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The Employee Free Choice Act in the 111th Congress

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"We will pass the Employee Free Choice Act. It's not a matter of if, it's a matter of when…."

- Sen. Barack Obama, September 2008[1]

"We just won an election. It's no secret. . . . I expect nothing less than what he said he was going to do, and we should hold him accountable."

- SEIU President Andy Stern, December 2008[2]

Organized labor's top legislative priority, the Employee Free Choice Act ("EFCA") would amend the National Labor Relations Act (the "NLRA") to make it easier for unions to organize employees. The bill would also require interest arbitration of first contracts after 120 days and would strengthen penalties for certain unfair labor practices. Although as of this writing the bill has not yet been introduced into the 111th Congress, it is expected to be the most hotly-debated and controversial measures addressed in this term. This paper will trace the history of EFCA's proposals, summarize the criticisms of the current bill, and review some alternatives that might be considered.

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1 *Employee Free Choice Act: Labor vs. Business*, BUSINESS WEEK, Sept. 22, 2008.

2 Matthew Kaminski, *Let's 'Share the Wealth'*, WALL STREET JOURNAL OPINION JOURNAL, Dec. 6, 2008 (*available at* http://online.wsj.com/article/SB122852244367484311.html)

I. EFCA's Three-Legged Stool

> The current process for forming unions is badly broken and so skewed in favor of those who oppose unions, that workers must literally risk their jobs in order to form a union. Although it is illegal, one quarter of employers facing an organizing drive have been found to fire at least one worker who supports a union. In fact, employees who are active union supporters have a one-in-five chance of being fired for legal union activities. Sadly, many employers resort to spying, threats, intimidation, harassment and other illegal activity in their campaigns to oppose unions. The penalty for illegal activity, including firing workers for engaging in protected activity, is so weak that it does little to deter law breakers.[3]

With these words, Rep. George Miller (D-CA), Chairman of the House Education and Labor Committee, introduced the Employee Free Choice Act of 2007 into the 110th Congress on February 5, 2007. His bill, co-sponsored by a majority of the House of Representatives, sought to remedy the "badly broken" system by making three significant changes to the NLRA.

Card Check

Under current law, an employer may, but is generally not *required* to, recognize a union as a bargaining representative unless the union prevails in a secret ballot election among the employees conducted by the National Labor Relations Board (the "NLRB" or the "Board"). EFCA would amend the NLRA to read:

> If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit,

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[3] 153 Cong. Record E260 (Feb. 5, 2007) (statement of Rep. Miller).

> the Board shall not direct an election but shall certify the individual or labor organization as the representative . . . .

The Board would be required to develop guidelines and procedures for card check, which would include crafting "model collective bargaining authorization language" and "procedures to be used by the Board to establish the validity of signed authorizations designating bargaining representatives."

Interest Arbitration

EFCA would require an employer to begin bargaining with a certified union for a first contract within ten days after receiving a request to do so. After only ninety days of bargaining, the bill would permit either party to request mediation by the Federal Mediation and Conciliation Service (the "FMCS"). Then, if no agreement is reached within thirty days of the request for mediation:

> The [FMCS] shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service. The arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties.

New Remedies

Finally, EFCA would create new remedies for employer unfair labor practices that occur "while employees of the employer were seeking representation by a labor organization, or during the period after a labor organization was recognized as a representative . . . until the first collective bargaining contract was entered into between the employer and the representative."

EFCA would assign priority to charges that an employer has discharged or discriminated against employees, threatened to discharge or discriminate against employees, or engaged in conduct that significantly interferes with employee rights during an organizing drive or first contract negotiations.

> If after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law.

Additionally, when it is found that an employee has been discharged or discriminated against during an organizing campaign or first contract negotiations, EFCA would award damages up to three times back pay. Current law provides for only make-whole remedies.

Lastly, EFCA would provide for civil fines of up to $20,000 per violation against employers found to have willfully or repeatedly violated employees' rights during an organizing campaign or first contract negotiations. In determining the amount of a civil fine, EFCA would require that the Board "consider the gravity of the unfair labor practice and the impact of the unfair labor practice on the charging party, on other persons seeking to exercise rights guaranteed by this Act, or on the public interest."

II. The Road to EFCA 2009

EFCA was first introduced in the 108th Congress on November 21, 2003 by Rep. George Miller (D-CA) and Sen. Edward Kennedy (D-MA). The bill died in committees in both the House and Senate. Re-introduced by the same sponsors in the 109th Congress on April 19, 2005, the bill suffered the same fate. When Democrats won majorities in both houses of Congress in 2006, the bill's backers had grounds for renewed optimism. Indeed, on December 7, 2006, newly-elected House Speaker Nancy Pelosi told the *New York Times*: "We certainly will be passing the card check, the Employee Free Choice Act."[4]

[4] Stephen Greenhouse, *Labor Presses for Measure to Ease Unionizing*, N.Y. TIMES, Dec. 8, 2006, *available at* http://www.nytimes.com/2006/12/08/washington/08labor.html

A. The 110th Congress

On February 5, 2007, in the early days of the 110th Congress, Rep. Miller re-introduced EFCA as H.R. 800 -- this time with 232 co-sponsors. Just three days after the bill's re-introduction – the House Subcommittee on Health, Employment, Labor and Pensions held a one-day hearing on EFCA. Less than a week later, the full Committee on Education and Labor held a mark-up session. During the mark-up session, Committee Republicans offered thirteen amendments, none of which received majority support. The Committee approved the original bill by a vote of 26-19 and reported it to the full House for a floor vote.[5]

On February 28, 2007, the House Rules Committee considered the extent to which floor amendments, including many similar to those rejected during the mark-up session, would be permitted. The following is a list of the floor amendments[6] proposed by members:

1	Shays (R-CT)	This amendment would place a six-month deadline on the NLRB to issue decisions for less difficult cases, and a one year deadline for more difficult cases involving "novel" questions.
2	Brown-Waite (R-FL)	This amendment would prevent labor unions from collecting any membership fees from a particular individual without first verifying that the employee is a citizen or lawful resident permitted to work in the U.S.
3	Musgrave (R-CO)	This "Right to Work" amendment would repeal the NLRA's provisions that permit employers, pursuant to a collective bargaining agreement that includes a union security agreement, to require employees to join or pay dues or fees to a union as a condition of employment.

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[5] House Committee on Education and Labor, Roll Call No. 14, Feb. 14, 2007, *available at* http://edlabor.house.gov/markups/pdfs/20070214HR800vote.pdf.

[6] House Rules Committee, Summary of Amendments Submitted to the Rules Committee for H.R. 800, February 27, 2007, *available at* http://www.rules.house.gov/amendment_details.aspx?NewsID=2518

4	McKeon (R-CA)	This ***Amendment in the Nature of a Substitute*** would strike the underlying text and insert in its place the text of H.R. 866, the Secret Ballot Protection Act. It would provide that a union may *only* be recognized and certified after a secret ballot election conducted by the National Labor Relations Board.
5	Kline (R-MN)	This amendment would allow employees to present a majority of signed cards to decertify a union, rather than requiring a secret ballot election under current law.
6	Blunt (R-MO)	This amendment would strike Section 2 of the bill (provisions relating to mandatory recognition by way of card check).
7	Foxx (R-NC)	This amendment would require the National Labor Relations Board to promulgate standards and a model notice for a "do not call or contact" list for employees who wish to avoid union solicitation.
8	Price, Tom (R-GA)	This amendment would require that in order to be considered valid, a signed authorization card must be accompanied by an attestation that the signer is a U.S. citizen or lawful resident alien, and be accompanied by documentary proof.
9	Davis, David (R-TN)	This amendment would amend Section 4 of H.R. 800 to make the bill's civil penalty and liquidated damages provisions also apply to unions that coerce an employee during a card check campaign or first contract negotiation.
10	Boustany (R-LA)	This amendment would require a union to return a previously signed authorization card within five days of an employee's request.
11	Chabot (R-OH)	This amendment would exempt small businesses (as defined by the Small Business Administration) from the union certification process described in the bill.
12	Emerson (R-MO)	This amendment would exempt businesses employing 50 individuals or less from the legislation.

13	King, Steve (R-IA)	This amendment would allow for provisions under HR 800 to give exemptions to businesses employing 50 persons or smaller similar to the enforcement clause of the Family Medical Leave Act.
14	King, Steve (R-IA)	Anti-"Salting" Amendment -- This ***Amendment in the Nature of a Substitute*** would allow businesses to hire only workers who seek bona fide employment with a company. This would also allow employers to fire an employee who engages in a "salting campaign" instead of doing his or her job.
15	King, Steve (R-IA)	This amendment would allow a private person to rescind authorization or withdraw support for a labor organization. It would require public notification of this right, and confidential protection of any employee's exercise of the right.
16	Emerson (R-MO)	*(LATE)* This amendment would change the initial negotiation period from 90 days to 120 days, then change the mediation period from 30 days to 120 days.

The Rules Committee permitted consideration only of the amendments proposed by Rep. McKeon (#4 above), Rep. Fox (#7 above), and the anti-"Salting" amendment offered by Rep. King (#14 above).[7]

On March 1, 2007, after about two and one-half hours of debate, the House of Representatives passed EFCA without any amendments to the original text by a vote of 241 - 185. Thirteen Republicans voted in favor of the measure, while only two Democrats voted against it.[8]

EFCA encountered an almost immediate "silent filibuster" in the Senate. In the debate over a Motion to Invoke Cloture (which would have permitted an "up-or-down" Senate vote on EFCA), Sen. Mike Enzi (R-WY), addressed the

[7] H.R. Rept. No. 110-23 (2007) (Conf. Rep.).

[8] 153 Cong. Record H2078 (March 1, 2007) (Passed by recorded vote: 241 – 185; Roll no. 118).

above-quoted arguments from Rep. Miller's introductory remarks in the House of Representatives:

> …we heard this same myth repeated, and it is based on three phony analyses by stridently pro-union researchers, who often make a series of wholly unfounded assumptions and routinely misuse statistical data.
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> The first analysis arrives at its conclusions by taking the number of National Labor Relations Board reinstatements offered each year, assuming that half occur in the context of an organizing campaign, and then dividing that number into some completely mythical and arbitrary number of "union supporters". Now, even if the first assumption was right, it is the number of supporters that matters. The lower the number, the more dramatic it looks. This number, however, is completely made up. There is no factual basis for determining this number.
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> Here are the facts. In 2004, for example, nearly 150,000 employees were eligible voters in National Labor Relations Board elections. Using their assumptions, there were only about 1,000 reinstatement offers that year. That is not 1 in 5; that is 1 in 150. Even that is likely very high since the vast majority of these offers are settlements which do not account for the fact that many of these terminations may have been perfectly lawful. Moreover, since unions won over 61 percent of these elections, their supporters amounted to at least 90,000.
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> Now, the second "analysis" uses the National Labor Relations Board's backpay figures as the basis for this claim. Here is the problem. The vast majority of those backpay claims do not arise in the context of an organizing campaign. They do not involve union employee terminations. And they do not single out union supporters. Most involve bargaining violations with already-established unions. In 2000, for example, two-thirds of the backpay number involved a single case that had absolutely nothing to do with an organizing campaign.
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> The third study consisted of stridently pro-union researchers calling union organizers about campaigns they conducted over a short period of time in an isolated geographic area. The "statistics" relied on were nothing more than untested anecdotes.
>
> So as this discussion continues, we are not going to allow incorrect and distorted numbers, and misused and misinterpreted data to

> obscure what is really at issue here. This is about taking away the right for people to have a secret ballot. Again, I want to reiterate that while this bill may be grossly misnamed as the Employee Free Choice Act, it has absolutely nothing to do with preserving free choice. In fact, it's just the opposite. How would you like to have someone come into your house with two or three people -- one of them being very big -- and pressuring you to sign a union card? Would you feel a little intimidated? Most people certainly would. Would you sign because you felt pressured, because you just wanted to have people stop bothering you, or because you didn't want to offend a co-worker or friend? Most people would. However, under this bill all a union would have to do is obtain 51 percent this way and it is automatic.[9]

On June 26, 2007, the Motion to Invoke Cloture garnered 51 votes, nine shy of the number required (i.e., 60) to end the filibuster.[10]

B. Prospects for the 111th Congress

The federal elections held on November 4, 2008, resulted in the election of Sen. Barack Obama (D-IL) to the United States Presidency. Sen. Obama was a co-sponsor of Sen. Kennedy's EFCA bill in the Senate last term. During a campaign stop in Ohio last year, then candidate Obama told supporters: "It is time to let unions do what they do best: organize. That's why we need to go ahead and pass the Employee Free Choice Act."[11] More recently, faced with the need to enact a comprehensive stimulus bill soon after his inauguration to combat the faltering economy, Mr. Obama has at times seemed less eager to confirm EFCA as a top priority.

The 2008 election also saw the Democratic caucus expand its majority in the House from 235 to 256 seats. Therefore, EFCA is expected to pass easily when it is re-introduced in the House. Its fate in the Senate remains uncertain.

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[9] 153 Cong. Record S8288 (June 22, 2007)

[10] 153 Cong. Record S8398 (June 26, 2007).

[11] Remarks for Senator Barack Obama: National Gypsum in Lorain, Ohio, Feb. 24, 2008, *available at* http://www.barackobama.com/2008/02/24/remarks_for_senator_barack_oba_1.php.

It is safe to assume that Senate Republicans will once again filibuster the bill. Sixty votes would then needed to pass a cloture motion ending debate and bringing EFCA up for a full floor vote. In the 110th Congress, every Democrat, except Sen. Tim Johnson (ND) who was unable to vote due to illness, voted for cloture. Every Republican, with the exception of Sen. Arlen Specter (PA), voted against cloture. The result was a 51-48 failure to end debate, and the measure was never brought to the floor for a vote.

While at least one Senate seat is still being contested as of this writing, it appears that as a result of the November elections, eight Democrats will replace former Republican Senators who voted against cloture. If every single Senator who voted on the cloture motion in 2007 votes the same way in 2009, and if all eight new Democrats vote for cloture, and if Sen. Johnson is able to cast his vote, that adds up precisely to the sixty votes needed to bring EFCA to the floor of the Senate for a vote. Passage would then be highly likely.

A lot of presumptions - reasonable as they may be - must fall in line to compel this result. There remain at least two "wild cards" in the mix. First, is the question of whether Sen. Arlen Specter will again break with the Republican caucus and vote for cloture, knowing that his vote may be determinative. In 2008, Sen. Specter co-authored a Policy Essay in the *Harvard Journal of Legislation* that was highly critical of EFCA, while calling for a more restrained, constructive approach to labor law reform. The Essay restated many of the issues he raised in his floor speech just before casting his vote for cloture last term - namely that the NLRB has become "ineffectual" due to "toothless remedies" available to it, and the delays caused by its administrative procedures.[12] It is clear that Sen. Specter would like to see significant substantive labor law reform in this Congress - and he likely realizes that he is in a position of power to mold it more in line with his views.

12 See Specter & Ngyuen, Representation Without Intimidation: Securing Workers' Right To Choose Under The National Labor Relations Act, 45 Harv. J. Legis. 311 (Summer 2008).

Joining him in that intriguing position are the two Democratic Senators from Arkansas. Sens. Blanche Lincoln and Mark Pryor have consistently remained lukewarm in their support of EFCA. Neither initially signed on as co-sponsors in the Senate, even as nearly every other Democrat did. In the weeks before the 2007 cloture vote, both continued to equivocate, insisting that they were listening to both sides and had not made up their minds on how they intended to vote. In the end, both fell into line with their caucus and voted for cloture. But very recently, the Associated Press reported that Sen. Lincoln said she didn't think EFCA was "necessary."[13] Back in 2007, Sen. Pryor sounded a lot like Sen. Specter, telling local Arkansas media outlets that he would vote for the bill, but knew it would not pass, adding:

> At some point, the business community and the labor community will come together and talk about how to modernize the way unions are formed….[14]

Some would suggest that notwithstanding party politics - or because of it - Senators might vote differently on an issue: (a) when they soon are facing a tough re-election, and/or (b) when they know a particular measure is or is not going to pass anyway. If Sens. Specter, Lincoln and Pryor do want to pursue some alternative course of labor law reform, they are certainly in a position as apparent swing votes to drive that effort. Anyone familiar with Senate politics remembers the various "Gangs of ____" who have forced various compromises during the past decade. Time will tell if this is the beginning of another such endeavor.

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[13] Lincoln: 'Card-check' proposal not necessary, ASSOCIATED PRESS, Dec. 16, 2008, *available at* http://www.wxvt.com/Global/story.asp?S=9534697&nav=menu1344_2

[14] Aaron Sadler, Pryor Backs Pro-Union Measure, THE MORNING NEWS, May 9, 2007, *available at* http://www.nwaonline.net/articles/2007/05/09/news/051007dcpryor.txt

III. Criticisms of EFCA

A. Authorization Cards are not a Reliable Indicator of Employee Preference.

Under existing law, the NLRB conducts a secret-ballot election to resolve questions concerning union representation.[15] To obtain a Board-run representation (or "RC") election, a union and/or group of employees may file a petition with the Board. The petition must be supported by objective proof that at least 30% of the employees wish to be represented by a union. This proof most often comes in the form of signed authorization cards prepared, distributed and collected by union organizers. Although the Board only requires cards signed by 30% of the employees to *start* the process toward an election, it is widely acknowledged by union organizers that they generally do not file a petition unless and until they have signed cards from as many as 60-80% of the employees - well more than the majority required to win the election.[16]

Board policy is to schedule an election within 42 days of the filing of a petition. During this period, the employees currently have the opportunity to consider information provided to them by the union, their employer and each

[15] Currently, the law also allows employers and unions the option of bypassing Board elections and voluntarily agreeing to union recognition upon presentation of authorization cards signed by a majority of employees. Dana Corp., 351 NLRB No. 28 (Sept. 29, 2007). Still, the secret ballot process remains the preferable method of determining representation issues.

[16] See, e.g., Teamsters Airline Division webpage, http://www.teamster.org/divisions/Airline/airlineorganizing.htm ("the general policy of the Airline Division is to file for a representation election only after receiving a 65-percent card return from the eligible voters in a group"); Motion Picture Editors Guild website, http://www.editorsguild.com/v2/getting_started.htm ("While not a hard and fast rule, ideally, we like to see between 70 and 80 percent of the crew sign"); New England Nurses Association website, http://www.nenurses.org/your_rights.htm ("Have 70–75 percent of members sign cards; if unable to reach this goal, review plan"); Lopez, Steven H., Reorganizing the Rust Belt: An Inside Study of the American Labor Movement, University of California Press, 2004, at 38 (""…the rule of thumb in the SEIU is that it's unwise to file for an election when fewer than 70 percent of the workforce have signed interest cards.")

other.[17] On the day of an NLRB election, a Board Agent conducts the balloting in private. He or she brings to the polling site official ballots, a secure ballot box and a voting booth, designed and constructed to protect each voter from all observation by others while marking his or her ballot. The voting area itself is completely off-limits to the union's staff and all of the employer's supervisory personnel. The only people allowed in the area are the eligible voters, the Board agent, and an equal number of designated employee observers for each party. The system is designed to ensure a fair, properly run voting process. Either party may file objections within seven days of an election.[18]

Most courts that have considered the issue have found that the card-check process is a "notoriously unreliable method of determining majority status of a union."[19] For more than 40 years, the NLRB, the U.S. Supreme Court, and the various federal courts have all recognized that card-check is "admittedly inferior to the election process."[20] Numerous courts have held: "[I]t is beyond dispute that secret election is a more accurate reflection of the employees' true desires than a check of authorization cards collected at the behest of a union organizer."[21] As the Court of Appeals for the Seventh Circuit noted years ago:

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[17] A union organizer working with pro-union employees almost always already has contact information about all the employees long before a petition is filed. Still, to guarantee the ability of *both* sides to communicate with *all* employees, pursuant to the Board's decision in Excelsior Underwear, 156 NLRB 1236 (1966), within seven (7) days after the scheduling of an election, the employer must provide the union with the names and addresses of all eligible voters in the unit.

[18] See National Labor Relations Board, Rules and Regulations and Statements of Procedures, Series 8, as amended, Sec. 102.69

[19] NLRB v. Flomatic Corp., 347 F.2d 74, 78 (2d Cir. 1965).

[20] NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969); see also United Services for the Handicapped v. NLRB, 678 F.2d 661, 664 (6th Cir. 1982) ("An election is the preferred method of determining the choice by employees of a collective bargaining representative."); NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 565 (4th Cir. 1967) ("It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check'….").

[21] Flomatic, 347 F.2d at 78; see also Pizza Products Corp. v. NLRB, 369 F.2d 431, (6th Cir. 1966); NLRB v. C. J. Glasgow Co., 356 F.2d 476, 481 (7th Cir. 1966).

> Workers sometimes sign authorization cards not because they intend to vote for the union in an election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back….[22]

Employees who sign cards under such circumstances are currently protected by their ability to vote their true desires in private, without fear of retaliation by co-workers or union representatives. Even if an employee signed an authorization card because he or she was threatened, or misled by a union representative – or for that matter, if an employee refused to sign a card for fear of management reprisal – that employee has the opportunity to vote his or her own conscience behind the curtain, with the full confidence that neither the union representative nor his or her co-workers nor his or her boss will ever know how he or she voted. EFCA will discard that important employee protection and force an employee to make a critical decision about his or her future on the basis of a face-to-face confrontation with a union organizer – and any accompanying pressure it may bring to bear.

B. Almost Half of the Workforce May Have *No* Choice at All.

Under EFCA, a union organizer need approach only the employees he or she believes want to or can be coerced to sign a card. This need only be a simple majority (50% plus one) of the workforce. Thus, 49.9% of the employees may never have an opportunity to voice their opinion on the issue. While it is true that a simple majority can also bind an entire workforce in a secret ballot election, NLRB election rules provide detail notice procedures. Those procedures ensure that each and every employee has the opportunity not only to vote in the election but also to discuss the issue with his or her co-workers and to attempt to persuade them on the issue.

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[22] NLRB v. Village IX, Inc., 723 F.2d 1360, 1371 (7th Cir. 1983). The A.F.L.-C.I.O. has admitted as much in prior editions of its *Guidebooks for Organizers*, noting that cards are "at best a signifying of an intention at a given moment," and that they may be signed by an employee "to get the union off [his] back." See Woodrow J. Sandler, "Another Worry for Employers," *U.S. News & World Report* (March 15, 1965) (quoting A.F.L.-C.I.O., *Guidebook for Union Organizers* (1961)).

An example of employee disenfranchisement in card check was reported in a 2007 voluntary card-check recognition case involving nurses at Kaiser Permanente in Orange County, California. Some nurses complained that: "Many of us were not even aware the [card check] vote was actually taking place."[23] NLRB Assistant Regional Director James Small told the *Orange County Register* that such complaints were common after a union gains recognition through a card check: "Many times individuals call us and ... say we never had a chance to vote on this or they will say we never understood that signing this card would result in the union getting in."[24] Not surprisingly, at a recent rally on Capitol Hill, EFCA supporters celebrated the organizing efforts at Kaiser Permanente as an example of an enlightened employer that "allows workers to form unions without management interference."[25]

C. The Principle of Informed Consent would be Jeopardized.

Under the current system, the "free speech" rights guaranteed by Section 8(c) of the NLRA ensure that all parties to an election have the opportunity to present facts, opinions and information regarding the issue of union representation. This provides employees with a chance to hear all sides of the story – both the positive and negative aspects of union representation. In a recent case, the Board observed:

> Even if no misrepresentations are made, employees may not have the same degree of information about the pros and cons of unionization that they would in a contested Board election…. Employees uninterested in,

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[23] Andrew Galvin, Kaiser Midwives Strike Back, ORANGE COUNTY REGISTER, May 23, 2007, *available at* http://www.ocregister.com/ocregister/money/homepage/article_1703303.php

[24] Ibid.

[25] See 1.5 Million Sign on to Support Employee Free Choice; Thousands Rally on Hill, AFL-CIO Now (Feb. 4, 2009), available at http://blog.aflcio.org/2009/02/04/15-million-workers-sign-on-to-support-employee-free-choice-thousands-rally-on-hill/

> or opposed to, union representation may not even understand the consequences of …recognition until after it has been extended.[26]
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> Later in that same decision, the Board explained:
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> The election-notice requirement provides critical assurance that all employees in the voting bargaining unit will have adequate information about their electoral rights and an opportunity, prior to voting, to discuss and weigh the pros and cons of choosing collective bargaining representation.[27]

Yet EFCA seeks to eliminate any and all notice of organizing – to potential voters and employers alike.

In testimony before the Senate Committee on Health, Education, Labor & Pensions on March 27, 2007, NYU law professor Cynthia Estlund[28] admitted that this, as much as anything, was the intent of EFCA:

> EFCA meets these concerns not by regulating what employers can say about unions any more than current law does, but by seeking to limit the employer's opportunity to mount this aggressive campaign – that is, by narrowing the time period during which the employer is aware of the organizing drive and can mount its counter-campaign. …
>
> Opponents argue that, without a formal campaign, employees will be deprived of essential information about unions. Information is good. But employers who are committed to avoiding unionization are not especially reliable sources of such information. The best way to learn what it is like to have a union is having a union.[29]

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[26] Dana Corp., 351 NLRB No. 28, at *6 (Sept. 29, 2007).

[27] Id.

[28] Professor Estlund was a highly regarded member of President Obama's transition team, serving as a Labor Team Lead apparently charged with review of the National Mediation Board. See http://change.gov/learn/education_labor_team_leads. In early 2009, NYU announced that Prof. Estlund may also be involved in President Obama's National Labor Relations Board on a broader level. See http://www.law.nyu.edu/news/ECM_PRO_059741. Prof. Estlund is a renowned critic of the Board, having years ago penned The Ossification of American Labor Law, 102 Columbia L. Rev. 1527 (2002).

[29] Testimony of Cynthia L. Estlund, Senate Committee on Health, Education, Labor & Pensions, March 27, 2007, *available at* http://help.senate.gov/Hearings/2007_03_27_a/Estlund.pdf

D. Free-Market Principles would be Disregarded.

Liberty of contract was central to the formulation of the NLRA and the collective-bargaining framework at the heart of our labor laws. Government regulation of the actual terms and conditions of employment in private-sector workplaces was always seen as inimical to these basic American principles. The U.S. Supreme Court has explained:

> The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement. This fundamental limitation was made abundantly clear in the legislative reports accompanying the 1935 Act. The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.[30]

Currently, when a union is certified as the exclusive bargaining representative for a unit of employees, the employer has an obligation to bargain in good faith with that union representative regarding the employees' wages, hours and other terms and conditions of employment. This duty to bargain in good faith is further defined as:

> …the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith

[30] H.K. Porter v. NLRB, 397 U.S. 99, 103-104 (1970) (quoting S. Rep. No. 573, 74th Cong., 1st Sess., 12 (1935))(emphasis supplied).

> with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party…[31]

This collective bargaining process was always intended as a balancing of power amongst the parties (i.e., capital/management on the one side, and labor on the other) in a free economic market. Section 8(d) of the Act expressly cautions that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession…." At all times during the process, the employees and/or their union representative retain the right to engage in economic pressure – to withhold their labor by means of a strike – in an effort to persuade the employer to modify its positions. But voluntary agreement has always been the most fundamental component of collective bargaining. Indeed, Samuel Gompers, founder of the American Federation of Labor and a father of the American labor movement, said: "The whole gospel of the labor movement is summed up in one phrase… ***freedom of contract*** -- organized labor not only accepts, but, insists upon, equality of rights and of freedom."[32] EFCA's interest arbitration provisions would represent a significant departure from those principles.

EFCA proponents complain that failure to reach an agreement after the first year of bargaining results in the union's loss of presumed majority status, leaving it vulnerable to decertification efforts. According to the AFL-CIO, this "creates a powerful incentive for employers not to bargain in good faith and to delay the process in hopes that…employees will become discouraged and

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[31] 29 U.S.C. §158(d).

[32] William E. Forbath, *The New Deal Constitution in Exile*, 51 Duke L. J. 165, 185 at n.95 (2001)(emphasis supplied).

decertify the union."[33] The current law specifically protects unions against this possibility, however, as the NLRB has held that the remedies ordered for an employer's refusal to bargain in good faith are to "assure at least a year of good-faith bargaining [and] include an extension of the certification year."[34] Moreover, the filing of an Unfair Labor Practice charge by a union "blocks" the processing of a decertification effort until there has been a full investigation and resolution of the charge. Thus, an employer who refuses to bargain does so at its own peril, while constrained for prolonged periods of time from unilaterally making significant changes to its operations.

E. Current Law Provides Adequate Remedies.

In his opening remarks at the February 8, 2007 Hearing on the Employee Free Choice Act, Rep. Robert Andrews (D-NJ), chairman of the House Subcommittee on Health, Employment, Labor, and Pensions, stated:

> Most employers are not bad actors; however, I do believe the current structure of the representation process perpetuates the ability of a few employers to coerce employees without consequence.[35]

The oft-repeated claim of insufficient consequences is simply not accurate. In addition to the traditional remedies provided for in the statute, there are a number of quite serious remedies that an employer can face under current law as a consequence for egregious labor law violations.

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[33] See AFL-CIO, The Employee Free Choice Act: Facilitating Initial Labor Agreements Through Mediation and Arbitration 1 (July 2006), *available at* http://www.aflcio.org/joinaunion/voiceatwork/efca/upload/Facilitating_Initial_Agreements.pdf.

[34] Northwest Graphics, Inc., 342 NLRB No. 127, slip op. 2 (2004) (extending the certification year by a full twelve months), enf'd 156 F. Appx. 331 (D.C. Cir. 2005).

[35] Strengthening America's Middle Class Through the Employee Free Choice Act, before the House Subcommittee on Health, Employment, Labor, and Pensions, 110th Cong. (Feb. 8, 2007) (statement of Rep. Andrews) *available at* http://www.house.gov/apps/list/speech/edlabor_dem/AndrewsStatementFeb8.html

Where an employer's unlawful actions have undermined the union's majority and made a fair election an unlikely possibility, the Board has the authority to order the employer to recognize and bargain with the union even where there has been no secret ballot election or where the union has lost an election. This authority was upheld in the U.S. Supreme Court's 1969 decision in NLRB v. Gissel Packing Co. [36]

With respect to the unlawful discharge of union supporters, Section 10(j) of the NLRA already gives the NLRB the authority to seek to petition any U.S. district court for "such temporary relief or restraining order as it deems just and proper."[37] This can include the immediate reinstatement of a discharged union supporter while unfair labor practice proceedings are pending.

Civil penalties are also already available under appropriate circumstances. Where a party refuses to comply with a Circuit Court's order enforcing an NLRB decision, the NLRB's Contempt Litigation and Compliance Branch can seek civil penalties, criminal sanctions, and extraordinary injunctive relief.[38]

The September 21, 2006 case of *Evergreen America Corp.*[39] illustrates the application of the first of these measures. In that case, the Board found that the Union possessed signed cards from 62 of 115 bargaining unit employees, yet lost the election by a vote of 61 to 52. Even though there were no allegations that the employer had discharged union supporters, the Board held that it had engaged in unlawful activity that undermined the employees' free choice. For example:

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[36] 395 U.S. 575 (1969).

[37] 29 U.S.C. §160(j).

[38] See NLRB v. Local 3, International Brotherhood of Electrical Workers, 471 F.3d 399 (2d Cir. 2006)

[39] 348 NLRB No. 12 (2006)

- Approximately 27 employees received threats of job loss and plant closure;
- 13 employees were unlawfully instructed not to attend union meetings, not to read the Union's literature and to throw the material away;
- 9 employees were unlawfully interrogated;
- 7 employees were subjected to the impression that their union activities were under surveillance;
- On 23 occasions, managers made express or implied promises to remedy solicited grievances;
- The company granted unprecedented and excessive across-the-board wage increases to bargaining unit employees;
- Managers manipulated the promotion process in order to promote more unit employees than in past years; and
- The company made other workplace changes designed to undermine union support, including liberalizing the attendance policy, expanding its casual dress policy, improving its sick leave policy, lowering the age for early retirement eligibility, and awarding employees $400 Christmas gift certificates.

Far from merely providing a "slap on the wrist," the Board ordered the employer to recognize the union on the basis of the card majority, noting:

> [S]imply requiring the Respondent to refrain from unlawful conduct will neither eradicate the lingering effect of the violations it committed nor deter their recurrence. Rather, we find that the employees' representational desires, expressed through authorization cards, would be better protected by a bargaining order than by traditional or special remedies that the Respondent asserts were not considered by the judge. Accordingly, because we conclude that it is unlikely that a fair rerun election can be held because of the lasting effects of the Respondent's violations, we affirm the judge's finding that a *Gissel* bargaining order is appropriate. [40]

[40] Id.

EFCA proponents argue that the extraordinary remedies discussed in this section are rarely sought by the NLRB. This is true. There are numerous cases reported each year that would seem to be ideal candidates for injunctive relief, bargaining orders, and civil contempt penalties. However, the NLRB has historically suffered from very tight budgetary constraints, and this is likely the reason that more cases are not aggressively pursued. Because EFCA would undoubtedly require significant increases in agency funding, one wonders why Congress would not simply provide that funding now and allow the existing remedial options to function in the way that they were intended.

IV. Potential Alternatives to EFCA

In the months following the defeat of EFCA 2007, the bill's sponsors avowed that EFCA should and would eventually pass exactly as presented in H.R. 800. The bill's critics continued to assert - as this paper asserts - that *no* aspect of EFCA is sound as a matter of policy.

There also, however, has emerged considerable discussion of alternative approaches to labor law reform possible in the 111th Congress. In mid-2008, presumed Senate swing vote Sen. Arlen Specter (R-PA) and Law Clerk Eric S. Nguyen published a Policy Essay in the *Harvard Journal on Legislation* entitled "Representation Without Intimidation: Securing Workers' Right To Choose Under The National Labor Relations Act."[41] The authors criticize both camps for placing "overreaching rhetoric" above substance in the debate over EFCA. At the same time, the authors assert that American labor law is in need of reform. The Essay calls for a constructive approach to developing legislation that addresses "three problems that hinder the ability of employees to choose," as the authors see them:

[41] 45 Harv. J. on Legis. 311 (Summer 2008).

(1) toothless remedies that fail to deter abuses by both unions and employers;

(2) administrative procedures that cause inordinate delays; and

(3) an ineffectual NLRB.

Indeed, even President Obama has hinted that he would consider some alternative approaches. In a January 15, 2009 interview with the *Washington Post*, Mr. Obama discussed issues being raised by EFCA opponents:

> If their arguments are we think there are more elegant ways of doing this or here are some modifications or tweaks to the general concept that we would like to see. Then I think that's a conversation that not only myself but folks in labor would be willing to have.[42]

More recently, the President told an assembled group of newspaper writers:

> I would love to see a process whereby business and labor get together and deal with some of the problems that have made it very difficult . . . for workers to form a union, but perhaps address some of the legitimate concerns that some businesses may have.
>
> Whether those conversations can bear fruit over the next several months, we'll see. But I'm always a big believer in, before we gear up for some tooth-and-nail battle, that we see if some accommodations can't be found. [43]

As the revival of this debate looms, it may be helpful to review some of the potential alternative proposals to the drastic and ill-conceived changes contemplated by EFCA. Inclusion of these notions in this paper should not be read as an endorsement or suggestion that they might make EFCA more

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[42] Interview: Obama Speaks With *Post* Editorial Board, available at http://www.washingtonpost.com/wp-dyn/content/video/2009/01/15/VI2009011502509.html?sid=ST2009011504146&s_pos=list

[43] Employee Free Choice Act, Philadelphia Inquirer, Feb. 16, 2009, available at http://www.philly.com/inquirer/hot_topics/39678452.html

palatable. This serves only as a summary of various concepts certain to be a part of the more reasoned, policy-based dialogue suggested by the Specter-Nguyen Policy Essay, and perhaps encouraged by the President's recent remarks.

Incentives for Voluntary Recognition, Disincentives for Demanding Election

In the U.K., the Employment Relations Act is designed to encourage "semi-voluntary" negotiation at various points during the organizing process. The law provides that the Central Arbitration Committee (CAC) is empowered, upon application of the parties, to utilize formal procedures to certify a union representative if the parties are unable to voluntarily agree upon some other acceptable approach. Both parties - the union and the employer - are encouraged to revisit their approaches as the process continues, however, in an effort to avoid relying upon "balloting" and certification by the CAC.[44]

For example, if the parties are unable to reach an agreement on recognition procedures and the CAC accepts the union's application for intervention, the union will be precluded from re-applying for recognition through the CAC for a period of three years. That bars the union for at least two years longer than under the NLRB election bar in the U.S.. Likewise, if faced with a request for recognition, an employer declines to negotiate some cooperative procedure and relies upon CAC intervention, any resulting certification of the union will be unrebuttable for three years.

[44] See Central Arbitration Committee, Statutory Recognition -- Guide for the Parties, Version 4-6 (June 2007)

Joint Petitions -- Proposed RJ Petition

In early 2008, the Board provided notice of, and sought comment on, regulations to establish a new type of "joint" petition filed by a union and employer for a representation election.[45] The proposal, designed to streamline certification procedures, provided that the joint "RJ" petition:

- would identify an agreed-upon election date within 28 days;
- would identify the agreed-upon place and hours for the election;
- would include an agreed-upon description of the bargaining unit;
- would include the full names and addresses of all eligible employees; and
- would not require *any* showing of interest.

Unfair Labor Practice (ULP) charges would not serve to block the election or cause the ballots cast in the election to be impounded, as now, but rather would be handled in conjunction with any post-election proceedings. Public comment was obtained,[46] but no further action was taken.

Expedited Elections

EFCA seeks short-sightedly to eliminate the period between the filing of a petition and a determination by the NLRB. Some have suggested that shorter time periods will better preserve the contemporaneous sentiment of employees and limit the extent to which delay might dilute union support. These people often point to Canadian provincial models. Some Canadian provinces which still require an election place a stricter time limitation on campaigns. In the U.S.,

[45] See Joint Petitions for Certification Consenting to an Election, 73 Federal Register 10199 (Feb. 26, 2008)

[46] See National Labor Relations Board, Public Comments on Proposed Joint Petition Rule, *available at* http://www.nlrb.gov/research/frequently_requested_documents.aspx.

NLRB policy guidelines call for an election within 42 days after a petition is filed. In Ontario, by comparison, balloting must take place, in most cases, between five and seven days after a union files for certification.[47] While five days is probably not an adequate amount of time for employees to thoroughly educate themselves and discuss the issue, there is a lot of room for discussion between that prospect and the current system's six-week window.

Union Access to Employees

In the U.K., if the parties resort to CAC-supervised balloting, the employer is obligated to provide much more extensive information about the employees to the union earlier than required here under the Board's Excelsior Underwear[48] doctrine. Moreover, the employer is obligated to facilitate union access to the employees on its premises to allow for the union's presentation of information to employees about the election.[49]

Codification of the *Gissel* doctrine

Under its *Gissel* doctrine, the Board has the authority to grant card-check recognition as an unfair labor practice remedy where an employer's unlawful actions have undermined the union's majority and made a fair election impossible.[50] Legislative amendments that would clarify appropriate circumstances and increased funding for the NLRB to pursue and enforce *Gissel* orders would go a long way towards addressing the abuses that are often

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[47] See Ontario Labour Relations Board, Information Bulletin No. 1 (Sept. 2007).

[48] 156 NLRB 1236 (1966).

[49] See Central Arbitration Committee, Statutory Recognition -- Guide for the Parties, Version 4-6, at 24-25 (June 2007). This is the flip-side of the effort underway here in the U.S. to pass state "Workplace Freedom" legislation, outlawing mandatory -- or "captive audience" -- speeches by employers regarding unionization. See, e.g., Walt Williams, Captive Audience, Sick Leave Bills Meet Different Fates, THE STATE JOURNAL (WV), Feb. 28, 2008.

[50] NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

highlighted by EFCA opponents while still preserving the secret ballot guarantee for the vast majority of employees.

Increased Use of Injunctions in "First Contract" Cases

In recent years, General Counsel Ronald Meisburg has sought to address the issue of delays in "first contract" negotiations. In a series of General Counsel Memoranda beginning with GC 06-05, issued April 19, 2006, Meisburg declared it a "priority" of his term to ensure that employees have the freedom of choice in a Board-conducted election, and "that their decision in an election is protected" by the Board. Accordingly, he directed Regional Offices to focus greater attention on pursuing 10(j) injunctions and special remedies in these bargaining cases. Whether or not the Board's budget allowed for more regular prosecution of these injunctions, and to what degree of success, are certainly legitimate questions for debate.

Routine Pursuit of Special Remedies in "First Contract" Cases

The remainder of these G.C. Memoranda[51] reiterate instructions that Regional Offices pursue injunctions and special remedies in "first contract" bargaining cases. The specific remedies suggested as possibilities include:

- extensions of the certification period by 6 to 12 months;
- requiring bargaining on a prescribed or compressed schedule;
- requiring periodic reports on status of bargaining;
- ordering reimbursement of bargaining costs;
- multi-facility postings; and
- union access to employer bulletin boards.

[51] See NLRB Gen. Couns. Mem. 06-05 (Apr. 19, 2006); NLRB Gen. Couns Mem. 07-08 (May 29, 2007); NLRB Gen. Couns. Mem. 08-08 (May 15, 2008); and NLRB Gen. Couns. Mem. 08-09 (July 1, 2008).

Codifying these remedies and/or funding the Board's ability to pursue them more freely are certainly options that would facilitate negotiations in the period immediately following certification of a union representative.

Interest Arbitration as Special Remedy in Egregious Cases

Mandatory interest arbitration as contemplated by EFCA might be reserved for use as a special remedy in cases where one of the parties displays a repeated, recalcitrant refusal to bargain in good faith. Current law allows the Board to impose more drastic measures against such employers who egregiously and repeatedly violate the Act. Use of this remedy in the same manner as a *Gissel* bargaining order may serve to deter the wrong-doing of the truly bad actors without depriving all of the other employers, unions and employees of the freedom of contract that has been central to American labor relations for decades.[52]

Injunctions for Organizing ULP Cases

The mandatory injunction actions described in EFCA would take discretion away from the NLRB, [53] requiring the Board to grant investigative priority and to pursue injunctive relief for any charges which allege that during organizing or negotiations an employer: discriminated against employees, threatened to discharge an employee, or engaged in any behavior that restrained, coerced or interfered with an employee's exercise of rights in violation of the NLRA. Requiring expedited pursuit of injunctive relief in a wide range of garden variety

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[52] See William Forbath, The New Deal Constitution in Exile, 51 Duke L. J. 165, 185 at n.95 (2001) (Quoting Samuel Gompers, founder of the A.F.L., thus: "The whole gospel of the labor movement is summed up in one phrase… freedom of contract -- organized labor not only accepts, but, insists upon, equality of rights and of freedom.")

[53] Ironically, it was the abusive application of the "injunction power" by courts in labor cases throughout the late 1800s and early 1900s that inspired labor to push for the current framework. See Felix Frankfurter & Nathan Greene, The Labor Injunction (1930)

ULP cases seems overly broad, but there may be some lesser degree of increased injunctive recourse to be considered.

Reciprocal Penalties

Because the NLRA restricts both unions and employers from engaging in coercive behavior, it seems obvious that the consequences for coercion should be the same irrespective of the actor. But, as written, the EFCA remedies would apply only to employer unfair labor practices. During the H.R. 800 Committee process, Rep. David Davis (R-TN) offered an amendment to make Section 4's civil penalty and liquidated damages provisions also apply to unions that coerce an employee during a card check campaign or first contract negotiation. All Democrats on the Committee voted against the amendment, precluding it from consideration along with the rest of the bill.[54] It seems only logical and equitable that Congress should set patronage aside and make any NLRA remedial changes reciprocal.

Extension of Board Members' Terms

Contributing to the general lack of confidence ascribed to the Board during the past few years is the extent to which the agency has become politicized. The Board is normally comprised of five Presidential appointees with staggered terms: two Democrats, two Republicans, and one additional member of the President's party. Recently, special interests have leveled intense attacks against the Board. This has resulted in Congressional hearings to explore alleged partisan biases of the Board and its Members, and perceived impact on recent decisions.[55] In the wake of these hearings, the Democratic-controlled

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[54] H.R. Rept. No. 110-23 (2007) (Conf. Rep.).at 32.

[55] See The National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights, before the House Subcommittee on Health, Employment, Labor, and Pensions, 110th Cong. (Dec. 13, 2007), *transcripts and witness statements available at* http://edlabor.house.gov/hearings/2007/12/the-national-labor-relations-b.shtml.

Senate actually refused to confirm any of President Bush's appointments to fill three vacancies on the Board.[56] As a result, for over a year, the Board has been acting with only two Members - a situation many challenge as a violation of its statutory mandate.[57] Any procedural amendments to prevent the crisis of the last year, or to provide a stronger sense of the value of precedent in Board decisions, would serve only to stabilize labor relations overall.

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[56] See, e.g., Mark Schoeff, Jr., NLRB Hobbles Along As Seats Remain Unfilled, Crain's Workforce Management (March 25, 2008).

[57] See 29 U.S.C. §153(b)