

## 40 ARGUMENTS AGAINST THE EFCA

### The Card Check Provision

1. The EFCA is a one-sided bill that ignores organized labor's 75-year track record of intimidation and coercion in the context of organizing campaigns. One need look no further than to the language within NLRB settlement postings, in which unions are often required to refrain from intimidating employees or engaging in activities, often of an outlandish nature.
2. We have seen thousands of cases in which unions have misled employees as to the true meaning of authorization cards in order to procure signatures. In other situations, employees were intimidated and coerced into signing. Few of those cases are reported, as employees are fearful of "outing" their colleagues who support the union.
3. While the NLRA does in fact "permit" employers to voluntarily recognize unions in response to a majority showing of interest, compelling them to do so is another matter entirely.
4. The bill would undo 75 years of legal precedent and effectively disenfranchise millions of employees overnight, while we are simultaneously fighting for more democracy in the representation process overseas.
5. The EFCA allows unions to bypass representation elections on the "front end" of the process, yet there is no corresponding provision extending card check to the decertification process. If it is fair for unions to win representation rights in this fashion, it's fair for them to lose those rights the same way.
6. Supporters of the bill have suggested that employees operating in so-called "right-to-work" states would have the right to "opt out" of union representation. That would not be the case, as there are no provisions for changing current law on this particular issue. Employees opposing the union would remain represented in the event of card check certification.

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7. Contrary to recent suggestions, employees would not decide whether the union uses their cards to seek certification. Union officials would. When given the option, unions will pursue card-check recognition every time. They are fighting tooth and nail to secure the passage of this legislation for a reason, and they will use it to full advantage.
  8. The heart of the current representation framework lies with the secret ballot. There are rarely any “secrets” in connection with card-signing campaigns.
  9. EFCA is being contemplated at a time when union representation election win rates have been steadily climbing to upwards of 65% in some cases – levels that meet or exceed those of 40 years ago.
  10. EFCA would essentially call for the NLRB to abandon the representation process, leaving an unregulated vacuum in its wake.
  11. For the first time in history, employers would be completely excluded from the representation process. The National Labor Relations Act contemplates a collaborative process to ensure labor peace. EFCA would exacerbate tensions between the parties.
  12. Absent a structured beginning and end to the organizing process, employers would be confronted with the distracting prospect of perpetual activity, during which time its conduct would be closely scrutinized under heightened remedial provisions.
  13. Litigation surrounding authorization cards will only increase, as will a range of legal challenges pertaining to questionable arbitration decisions, shotgun unfair labor practice charges and fewer conciliations, against the backdrop of treble damages.
  14. Critical decisions would be made without the benefit of key information pertaining to the bargaining process, in an unregulated atmosphere rife with intimidation. Employees cannot be expected to make a reasoned choice if they have heard only one side of the issue.
  15. EFCA offers no safeguards for collateral investigation into signature authenticity, fraud, revocation and coercion, leaving the Board’s informal procedures in place.

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16. The fact that unions continue to lose large numbers of elections even when their petitions to the NLRB were supported by a majority of employees merely underscores the fact that employees do change their minds about union representation, when armed with knowledge of the facts.

17. The bill is silent with regard to challenging the appropriateness of the unit for which the union seeks recognition.

18. There is little if any evidence to suggest that the current framework is broken to begin with. The historical decline in union membership can be attributed to any number of systemic factors, such as the decline of some heavily unionized industries, globalization of the economy, the constant increase of pro-employee legislation at both the federal and state levels, and more enlightened practices by employers – all of which will remain present in a post-EFCA era.

19. There will be less incentive for employers to “walk the line” when it comes to interference, as card-signing activity in a vacuum will now lead to a bargaining order anyway.

20. The U.S. Supreme Court has consistently opined that authorization cards are a flawed mechanism for ascertaining employee sentiment.

21. Elections are not unnecessarily delayed by management. The average duration from petition to election has consistently declined in the absence of this legislation. It is now down to a median of 39 days.

22. Union election victories are not endlessly tied up in challenges, as often alleged. The percentage of certification challenges has also been declining, to approximately 1% of all union victories.

23. Unions continue to contest only a relatively small percentage of employer victories through the objections process.

24. The Canadian model on which EFCA is based has been a failure in its own country. In response, a majority of Canadian provinces have shifted back to a secret ballot model over the past twenty years. Half of the Provinces that retain card check require a supermajority of cards prior to certification. Employees operating within the few remaining provinces that support card check account for two-thirds of the nation’s lost work days due to work stoppages, despite the fact that they only account for one third of its population.

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25. In the event of the heightened litigation that will inevitably flow from the card-check process, the confidentiality of individual signatures would likely be undermined.

26. Although union representation petitions are often contested, they typically lead to a mutually agreeable conciliation that enhances the cooperative nature of the current scheme. This is evidenced by the fact that 90% of all elections are secured through a stipulated election agreement.

27. The NLRB's current election rules require that the employer furnish detailed contact information to the union about the names and home addresses of its workforce, thus already providing unions with ample access to bargaining unit employees. Similarly the Board's notice posting requirements effectively ensure substantial voter participation.

28. Card checks and neutrality agreements are already permitted, and in some cases encouraged, as shown by their increase in recent years.

29. EFCA makes no provisions for "curing" union threats, misrepresentation and overreaching when it comes to signature procurement.

30. In the past, even union officials like Andy Stern, President of the Service Employees International Union, have expressed the sentiment that representation elections are "the American way."

31. Even our Federal labor laws require union officers to be elected by secret ballot.

32. A truly "free" choice means an informed atmosphere free from coercion.

### **Mandatory Interest Arbitration**

33. The fact that unions often fail to achieve a collective bargaining agreement is likely a testament to their own ineptitude rather than management tactics.

34. This represents the first occasion in peace-time history that our government would convey authority to a third party to essentially decide what a private sector employer must provide in terms of wages and benefits, free from the checks and balances of unit ratification.

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35. Dictated terms of an initial agreement give rise to the likelihood of decreased stability, as employers seek to recoup losses during renewal bargaining, only to be met with increased strike probability.

36. There is a dearth of any legislative guidance pertaining to the proposed arbitration process, the method for choosing an appropriate arbitrator or “board” (as yet undefined), and the manner for challenging any rendered decision.

37. The arbitrary deadline of 130 days for imposing interest arbitration is unreasonable in light of numerous surveys establishing the average length of first-contract negotiations, even in the absence of bad faith bargaining.

### **Enhanced Penalties Against Employers**

38. The NLRB is already doing an effective job of policing employer compliance, as evidenced by the fact that we have seen a 500% increase in backpay awards over recent years, suggesting that vehicles are already in place to deter future violations.

39. Unions already have substantial remedial relief available to ensure the sanctity of the representation process by virtue of injunctions brought under Section 10(j) of the Act. The Board may also issue a re-run election on the heels of objectionable employer (or union) misconduct. In extreme cases, the Board may even resort to the issuance of a “Gissel” order, compelling the employer to bargain with the union even following a union election defeat. All of these remedies are available right now for purposes of safeguarding “laboratory conditions.”

40. The bill is a rarity in that it would impose increased penalties against employers, going far beyond traditional “make-whole” remedies, with no corollary for wrongdoing unions.

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