Center for American Progress Action Fund

The Employee Free Choice Act 101

A primer and a rebuttal

By David Madland and Karla Walter March 2009

The freedom to form a union is a democratic right that is under attack. Too many workers are prevented from freely choosing to band together in a union to bargain collectively with their employer on workplace issues.

More than half of all workers in the United States say they would vote to join a union if they could, but union membership in the private sector is less than 8 percent today—down from one-third of private sector workers in the middle of the 20th century—because existing laws make forming a union a Herculean task that few want to undertake.

The Employee Free Choice Act is a sensible reform that would protect workers' right to join together in unions and make it harder for management to threaten workers seeking to organize a union, but conservatives are waging war against the bill.

The Employee Free Choice Act will restore balance to the union election process by allowing workers the choice to organize a union through a simple majority sign-up process—a system that works well at the small number of workplaces that choose to permit it, raising penalties when the law is violated and promoting productive first contract negotiations with a mediation and arbitration option.

Why do we need the Employee Free Choice Act?

Today, millions of American workers are denied their right to form a union because the process of voting on union formation has been corrupted. Workers that consider forming a union today face an undemocratic system and are frequently intimidated by their employer. A new report by the Center for Economic and Policy Research finds that in 2007 at least one pro-union worker was fired during 30 percent of union election processes, and pro-union activists faced a more than 20 percent chance of being fired.

The problem isn't just corporations that violate the law. Over the years, our legal system has allowed unfair elections to become the norm. More than 90 percent of companies legally force workers to attend anti-union meetings that include "one-on-one conversations" with supervisors.

According to research by University of Oregon Professor Gordon Lafer, workers often face pressure from their direct supervisors—the person with the most control over their job—to reveal their private preferences for the union. This takes the "secret" out of the "secret ballot"—the most common conservative mischaracterization of current union organizing rules. Meanwhile pro-union employees are banned from talking about forming a union except while they are on break time and banned from distributing pro-union information except when they are both on break time and in a break room.

Many corporations focus significant time and energy on fighting union organizing drives; 75 percent hire consultants to run sophisticated union-busting campaigns based on mass psychology and distorting the law, according to Cornell University Professor Kate Bronfenbrenner. Corporations can even make dubious "predictions" (but not "threaten") that unionization will force the company to close its doors.

Corporations have the right to their opinion, but they do not have the right to distort the election process to such a degree that it is a parody of democracy. A democratic election requires that one side does not hold all the power, control all the media, and control the timeline of the election. Yet, that is exactly what many union elections look like today.

Nevertheless, there are still workplaces where workers successfully form a union. The corporate response? Often it's to bargain with the new union in bad faith by using delay tactics and stalling the negotiation of a first contract indefinitely. These delay tactics can cause workers to grow frustrated and lose faith in their ability to be treated fairly at the bargaining table. Only 38 percent of unions certified through the National Labor Relations Board election process achieve a first contract after one year—and only 56 percent ever achieve a first contract.

Unfairly preventing workers from joining together in unions it is not only a violation of their basic human rights, it is also bad for the economy and democracy. Without strong unions, our entire community pays a heavy price: wages lag, race and gender pay gaps widen, and voter turnout is depressed as insecurity, poverty and inequality increase. Income inequality is now at the extreme levels it was in the 1920s, when unionization rates were also below 10 percent.

What are the benefits of unions?

Unions raise wages and benefits for their members. When unions are strong and able to represent the people who want to join them, these gains spread throughout the econ-

omy; non-union companies increase their wages and all workers have more purchasing power, producing a "virtuous circle of prosperity and jobs," according to University of California at Berkeley Professor Harley Shaiken. Unionized workers also provide a counterbalance on unchecked CEO greed and promote greater income equality. A Center for American Progress report found that strengthening unions is critical to reducing poverty in the United States.

Unions give workers a greater voice at work and in our democracy. On the job, unionized nurses have been able to work with hospitals to improve staffing levels so that patients receive quality care, and firefighters have been able to implement new safety programs to reduce on-the-job fatalities. Unions help people participate in government and significantly increase voting rates, especially for non-white and non-wealthy voters. For every 1 percent increase in union density, voter turnout increases by .2 to .25 percent.[1]

How will the Employee Free Choice Act help?

By passing the Employee Free Choice Act, Congress can support workers' democratic right to bargain for their fair share, raise the wages of working men and women, and pump billions of dollars into the American economy. The bill would allow workers rather than corporations—as under current law—the choice to organize a union through a simple majority sign-up process—a system that works well at the small number of workplaces that choose to permit it. The Employee Free Choice Act would raise penalties when the law is violated, and promote good-faith bargaining through a mediation and arbitration option so that employees can negotiate a first contract.

In 2007, the Employee Free Choice Act passed the House and received majority support in the Senate, but it did not receive enough votes to break the threat of a filibuster. With a new Congress, and President Obama's promise to sign the bill, the Employee Free Choice Act has a strong chance of becoming law.

Debunking conservative myths about the Employee Free Choice Act

For the past few years, some conservatives as well as a host of CEOs have been waging a multi-million dollar campaign to defeat the bill, and they have recently ramped up the intensity of their campaign. Rather than recognize that the freedom to form a union is a democratic right and that we all do better when workers are paid their fair share, opponents are fighting to preserve the status quo. They don't want their power challenged by unionized workers. When Wal-Mart CEO Lee Scott was asked at an analyst meeting on October 28, 2008 about the Employee Free Choice Act, he stated: "We like driving the car and we're not going to give the steering wheel to anybody but us."

The campaign against the Employee Free Choice Act often relies on mischaracterization and twisted "facts" that deserve closer scrutiny. Three myths dominate opponents' arguments against the Employee Free Choice Act, and a closer look shows they're just not in touch with reality.

Myth 1: The Employee Free Choice Act is undemocratic because it eliminates the secret ballot and allows unions to intimidate workers.

FACT: The Employee Free Choice Act restores previously won democratic rights.

- The Wagner Act, passed in 1935 to protect the democratic right of workers to organize labor unions, engage in collective bargaining, and to take part in strikes and other forms of protest, promoted majority sign-up. Elections were just one way for workers to unionize during the 1930s. Under these legal rules millions of workers poured into unions, exercising their basic democratic rights. Almost a third of all union certifications between 1938 and 1939 occurred without an election according to Dr. David Brody, labor historian.[2]

- The Wagner Act placed the federal government squarely on the side of collective bargaining and the right to organize. The original interpretation of the law was that a firm's duty was to remain completely neutral in a representation election, in recognition that economic dependence defines the relationship between employers and workers. Employer persuasion could not be separated from employer coercion.[3]

FACT: The Employee Free Choice Act promotes free and fair union election processes.

- The Employee Free Choice Act will restore balance to the union election process by allowing workers to choose a union through simple majority sign-up or an election. Under current law, management rather than workers has the power to decide whether workers can organize a union through majority sign-up or election.

- Under this legislation, workers retain the right to choose a traditional election. If at least 30 percent of workers want an election, rather than majority sign-up, a "secret ballot" election will be held.

- Majority sign-up works well at the workplaces that choose to permit it, including large U.S. corporations such as AT&T, Inc., United Parcel Service, Inc., and Dow Jones & Company.

- Many businesses use similar petition processes to form business improvement districts that raise area taxes for the provision of collective services and allow member businesses a collective voice to influence area decision makers and improve district conditions.

FACT: The current process is not secret or democratic.

Often, management has already learned where employees stand before the "secret ballot" vote takes place.

- Management uses one-on-one meetings—often conducted by workers' direct supervisor, the person with the most control over their job—to intimidate workers and determine their support for unionization. Union busting consultants instruct supervisors to gauge employees' support for a union based on their reactions during these meetings and use grading systems to track employee support for the union. Employees do not have the legal right to refuse to discuss the issue. Thus the "secret ballot" for most workers is anything but secret, since their vote was known long before they stepped into the polling booth.

- A former anti-union consultant wrote that he would often create a $100 prize for the supervisors who most accurately predicted the number of anti-union votes, reporting that: "In pool after pool the supervisors were astonishingly accurate."[4]

The current election process, governed by the National Labor Relations Board, is not democratic and fails on almost every single measure of basic fairness. NLRB elections more closely resemble the sham "elections" of one-party states than anything we would call American democracy.

- In NLRB elections, parties do not have equal access to voters, equal access to the media, or free speech for both candidates and voters.

- Management is permitted to plaster the workplace with anti-union information, demand workers attend mandatory, one-on-one meetings, and even "predict"—but not "threaten"— that unionization will force the company to close its doors.

- Meanwhile pro-union employees are banned from talking about forming a union except while they are on break time and are banned from distributing pro-union information at work except when they are both on break time and in a break room. Union organizers are banned from ever entering the workplace or even accessing publicly used but company-owned spaces, such as parking lots, at any time, for any reason.

Firms often prevent workers from even holding an NLRB election.

- The number of NLRB representation elections has fallen to its lowest level in over half a century.

- Union avoidance consultants—employed by most companies facing the prospect of a union election—counsel corporations to conduct an aggressive, intimidating offensive as soon as workers begin discussing unionization. "Winning an NLRB election

undoubtedly is an achievement; a greater achievement is not having one at all!" advises law firm, Jackson Lewis.

FACT: Intimidation by corporations, rather than unions, is the primary problem.

A new report by the Center for Economic and Policy Research finds that in 2007 corporations fired at least one pro-union worker in 30 percent of NLRB-certified elections, and pro-union activists faced a more than 20 percent chance of being fired.

Every 18 minutes a worker is illegally fired or discriminated against by their employer for their union activity—including discrimination even after a workplace has been organized—yet firms face few consequences when caught.

- In 2007, 29,559 workers received backpay from their employers because they were illegally fired or denied work as a result of exercising their federally protected labor law rights.

- Illegal firings have a chilling effect on union activity. When a worker is fired for union activity, the impact of that firing extends not only to the worker fired, but also to her coworkers. For every pro-union worker who is fired, 395 others witness the termination, and too often those workers see that a corporation's illegal actions are not penalized.

Unions have long demonstrated their respectful and lawful treatment of workers.

- Increasingly, unions rely on organizing campaigns where employers voluntarily agree to recognize a union once a majority of workers have signed a card supporting unionization. Since 2003, over half a million workers formed unions through majority sign-up.

- While critics of majority sign-up campaigns claim pro-union workers and union organizers will coerce workers to obtain their signature, they can find few cases of past fraud or coercion by pro-union petitioners. American Rights at Work recently conducted a review of 113 past union petition processes cited by the anti-union HR Policy Association as involving union fraud and coercion. Its examination revealed misconduct in only 42 of the 113 cases occurring between 1938 and 1997—far less than one per year.[5]

Cornell University Scholar Kate Bronfenbrenner's exhaustive studies have found that corporate coercion—most of which is legal—is rampant.

- Ninety-two percent of private-sector companies force employees to attend closed-door meetings to hear anti-union propaganda; 78 percent require that supervisors deliver anti-union messages to workers they oversee; 75 percent hire outside consultants to run anti-union campaigns; and half of employers threaten to shut down partially or totally if employees join together in a union.

Myth 2: Binding arbitration prevents negotiation by imposing unreasonable time limits and will lead to the imposition of uncompetitive contracts.

FACT: Arbitration encourages negotiations and prevents companies from using delay tactics.

After workers win an election in favor of union representation, a first contract must be negotiated to govern labor management relations. Currently, corporations often engage in bad faith bargaining to prevent recently unionized workers from ever signing a first contract.

- Firms continue their anti-union campaigns through negotiations by using delay tactics that can cause workers to grow frustrated and lose faith in their ability to be treated fairly at the bargaining table. Only an estimated 38 percent of unions certified through the NLRB election process achieve a first contract after one year, and only 56 percent ever achieve a first contract.

- In Canada, where several provinces require binding arbitration if labor and management cannot come to an agreement, Karen Bentham of the University of Toronto found that workers who form unions reach a first contract 92 percent of the time.

The vast majority of contract negotiations are resolved voluntarily where arbitration is an option.

- The arbitration option does not mean that labor or management will be rushed into unfair agreements. All time limits under the Employee Free Choice Act can be extended by mutual consent of the parties—giving the parties flexibility to use the time frames that fit their specific needs. Voluntary negotiations can proceed as slowly or quickly as necessary as long as both parties feel that the other is negotiating in good faith.

- The legislation would allow either party to seek mediation assistance after 90 days of negotiations. After 30 days of mediation, either party can request binding arbitration.

- Mediation and arbitration prevents either party from stalling and bargaining in bad faith. The threat of arbitration—not the actual use of the procedure—tends to encourage parties to voluntarily settle. Available research shows that 70 to 90 percent of American public sector contracts covered under arbitration laws are reached without a binding arbitration award.[6]

FACT: Industry experts determine agreements based on current practices that are fair to workers and to management.

- Wage increases and contract terms resulting from arbitration tend to be very similar to those won through voluntary negotiations. According to MIT Professor Thomas Kochan, arbitrators make decisions that reflect what is occurring in comparable jurisdictions, and

there is a widely shared norm among arbitrators that contract innovations are best left to the parties to negotiate on their own.[7] A 2001 Cornell University study looking at the difference between states with arbitration statues and states without such statutes found that police officers' wages were not affected by the presence of arbitration statutes.[8]

- The Federal Mediation and Conciliation Service, or FMCS, is charged with establishing the arbitration board, but employs only mediators, not arbitrators. If arbitration is requested, labor and management together select an arbitrator from a list of FMCS recommended private-sector arbitrators. This arbitrator will determine contract terms. Private arbitrators are often specialists in particular industries and have substantial experience determining contract terms.

Myth 3: Increasing unionization, especially during the recession, will harm workers and the economy by making business uncompetitive.

FACT: Unions are good for all workers. They improve wages, benefits, and working conditions. Even in today's tough economic times, unions are good for the economy and help foster a competitive high-wage, high-productivity economy.

Unions raise wages and benefits for all workers. Union workers earn significantly more on average than non-union counterparts and union employers are more likely to provide benefits.

- Unionized workers earn 11.3 percent ($2.26 dollars per hour) more than non-union workers with similar characteristics. Union workers nationwide are 28.2 percent more likely to have employer-provided health insurance and 53.9 percent more likely to have employer-provided pensions compared to workers with similar characteristics who are not in unions. Workers in low-wage industries, women, African-American, and Latino workers have higher wages in unionized workplaces than in non-unionized workplaces.

- Even non-union workers—particularly in highly unionized industries—receive financial benefits from companies that increase wages to match what unions would win in order to avoid unionization and to retain employees.

Without unions, fewer workers get ahead. Union membership rewards workers for productivity gains they deserve, but do not always receive.

- Declining unionization rates mean that workers are less likely to receive good wages and be rewarded for their increases in productivity. In 1980, 25.7 percent of American workers were either members of a union or represented by a union at their workplace. By 2008, that portion declined to 13.7 percent.

- Throughout the 20th century, American workers have helped our economy grow by becoming more productive. Prior to the 1980s, productivity and workers' wages moved in tandem—as workers produced more per hour, they saw a commensurate increase in their earnings—but this link between economic growth and the well-being of the middle class has broken down.

- From 1980 to 2008, nationwide worker productivity grew by 75 percent, while workers' inflation-adjusted average wages increased by only 22.6 percent—meaning that workers were compensated for only a small share of their productivity gains. Higher union wages reward workers for a larger portion of their productivity gains.[9]

Today, CEOs rather than workers are rewarded for growth in the economy.

- CEO pay has skyrocketed from 27 times more than the average American worker's wages in 1973 to 344 times higher today. Increased unionization will mean that workers rather than CEOs are rewarded for increases in labor productivity. By joining together in unions, workers can help counterbalance the power of CEOs.

Greater unionization will lead to more money circulating in the economy, rather than stagnating in the bank accounts of rich CEOs.

- If union coverage rates were 5 percentage points higher—18.7 percent instead of 13.7 percent—and the union wage premium remained constant —unionized workers earn 11.3 percent ($2.26 dollars per hour) more than their non-union counterparts on average— new union workers nationally would earn an estimated $25.5 billion more in wages and salaries per year.

- Also, new research from the Economic Policy Institute estimates that if 5 million service workers joined unions, these workers would get a $7,000 annual raise on average and $34 billion in total new wages would flow into the economy. These working-class employees would be more likely than CEOs to spend their money during an economic downturn, who can afford to save during lean economic times.

When unions were stronger, the economy thrived.

- From 1947 to 1973, the period when unions were strongest and nearly one-third of workers were organized, U.S. economic output nearly tripled in size, growing at an average of 3.8 percent annually. The strength of unions during this period meant workers were rewarded with increasing real wages, and greater American purchasing power produced more profit for U.S. companies, more investment, and increased labor productivity. In the years since 1973, U.S. economic output grew by an average of 2.9 percent annually, and since 2001, output has grown by an average of only 2.2 percent per year.

Higher wages are competitive.

- Competitiveness is linked to productivity, quality, and innovation—all of which can be enhanced with higher wages. Henry Ford found in 1914 that paying employees $5 per day—double the auto industry's prevailing wage—reduced turnover, allowing him to cut the price of the Model T and increase profits significantly. Also, higher wages meant his employees could now afford to purchase his cars. Ford commented that the $5 daily wage was one of the finest cost-cutting moves the company ever made.

- Still today, companies that invest in their workers through fair wages see higher profits than low-wage corporations. In the retail world, labor costs in 2005 for partially unionized retailer Costco were 40 percent higher than Sam's Club, but Costco produced almost double the operating profit per hourly employee in the United States—$21,805 per employee versus $11,615 per employee.

Small business will continue to thrive under the Employee Free Choice Act.

- Current labor law excludes from its jurisdiction small businesses with low sales volumes. These exemptions have existed for over 70 years. The Employee Free Choice Act makes no changes to the exemptions for small businesses.

- The Employee Free Choice Act will streamline the union selection process, so small business where workers exercise their right to form a union will be spared the cost of a long election battle.

Conclusion

The freedom to join together in unions is a democratic right – but for American workers this right is under attack. Today union membership rates are low because the current union election process has been corrupted. Workers attempting to organize face an undemocratic process where intimidation is rampant, pro-union voices are silenced, and too often corporations violate workers' rights. Opponents of the Employee Free Choice Act are fighting to preserve the status quo with a multi-million dollar campaign based on myths and scare tactics. However, by passing the Employee Free Choice Act, Congress can support workers' democratic right to organize, restore balance to the union election process, raise the wages of working men and women, and pump billions of dollars into the American economy.

Endnotes

1 Benjamin Radcliff and Patricia Davis, "Labor Organization and Electoral Participation in Industrial Democracies," *American Journal of Political Science*, 44 (1) (2000): 132-141.

2 David Brody, *Labor Embattled: History, Power, Rights,* (Chicago, University of Illinois Press, 2005).

3 David Brody, "New strategies: How the Wagner Act became a management tool," (New Labor Forum, 2004).

4 Martin Jay Levitt, *Confessions of a Union Buster* (New York: Crown Publishers, 1993).

5 HR Policy Association's review looked for any NLRB decisions involving coercion or deception in connection with a union's solicitation and collection of union authorization cards. It covered cards signed for union representation purposes. The vast majority of these petitions were most likely petitions for a union representation election.

6 Julie Martinez Ortega and Erin Johansson, "The Facts Behind the Employee Free Choice Act," (Washington: American Rights at Work, 2008).

7 Ibid.

8 Orley Ashenfelter and Dean Hyslop. "Measuring the effect of arbitration on wage levels: The case of police officers," *Industrial and Labor Relations Review,* 54 (2) (2001).

9 The cost of benefits—especially health insurance—has increased over time and now accounts for a greater share of total compensation than in the past, but this increase is nowhere near enough to account for the discrepancy between wage and productivity growth. For example, according to analysis by the Center for Economic and Policy Research, between 1973 and 2006 the share of labor compensation in the form of benefits rose from 12.6 percent to 19.5 percent.