. NLRB*, 678 F.2d 661, 664 (6<sup>th</sup> Cir. 1982); *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1371 (7<sup>th</sup> Cir. 1983); and *Avecor, Inc. v. NLRB*, 931 F.2d 924, 934 (D.C. Cir. 1991).

<sup>52</sup> Section 9(c)(1) of the NLRA, governing the NLRB’s power to conduct elections, states: “If the Board finds ... [that] a question of representation exists, it shall direct an election by secret ballot.”

<sup>53</sup> *Linden-Lumber*, 419 U.S. at 305 (quoting *Aaron Brothers*, 158 N.L.R.B. 1077, 1078 (1966)) (“[A]n employer is not obligated to accept a card check as proof of majority status ... and he is not required to justify his insistence on an election by making his own investigation of employee sentiment and showing affirmative reasons for doubting the majority status.”).

<sup>54</sup> H.R. 1409, S. 560, Employee Free Choice Act, 111th Cong. (2009) (emphasis added). This reform would be consistent with NLRA section 7, which gives employees the right to bargain collectively “through representatives of *their own choosing*.” Implicit in this language is the recognition that whether or not to form a union is a question for employees, not their employers.

<sup>55</sup> It should also be noted that EFCA does not eliminate the election process. Employees can still decide to petition the NLRB for an election. In fact, employees may decide to pursue an election because of the lower initial threshold of support required. Whereas union certification through card check requires support of over fifty % of unit members, a valid NLRB election petition only requires support of 30 % of employees. An additional reason for choosing an NLRB election over card-check is provided by *Dana Corporation*. 351 NLRB 434 (2007). By providing a 45 day window in which employees can decertify the union, *Dana* may create a significant impetus against pursuing card check recognition. But, it could be argued that *Dana* will be obsolete after the passage of EFCA. *Dana* is limited to “voluntary recognition” of a union. See *Dana*, at 441. Because current NLRB law gives employers the right to demand an election, any recognition based on card check is necessarily voluntary. EFCA puts an end to employers’ ability to refuse to recognize a valid card majority. Since an employer could no longer refuse a valid card majority, recognition on the basis of card-check could not legally be considered “voluntary.” Therefore, it could be argued that *Dana* would become moot if EFCA is passed.

<sup>56</sup> *Joy Silk Mills*, 85 NLRB at 1264 (quoting *Aircraft Hoisery Co.*, 78 NLRB 333 (1948)).

<sup>57</sup> *Celanese Corp. of America*, 95 NLRB 664, 673 (1951); overruled by *Levitz Furniture Co.*, 333 NLRB 717 (2001). Although *Celanese* dealt with withdrawal of recognition from a union, rather than an initial refusal to recognize a union, both situations were governed by the same “good faith doubt” standard. See *Celanese*, at 671-73. In *Levitz*, the Board overruled the “good faith doubt” standard, stating that “there are compelling legal and policy reasons why employers should not be allowed to withdraw recognition merely because they harbor uncertainty.” *Levitz*, at 717. Instead, “an employer may unilaterally withdraw recognition ... only where the union has *actually* lost majority support.” *Id.* (emphasis added).

<sup>58</sup> The employer could still demand an election if they could show reasonable grounds to doubt the union’s majority support. Furthermore, like under the *Joy Silk* doctrine, the employer would not need actual proof; instead, they would merely need to show *reasonable grounds to believe* that their doubt(s) may be true.

<sup>59</sup> State laws include: California Government Code, 3507.1; California Government Code, 3577; California Government Code, 71636.3; California Education Code, 92625.3; General Statutes of Connecticut, Chapter 561, Section 31-106; General Statutes of Connecticut, Chapter 166, Section 10-153b; Illinois Public Labor Relations Act, 5 ILCS 315/9; Kansas Statute, 72-5415; Maryland Code, Education, 6-405; Maryland Code, Education, 6-506; Massachusetts General Laws, Chapter 150E: Section 4; Massachusetts General Laws, Chapter 71, Section 89; Massachusetts General Laws, Chapter 50A: Section 5; New Hampshire Revised Statutes Annotated, Title XXIII, Section 273-A:10; New Jersey P.L. 2005, Ch. 161; New Jersey P.L. 2005, Ch. 161; Consolidated Laws of New York, New York State Labor Relations Act, Chapter 31, Article 20, Section 705; Consolidated Laws of New York, Chapter 18, Article 2, Section 12; North Dakota Century Code, 15.1-16-11; Oklahoma Statutes, 70-509.2; Oklahoma Statutes, 11-51-211; Oregon Revised Statutes, 243.682.

<sup>60</sup> N.Y. Public Employees' Fair Employment Act, Civil Service Law, Article 14.

<sup>61</sup> Section 201.9(g)(1).

<sup>62</sup> See *Beaver Central School Dist.*, 35 NYSER ¶ 3003 (holding that the union's current membership list was sufficient to discern employees' choice for representation).

<sup>63</sup> N.Y. Comp. Codes R. & Reg. tit. 4, ch. VII, sect. 201.9(g)(1).

<sup>64</sup> *Mamaroneck Union Free School Dis.*, 18 NYSER ¶ 4073 (1985).

<sup>65</sup> The Board already provides unit clarification petitions. See NATIONAL LABOR RELATIONS BOARD, FORM 502, available at [http://www.nlr.gov/nlr/shared\\_files/forms/nlrform502.pdf](http://www.nlr.gov/nlr/shared_files/forms/nlrform502.pdf).

<sup>66</sup> See R.S.C., c. L-2, § 30-3 (1985) (Can.) (Canada Labour Code, applicable only to industries of national concern such as transportation and communications industries, and banks); R.S.Q., c. C-27, § 21 (1977) (Que.) (Quebec Labour Code); R.S.B.C., c. 244, § 23 (1996) (B.C.) (British Columbia Labour Relations Code-requires 55% of bargaining unit members for certification); R.S.N.B., c. 1-4, § 14(2)-(5) (1973) (N.B.) (New Brunswick Industrial Relations Act-requires 60% of bargaining unit members for certification); R.S.P.E.I., c. Li-, § 12(4) (1998) (P.E.I.) (Prince Edward Island Labour Act); see also *D. G. Gilbert, Canadian Labour and Employment Law for the U.S. Practitioner*: 13, 32-33, 44-46, 400-03 (2003).

<sup>67</sup> Employment Relations Act, 1999, c. 26 (including Parts I and II of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act of 1992).

<sup>68</sup> See Hazel Oliver, *Trade Union Recognition: "Fairness at Work"?*, 20 COMP. LAB. L. & POL'Y J. 33, 35 (1998).

<sup>69</sup> Employment Law Post, "Democrats Drop EFCA Card-Check Provision," July 17, 2009. Retrieved August 15, 2009. <http://employmentlawpost.com/hrnews/2009/07/17/democrats-drop-efca-card-check-provision/>.

<sup>70</sup> Steven Greenhouse, "Democrats Drop Key Part of Bill to Assist Unions," *New York Times*, July 17, 2009.

<sup>71</sup> See R.S.O., c. 1, § 8 (1995) (Ont.) (Ontario Labour Relations Act; election within five days); Manitoba Labor Relations Act § 48(1) (election within seven days); R.S.N., c. L-, § 47 (1990) (Nfld.) (Newfoundland Labour Relations; election within five days); R.S.N.S., c. 475, § 25(3) (1989) (N.S.) (Nova Scotia Trade Union Act; election usually within five days).

<sup>72</sup> But, see Logan, John. "Union Recognition and Collective Bargaining: How Does the United States Compare With Other Democracies." *Perspectives on Work*, vol. 10 (spring 2009). <http://www.lera.uiuc.edu/Pubs/Perspectives/onlinecompanion/Spring2009Vol10/Logan.html> (last accessed August 16, 2009) ("[T]he policy situation is far from static and Canadian laws are much more malleable than their U.S. counterpart -- provinces that have moved from majority sign up to elections could still move back in the opposite direction. In May 2008, for example, the Ontario Legislature considered a bill to reintroduce majority sign up. Thus, majority sign-up could, once again, become the norm in Canada.")

<sup>73</sup> See *Wolverine Tube* [1963], 63 C.L.L.C. 1226 (O.L.R.B.), 1230, and *Sun Tube* [1962], O.L.R.B., *Monthly Report* 28, 29.

<sup>74</sup> Ontario Economic Development and Workplace Democracy Act of 1998. The 1998 Act was passed in response to a 1997 OLRB decision that imposed a union on Wal-Mart for engaging in aggressive anti-union electioneering. See *United Steelworkers of Am. v. Wal-Mart Canada Inc.*, [1997] O.L.B.R. Rep. 963; *United Steelworkers of Am. v. Wal-Mart Canada Inc.*, [1997] 34 C.L.R.B.R. (2d) 161.

<sup>75</sup> *Baron Metal Industries Inc.*, [2001] O.L.R.D. No. 1210.

<sup>76</sup> *Fieldcrest Cannon*, 318 N.L.R.B. 470 (1995).

<sup>77</sup> *Fieldcrest Cannon v. NLRB*, 97 F.3d 65 (4<sup>th</sup> Cir. 1996).

<sup>78</sup> Valley Hospital Medical Center, Inc., 351 NLRB 1250 (2007) (“[T]he Board reserves special remedies for cases involving ‘numerous, pervasive and outrageous’ unfair labor practices.”).

<sup>79</sup> See 29 U.S.C. 160(c); NLRB Rules and Regulations, Section 103.101 & 103.102(a); NLRB Casehandling Manual, Paragraph 10528 (reinstatement) & Paragraphs 10530-10546 (backpay).

<sup>80</sup> 29 U.S.C. § 216(b) (“Any employer who violates the provisions of section 206 [minimum wage] or section 207 [overtime] of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.”) (emphasis added).

<sup>81</sup> See ADA, § 706(f)(1), 42 U.S.C. § 2000e-5(f) (providing for civil actions by the Equal Employment Opportunity Commission and the person aggrieved); and § 706(g)(1), 42 U.S.C. § 2000e-5(g) (providing not only for backpay but also injunctions, appropriate affirmative action and other equitable relief). See also Title VII, 42 U.S.C. § 12117(a) (“The powers, remedies, and procedures set forth in section ... 2000e-5 ... of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter.”).

<sup>82</sup> Title VII, FLSA, and ERISA are all extremely protective. After showing that the employer is liable, there is no burden shifting. Likewise, the Supreme Court recently held in *Gross v. FBL Financial*, 557 U.S. (June 18, 2009), that the burden of proof in ADEA unlawful discrimination cases never shifts as it would do in an NLRA discriminatory discharge case. If age was a motivating factor in the decision to fire the employee, then the employer is liable, even if they also had a “legitimate business reason” to fire the employee.

<sup>83</sup> 29 U.S.C. § 160(l).

<sup>84</sup> This observation has bi-partisan support. In a 2006 memorandum, Ronald Meisburg, the Bush-appointed General Counsel for the NLRB, wrote that “our records indicate that in the initial period after election and certification, charges alleging that employers have refused to bargain are meritorious in more than a quarter of all newly-certified units (28%). Moreover, of all charges alleging employer refusals to bargain, almost half occur in initial contract bargaining situations (49.65%).” Ronald Meisburg, First Contract Bargaining Cases, General Counsel Memorandum, GC 06-05 (April 19, 2006).

<sup>85</sup> Ortega, Julie Martinez. “Why We Should Support the Employee Free Choice Act,” *Labor Studies Journal*, vol. 31 (2007): 23, 26.

<sup>86</sup> 29 U.S.C. section 173(b).

<sup>87</sup> Interest arbitration is the adjudication of terms and conditions of employment to be contained in a resulting collective agreement. This is different than Grievance Arbitration, which deals with the allegation that an existing collective agreement has been violated or misinterpreted.

<sup>88</sup> See O’Nil, Terry & E.J. McMahon, “TAYLOR MADE: The costs and consequences of New York’s Public Sector Labor Laws,” retrieved March 10, 2009, [http://www.empirecenter.org/Documents/PDF/TaylorLaw\\_Final.pdf](http://www.empirecenter.org/Documents/PDF/TaylorLaw_Final.pdf).

<sup>89</sup> Although 8(h) may integrate 8(d)’s “good faith duty,” it is unlikely that 8(h) integrates 8(d)’s notice requirements. EFCA explicitly limits 8(h) to collective bargaining “for the purpose of establishing an initial agreement” – in other words, where a collective bargaining agreement does not exist yet. In contrast, the notice requirements of 8(d)(1) – (3) are explicitly limited to “where there is in effect a collective bargaining contract.” However, 8(h) would probably integrate the notice requirements added to the NLRA by the 1974 Healthcare Amendments. See 29 U.S.C. §§ 152(14), 158(d)(A) – (C), 158(g), 169, 183, 213 (1976 & Supp. V 1981). See also Michael Stapp, *Ten Years After: A Legal Framework of Collective Bargaining in the Hospital Industry*, 2 HOFSTRA LAB. L.J. 63 (1994). Section 8(d) was amended by the addition of sections 8(d)(A), (B), and (C) – which apply “[w]hen the collective bargaining involves employees of a health care institution.” Section 8(d)(B) states “[w]here the bargaining is for an initial agreement following certification or recognition, at least 30 days’ notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in section 8(d)(3).” (emphasis added). Thus, where health care workers are involved, notice must be given to the FMCS not only where a collective bargaining agreement is already in effect, but also where one is being initially negotiated.

<sup>90</sup> Hooker Chemicals Corp., 224 NLRB 1535, 1538 (1976), denied 573 F.2d 965 (7th Cir. 1978), overruled by *United Artists Communications, Inc.*, 274 NLRB 75 (1985) (holding that NLRA 8(d)(4) does not mandate a 30-day mediation requirement when the party who initiates notice under 8(d)(1) has made no effort to satisfy the notice requirements of 8(d)(2) and (3)).

<sup>91</sup> See *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962) (ruling that a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement even if the agreement does not contain an express no-strike clause).

<sup>92</sup> NLRA 8(d) extends a duty to bargain in good faith to “wages, hours, and other terms and conditions of employment.” These items are considered “mandatory” subjects of bargaining.

<sup>93</sup> For example, in *NLRB v. Columbus Printing Pressmen Union No. 252*, 543 F.2d 1161 (5th Cir. 1976), the court held that a union violated 8(b)(3) by insisting on a provision mandating interest arbitration for negotiation of the extension of the original collective bargaining agreement.. And in *American Metal Products v. Sheet Metal Workers Local 104*, 794 F.2d 1452 (9th Cir. 1986). The court refused to enforce an award to a second round of interest arbitration granted pursuant to an initial interest-arbitration award.

<sup>94</sup> See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964).

<sup>95</sup> See *Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

<sup>96</sup> See Stewart Acuff, AFL-CIO National Organizing Director, address at Hofstra Labor and Employment Law Journal Forum: “The Employee Free Choice Act – the Right or Wrong Choice for America?” April 1, 2009 (“We will never take the Employee Free Choice Act off the table. We will fight until it is passed!”).