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# THE EMPLOYEE FREE CHOICE ACT
## Questions and Answers

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For more than 70 years, the nation's labor laws have proclaimed that working Americans' right to join a union is a fundamental freedom, just like the rights to speak or worship. Indeed the freedoms to form unions and bargain with employers follow from other basic American rights—freedom of association and petitioning for the redress of grievances.

But, over the years, this basic American right has been eroded by employers' interference in the process by which working Americans once were able to decide for themselves whether to form unions. In order to restore this right, bipartisan legislation—the Employee Free Choice Act—has been introduced by Sen. Edward Kennedy (D-Mass.) and Reps. George Miller (D-Calif.) and Peter King (R-N.Y.).

On March 1, 2007, a bipartisan majority of the U.S. House of Representatives passed the Employee Free Choice Act by 241-185. On June 26, 2007, the proposed law gained majority support in the U.S. Senate but was blocked by the threat of a filibuster.

In 2009, the newly elected Congress will consider the Employee Free Choice Act once again. There are strong economic arguments for a law that will empower working Americans to revive the economy by restoring their purchasing power. However, this compelling case has been challenged by false procedural points, including the claim that, by empowering working Americans to form unions through majority sign-up, the bill would outlaw secret ballot elections about union representation. Therefore, these questions and answers address the procedural issues, so that the debate can return to the real issues of how working Americans can share in the gains of their growing productivity and how the nation can build an economic recovery on paychecks, not bubbles.

## Why do the nation's labor laws need to be reformed?

The nation's labor laws are broken and need to be fixed.

The basic labor law—the National Labor Relations Act (NLRA)—was intended to protect workers' rights to organize and join unions and bargain with their employers for better pay, benefits, and working conditions. But it has been distorted by decades of hostile amendments, lax enforcement, and corporate tactics that bend or break the law.

Originally, the NLRA encouraged workers to form unions freely without interference by the employers who control their livelihoods. But now, elections administered by the National Labor Relations Board (NLRB) offer overwhelming advantages to anti-union employers. These companies can campaign on their premises, while workers who support the union cannot campaign on the worksites. During these anti-union campaigns, employers routinely intimidate, harass, coerce, and even fire employees who support unions—and a weakened NLRB and watered-down labor laws can do little or nothing to stop them. In the event that workers succeed in voting to be represented by a union, companies can delay negotiations for the first union contract by challenging the results and then refusing to bargain in good faith, and existing labor laws are powerless to stop these stalling tactics.

## How was the National Labor Relations Act intended to work?

The National Labor Relations Act (NLRA) was originally intended to encourage the formation of unions and the process of collective bargaining. Enacted in 1935, in the midst of a national economic emergency with disturbing similarities to the current crisis, the NLRA's Findings and Declaration of Policy explains:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners.[1]

The law created the National Labor Relations Board (NLRB) to administer a simple democratic procedure for workers to decide on their own whether to be represented by a union. Workers would sign cards authorizing a union to represent them. The NLRB would verify the validity of these cards. If a majority of the employees at a workplace expressed their support, the NLRB would "certify" the union as their "exclusive representative." If there were a legitimate question about whether the majority of workers wanted union representation, the NLRB would conduct an election where the employees would choose between the union and "no representative."

Employers were expected to stay out of this process. Because employers control their employees' livelihoods, the NLRA's authors believed that any efforts on their part to discourage workers from forming unions would have the effect of coercing the employees. This concern even trumped traditional considerations of free speech, since employer involvement in the process could intimidate, not inform, the employees. This view was expressed in a 1941 decision by the legendary civil libertarian, Judge Learned Hand: "Language may serve to enlighten a hearer ... but the light it sheds will in some degree be clouded if the hearer has no power ... What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which is not safe to thwart."[2]

## How did labor law change?

Our nation's labor laws no longer fulfill their express purpose of protecting workers' rights to join together and bargain with their employers to improve their living standards and working conditions.

Leading business journalists recognize this reality. *Fortune* magazine senior writer Marc Gunther explains: "By law, American workers have the right to form unions and bargain over wages and working conditions. Trying to exercise those rights is another matter entirely—workers are routinely discriminated against for supporting unions, most employers hire anti-union consultants to block

organizing drives, and some go so far as to close down work sites when employees vote for a union" (Gunther 2006, 10-22). As *Washington Post* business columnist Steven Pearlstein writes: "Over the years [the right to form unions and bargain collectively] has been whittled away by legislation, poked with holes by appeals courts, and reduced to irrelevance by a well-meaning bureaucracy that has let itself be intimidated by political and legal thuggery"(Pearlstein 2004, E01).

With the passage of the Taft-Hartley Act in 1947, the NLRA was amended to give employers effective veto power over their employees' decisions to be represented by unions. Under the new rules, even if 100% of the employees sign cards declaring that they want to be represented by a union, the employer can demand that the NLRB conduct an election. The Taft-Hartley amendments also give employers the right to campaign against the union as long as they do not threaten employees with reprisals for their union activities or promise benefits in return for opposing the union.

The new rules encouraged employers to conduct anti-union campaigns when their employees try to organize. By the 1980s, a $300 million-a-year industry emerged of lawyers, public relations experts, and management consultants who run companies' anti-union campaigns.[3]

## How are union representation elections conducted by the National Labor Relations Board different from elections for public office?

Supervised by the NLRB but conducted at the very workplaces that employers own and manage, union representation elections are unlike any democratic elections held anywhere else in the United States. Quite simply, one side—the anti-union employer—has all the power. In large measure, this is because employers control employees' jobs, paychecks, and livelihoods.

The one-sidedness of these elections also results from the special circumstances of campaigns conducted on an employer's premises and during the employees' workhours. As Professor Gordon Lafer, a political scientist at the University of Oregon, explains, these elections fall short of four standards for free elections (Lafer 2005):

*1) Free speech, with equal access to the media and the voters:* Anti-union managers can campaign with every worker, throughout the workplace, and around-the-clock. Pro-union employees can campaign only on break time. Management can require employees to attend "captive audience" anti-union meetings. Pro-union workers can be forced to attend—but denied the opportunity to speak out. Management can post anti-union messages on the workplace's walls and bulletin boards. But pro-union employees cannot make use of these facilities.

*2) Freedom from coercion:* Because the nation's laws recognize that voters are vulnerable to economic coercion, it is illegal for private companies to tell their employees to support particular candidates in elections for federal offices, such as the Congress or the presidency. But, in union representation elections, supervisors—who manage workers and can fire, promote, demote, or reassign them—can hold one-on-one meetings with their employees to instruct them to oppose the union.

*3) Campaign finance regulation:* In federal elections, there are limits on how much money candidates can raise and spend. But, in union representation elections, there are no limits on how much money companies can spend to defeat the union, including their fees to the anti-union lawyers and consultants.

*4) Timely implementation of the voters' will:* In democratic elections, the winning candidates usually take office just two months after Election Day. But, with union representation elections, employers can appeal the result to five different levels for several years: the regional NLRB office, an administrative law judge, the entire NLRB, a federal appeals court and the Supreme Court. Then the employer can engage in delaying tactics during the negotiations over the first union contract.

As the former general counsel of the NLRB, Fred Feinstein, explains: "The inherent power of employers, combined with the potential for delay in the enforcement of NLRA rights and procedures, makes union success in a traditional NLRA campaign largely dependent on employer mistakes" (Shaiken 2007, 8).

## What would it be like if a political campaign were conducted under the same rules as NLRB elections?

NLRB election campaigns more closely resemble sham elections in totalitarian countries than elections for public office in the United States or any other democracy.

Imagine an election where an incumbent president, governor, or mayor can:

- Force voters to attend his campaign rallies.
- Threaten to fire his opponent's supporters or deny them raises.
- Prevent his opponent from campaigning in the daytime.
- And, if an opponent wins the election anyway, delay that person from taking office.

Even if this campaign concluded with a secret ballot, few if any Americans would say that this was a free election.

## Do employers really try to intimidate workers before union representation elections conducted by the NLRB?

Employers' anti-union campaigns often violate even the watered-down protections of current labor law. For instance, Harvard Law Professor Paul Weiler estimates that one in 20 union supporters—an average of approximately 10,000 workers a year—is fired by their employers during union organizing campaigns (Greenhouse 1996). Similarly, in a study of 400 elections on union representation conducted by the National Labor Relations Board, Dr. Kate Bronfenbrenner of Cornell University found that 50% of the employers threatened to close the office or plant and 32% fired workers who actively supported the union (Bronfenbrenner 2000). These findings are confirmed by the NLRB annual report for 2007: During that year, more than 29,000 people—one worker every 18 minutes—were disciplined or even fired for union activity (Shaiken 2007, 1).

These actions are in violation of the NLRA's provisions prohibiting employers from firing, harassing, or threatening employers who seek to organize unions. But, as the journalist Michael Kinsley once said of campaign finance, when it comes to employer opposition to workers' organizing efforts, the real scandal is not what is illegal but rather what is legal. Because of spotty enforcement by over-burdened federal officials, and slick tactics by the lawyers, publicists, and employee-relations specialists who earn an estimated $300 million a year advising employers how to defeat organizing drives, tactics that skirt the law have become commonplace.

All in all, according to Bronfenbrenner, 80% of employers who face employee organizing efforts hire consultants to help them conduct anti-union campaigns. And their tactics make a mockery of the NLRA's promise that workers are guaranteed "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."[4]

Bronfenbrenner found another, uglier reality. In addition to the 32% of employers who break the law by firing pro-union workers and the 50% who skirt the law by threatening to close down the workplace, others use legal but hardball tactics:

- Ninety-one percent of employers facing organizing efforts force employees to attend anti-union meetings;
- Seventy-seven percent distribute anti-union leaflets; and
- Fifty-eight percent show anti-union videos.

In addition to these efforts, employers can also get away with these tactics:

- Firing employees who refuse to attend the anti-union meetings or who insist on asking embarrassing questions;
- Excluding known union supporters from these meetings;

- And barring union representatives from the workplaces during the weeks before the federally supervised elections where workers decide whether to be represented by a union.

These conditions resemble sham elections in totalitarian countries. In fact, they violate international conventions that the United States has signed protecting freedom of association—a right that is a close cousin to the U.S. Constitution's guarantees of free speech and freedom of assembly. According to a recent study by the international watchdog group, Human Rights Watch: "Workers' freedom of association is under sustained attack in the United States, and the government is often failing in its responsibility under international human rights standards to deter such attacks and protect workers' rights."[5]

## Are workers' votes in current NLRB elections really 'private'?

Workers' immediate supervisors often meet individually with employees to urge them to oppose their co-workers' efforts to form a union. Frequently, supervisors keep tallies of whether individual workers support the union and report back to higher-ups about individual employees' views on union representation. Therefore, even if there is a secret ballot election, individual employees' views are often anything but "private."

## What does the Employee Free Choice Act do?

As Ed Kilgore, vice president of the centrist Democratic Leadership Council writes, the Employee Free Choice Act "is an example of how it is sometimes essential to amend the letter of the law to preserve its spirit."[6] The Employee Free Choice Act keeps the original promises of the NLRA through three reforms:[7]

*First, the Employee Free Choice Act restores working Americans' rights to make their own decisions about whether to form and join unions.* It provides that if a majority of the employees sign union authorization cards—and after the NLRB validates the cards—the company must recognize and bargain with the union. This short-circuits the current management-dominated election process where companies can coerce employees not to support the union. But if a majority of employees prefer instead to hold an election, they will have that right.

*Second, the Employee Free Choice Act provides real penalties for companies that break the law during organizing campaigns and negotiations for the first contract.* Currently, companies break the law with impunity during organizing campaigns and negotiations for first contracts because they think they can get away with it—or can afford to pay the penalties. That is why the Employee Free Choice Act provides tougher penalties to protect workers' rights:

- Up to $20,000 per violation for companies found to have willfully or repeatedly violated employees' rights during organizing campaigns or first contract negotiations.
- Triple back pay for employees who are discharged or discriminated against for supporting unions during organizing campaigns.
- A requirement that the NLRB seek federal court injunctions when there is reason to believe that a company has discharged or discriminated against union supporters, threatened to do so, or engaged in other conduct that endangers employees' rights during organizing campaigns or first contract negotiations.

*Third, the Employee Free Choice Act makes sure that employers and employees negotiate a first contract after workers form a union.* When an employer and a new union are unable to negotiate a first contract within 90 days, either party can request mediation by the Federal Mediation and Conciliation Service (FMCS). If no agreement is reached after 30 days of mediation, there is binding arbitration. Both timelines can be extended if the employer and the union agree.

## What is majority sign-up ("card-check")?

With majority sign-up, a majority of the employees at a company sign cards declaring that they want to be represented by a union. Then the National Labor Relations Board determines whether the cards are valid. After the NLRB determines that the union represents a majority of

the workforce, the employer is required to recognize and bargain with the employees' union.

## Is majority sign-up a new procedure?

In the years after the National Labor Relations Act went into effect, majority sign-up was one of the major methods by which working Americans formed unions. As Professor Harley Shaiken of the University of California at Berkeley writes: "During this early period, the NLRB and the courts found it illegal for an employer presented with signed authorization cards or other such evidence of majority support not to recognize the union. The Board directed elections take place only when a genuine question arose as to whether a majority of employees supported a union" (Shaiken 2007, 7). During 1938 and 1939, almost a third of all union certifications took place as a result of majority sign-up, rather than an NLRB election (Brody 2005, 103).

As labor laws were weakened, majority signup as a method of forming unions became less common. Over the past decade, there has been renewed interest in majority sign-up among working Americans, employers, public officials, and unions. Twenty-two laws in 12 states now grant public and private employees the right to form unions through majority sign-up. In 2004, Oklahoma granted municipal employees the right to majority sign-up to encourage "labor peace."[8]

Since 2003, more than half-a-million American workers formed unions through majority sign-up. Among many others, these workers include:[9]

- 64,000 hotel and casino workers
- 46,000 home care providers
- 11,000 UPS freight workers
- 5,800 public school teachers and aides
- 225 reporters and editors at Dow Jones
- 162 nuclear engineers at Pacific Gas & Electric
- 8,000 farmworkers jointly employed by Mount Olive Pickle and the North Carolina Growers Association

## Does majority sign-up work?

Growing numbers of employers—including the leading wireless phone company AT&T Mobility and the huge chain of hospitals and health plans Kaiser Permanente—have agreed to remain neutral in organizing campaigns and recognize unions through majority sign-up. As Kaiser Permanente explained in a brief filed with the NLRB, the health care giant agreed to majority sign-up because it "recognized that the protracted and often adversarial NLRB election processes frequently undermined the ability of everyone involved to focus on the primary mission of providing quality health care."[10]

## Why can't the NLRB election process be fixed?

In theory, the NLRB election process could be fixed, but the reforms required would be quite radical and virtually impossible to enforce, so fixing the NLRB election process is not a practical solution.

The chief problems with the NLRB election process are:

- excessive delays,
- unlawful firings of union advocates during a campaign, and
- unequal access

The first two, excessive delays and unlawful firings, are relatively easy to fix, and EFCA provides means of doing so. But the third, unequal access, is the most serious, and the most impractical to fix.

Today, elections conducted by the NLRB have no resemblance to free elections of any kind. Jimmy Carter, who conducts election oversight around the world, would not find that NLRB elections meet any of the standards we expect of elections even in the most politically backward of countries. An analogy would be a political election where only one party was permitted to use radio, only one party was permitted to use television, only one party was given public voter lists for mailings, and where leaders of the other party were exiled until the election was over. Most of the public discussion about NLRB

elections today concerns the last item in this analogy (exile, that is firing of union supporters during election campaigns), but this is actually the least important impediment to free elections. More damaging are the one-sided campaign rights.

During a union election campaign, workers are frequently subject to an ongoing campaign of employer terror and intimidation during their work time, with advocates of union representation having no opportunity to respond. Employers can lawfully hold "captive audience meetings" during work time during which sophisticated consultant-produced presentations threaten workers with loss of employment, reduction of wages, and loss of benefits and security if they should vote for union representation. Employers and their representatives (usually, outside consultants) pull workers off their jobs for individual meetings where similar threats and intimidation take place. Meanwhile, an employer is not even required to provide a name and address list of eligible voters (workers) to a union until about two weeks before the election (which can take place as much as a year or more after the campaign starts). The address list itself need not give the union any practical way of contacting workers—no phone numbers need be provided, many addresses may be incorrect or incomplete (e.g., only post office box numbers)—so while the employer is conducting daily "captive audience" meetings and individual supervisory conferences, union representatives (who are now not even permitted access to an employer parking lot) have no viable way to meet with employees to present an alternative point of view.

Prior to the Taft-Hartley amendments to the NLRA in 1947, employers were prohibited from campaigning against union representation during election campaigns. Taft-Hartley, however, protected employers' rights to campaign against unions, provided only that they did not threaten employees with reprisals for supporting unionization, or promise material rewards for opposing unionization.

Pre-election campaigns, therefore, take place in the following context:

1. Supervisors can (and do) campaign against unionization continuously during working hours, whereas union representatives are prohibited from entering the workplace and union supporters are prohibited from discussing unionization among themselves during working time, and can lawfully be discharged for doing so.

2. Although direct threats and promises by supervisors are prohibited, this prohibition is impossible to enforce, for two reasons:

    a. there are usually no witnesses to one-on-one conversations between supervisors and employees;

    b. it is practically impossible for employees to distinguish between prohibited threats and permitted expressions of opinion (e.g., it is prohibited for a supervisor to say that a facility will close after a union wins an election, but it is permitted for a supervisor to say that a facility could close after a union wins an election and that many other facilities have closed).

An even more serious problem, however, is that employer campaigning is inherently coercive, even in the absence of explicit or implicit threats, because of the power relationship that is inherent in the employer-employee relationship. We have a sophisticated understanding of these power relationships outside the union context. For example, we understand that there is no such thing as a non-coercive sexual approach ("pass") by a supervisor to a worker, even though such an approach would be perfectly appropriate in a non-workplace situation. We deem such appropriate non-workplace behavior to be "harassment" in the workplace, and have made such behavior unlawful, solely because we recognize that the power relationships in a workplace, where one party has the power over another's livelihood, make otherwise innocuous behavior improper. Similarly, there is no such thing as a non-coercive expression of opinion by a supervisor regarding unionization. Prior to Taft-Hartley, this was recognized, and such expression was prohibited.

This becomes especially difficult to fix because the Taft-Hartley amendments codified an earlier Supreme Court decision protecting employers' rights to "free

speech" regarding the desirability of union representation. Therefore, it is possible that attempts to reverse this Taft-Hartley provision would be unconstitutional. As long as union election campaigns are permitted, it might arguably be constitutionally impossible to control employer exercise of "free speech" in an election campaign. The only solution is to permit unions to avoid long, one-sided, and inherently coercive employer campaigns by demanding recognition, based on majority support.

One suggestion has been that EFCA could grant unions equal rights to those enjoyed by employers; that is, employers, if they wish, can refrain from campaigning against unionization in the workplace, but if they choose to campaign, then union representatives must be granted equivalent rights. Such a provision, however, would be practically impossible to implement and enforce. As noted above, there are usually no witnesses to supervisory campaigning, so it would be difficult, if not impossible, for unions to establish their right to equivalent access. If "equal rights" to campaign were granted, it would likely spur endless litigation about whether the rights were equal. Because of typically high supervisor-to-employee ratios, unions could not practically have the resources to conduct equivalently intensive campaigns inside a workplace.

The only practical solution to all this is to eliminate the campaign period altogether, by permitting unions to make their majority status known, and requiring employers to recognize it.

## Does the Employee Free Choice Act "silence employers" or require that they remain neutral about the election?

With the Employee Free Choice Act, employers are still free to express their opinions about unions as long as they do not threaten or intimidate employees.

In fact, employers can always express their views about unions—and many exercise this opportunity from their employees' first days on their jobs. Companies frequently force new employees to watch anti-union videos during their orientations. Also, companies often place anti-union materials on their bulletin boards. When workers try to form unions, companies can send employees anti-union letters and emails.

Therefore, when deciding whether to organize, most workers believe they already have enough information about their employers' opposition toward the union. According to a survey of workers who signed cards in a majority sign-up recognition, 73% said they had enough information about management's attitude toward the union. In the same survey, 70% said they had enough information about the union, and 81% had enough information about the union recognition process (Eaton and Kriesky 2008).

## Will employees be pressured into signing union authorization cards?

It is illegal now for unions or their agents to coerce employees to sign a union authorization card. With the Employee Free Choice Act, it will still be illegal—and any person who breaks the law will face serious penalties.

Academic studies show that, with majority sign-up as compared to NLRB election campaigns, employees report less pressure from co-workers to support the union and less pressure from employers to oppose the union. In the first 70 years of the National Labor Relations Act, only 42 cases found fraud or coercion by unions in the submittal of authorization cards. By contrast, there were 29,000 documented cases of intimidation or coercion by employers in 2007 alone.

## If employees could decide for themselves, would many more working Americans form and join unions?

While only 12% of working Americans and 7.4% of private-sector workers were union members in 2006, public opinion surveys show that much larger numbers would join unions if they could choose freely without interference and intimidation by their employers.

In a survey conducted in December 2006 by Peter D. Hart Research Associates, 58% of non-managerial working Americans indicated that they would join a union if they could (Shaiken 2007, 1).

While this finding represents a record level of interest, recent surveys show steadily increasing support for forming and joining unions. As Professor Richard Freeman of Harvard University wrote in 2007: "The proportion of workers who want unions has risen substantially over the last 10 years, and a majority of nonunion workers in 2005 would vote for union representation if they could. This is up from the roughly 30% who would vote for representation in the mid-1980s, and the 32% to 39% in the mid-1990s, depending on the survey" (Freeman 2007, 2).

Given a free and fair choice, millions more working Americans would form and join unions. But as currently amended, interpreted, and laxly enforced, the nation's labor laws do not allow most workers a free and fair choice. That is why the Employee Free Choice Act is needed now—to keep the promise that working Americans can exercise "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

## Endnotes

1 The National Labor Relations Act (1935).

2 Judge Learned Hand, NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1941).

3 House Report 105-453: Fairness For Small Business and Employees Act of 1998. www.congress.gov/cgi-bin/cpquery/?&sid=cp105jIYFa&refer=&r_n=hr453.105&db_id=105&item=&sel=TOC

4 supreme.justia.com/us/363/144/case.html

5 "Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards," Human Rights Watch, page 2, August 2000.

6 www.ndol.org/ndol_ci.cfm?kaid=127&subid=177&contentid=254070

7 For the provisions of the Employee Free Choice Act, see freechoiceact.org.

8 www.americanrightsatwork.org/publications/general/half-a-million-and-counting-20080917-654-116-116.html

9 www.americanrightsatwork.org/publications/general/half-a-million-and-counting-20080917-654-116-116.html

10 www.nlrb.gov/nlrb/about/foia/danametaldyne/Kaiser.pdf

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