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**Interest Arbitration Under the
Employee Free Choice Act:**

What Could This Mean for Employers?

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Interest Arbitration Under the Employee Free Choice Act: What Could This Mean for Employers?

I. The Employee Free Choice Act and Mandatory Interest Arbitration

A wave of change is approaching in federal labor law. The Employee Free Choice Act (EFCA), a bill that enjoyed the almost unanimous support of Democrats in the 110th Congress,¹ will likely be among the first bills debated in the new Congress in 2009.² President Obama was a cosponsor of EFCA in the Senate in 2007, and therefore he is expected to sign EFCA into law if it is passed by the new Congress.

If enacted, EFCA would dramatically change federal labor law in two key areas: (1) the process through which a union becomes certified as the exclusive bargaining representative of a group of employees and (2) the process by which a first contract is negotiated between an employer and a newly certified union. The first aspect of EFCA, which would replace secret ballot elections with certification through signed authorization cards (i.e., a “card check”), has received far more attention than the second. The purpose of this paper is to focus on the second aspect of EFCA as it could potentially have a more significant impact on employers than the “card check” provision.

When a union is certified, EFCA would guarantee that a first contract is reached either voluntarily or by government mandate. Specifically, EFCA provides that if the parties do not reach a voluntary agreement after 120 days of negotiations and mediation—which is usually not a sufficient amount of time to negotiate a first contract—the government “shall” refer the dispute to binding interest arbitration.³ The interest arbitrator would

¹ H.R. 800, 110th Cong. (2007). EFCA passed the House of Representatives in March 2007, with 241 votes for and 185 against. Final Vote Results for Roll Call 118, H.R. 800, 110th Cong. (2007), available at <http://clerk.house.gov/evs/2007/roll118.xml>. AFL-CIO, *The Employee Free Choice Act*, <http://www.aflcio.org/joinaunion/voiceatwork/efca/brokensystem.cfm> (last visited Nov. 14, 2008).

² Editorial, *Big Labor's Comeback*, Wall St. J., Aug. 28, 2008, available at http://online.wsj.com/article/SB121979616286074815.html?mod=googlenews_wsj.

³ Specifically, the bill calls for section 8 of the National Labor Relations Act (29 U.S.C. § 158) to be amended by adding the following:

(h) Whenever collective bargaining is for the purpose of establishing an initial agreement following certification or recognition, the provisions of subsection (d) shall be modified as follows:

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determine the terms of the parties' first contract, including wage rates, benefits, and many other terms and conditions of employment. The contract imposed through interest arbitration would bind the parties for two years.

EFCAs interest arbitration provision would overturn a fundamental principle of federal labor law that has existed since the original Wagner Act was passed in 1935. That principle is one of freedom of contract. While the National Labor Relations Board (the Board) is authorized to determine whether good-faith bargaining has occurred, neither the Board nor any other governmental agency has the authority to compel an employer or a union to agree to a proposal that it deems to be unwise or undesirable.⁴ This voluntary system results in a first contract in the vast majority of cases. For instance, a 2000 study indicated that 68% of newly organized employees received a first contract within one year of bargaining.⁵ Despite this track record of success in most cases, EFCAs would fundamentally alter the bargaining process in every first contract negotiation.

Although arbitration is a common practice in private sector labor law, interest arbitration is not. Labor arbitration is divided into two distinct categories. The first, grievance arbitration, is a staple of private sector labor relations for resolving contract interpretation and discipline disputes.⁶ In traditional grievance arbitration, the arbitrator's authority is limited to interpreting the existing collective bargaining agreement.⁷ Most private sector collective bargaining agreements contain a grievance/arbitration process to resolve contract interpretation or discipline issues.

(1) Not later than 10 days after receiving a written request for collective bargaining from an individual or labor organization that has been newly organized or certified as a representative as defined in section 9(a), or within such further period as the parties agree upon, the parties shall meet and commence to bargain collectively and shall make every reasonable effort to conclude and sign a collective bargaining agreement.

(2) If after the expiration of the 90-day period beginning on the date on which bargaining is commenced, or such additional period as the parties may agree upon, the parties have failed to reach an agreement, either party may notify the Federal Mediation and Conciliation Service of the existence of a dispute and request mediation. Whenever such a request is received, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(3) If after the expiration of the 30-day period beginning on the date on which the request for mediation is made under paragraph (2), or such additional period as the parties may agree upon, the Service is not able to bring the parties to agreement by conciliation, the Service 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.

⁴ *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103, 104, 108 (1970) (recognizing "from the beginning that agreement in some cases will 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").

⁵ Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing* 51 (submitted to U.S. Trade Deficit Review Comm'n, Sept. 6, 2000, on file with Sch. Of Indus. & Labor Relations at Cornell Univ.).

⁶ Elkouri & Elkouri: *How Arbitration Works*, 46 (Alan Miles Ruben ed., Bureau of Nat'l Affairs 2003).

⁷ *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

Interest arbitration, by contrast, is rare in the private sector, and occurs only when the parties voluntarily agree to that process.⁸

Interest arbitration is a “legislative process” that affords the arbitrator enormous power to write the terms of the parties’ contract.⁹ If management and the union do not reach agreement at the bargaining table, an interest arbitrator is authorized to create new, binding contract terms governing wages, hours, and other terms and conditions of employment.¹⁰ Interest arbitration typically occurs in the public sector, where government employees do not have the right to strike in support of their bargaining demands.¹¹ In the private sector, however, interest arbitration is rare because parties use economic pressure to resolve deadlocks in their negotiations.¹²

Even though the private sector has little experience with interest arbitration, EFCA would make interest arbitration the norm in first contract negotiations. EFCA would afford the parties just 120 days to negotiate a first contract voluntarily, which is a short period of time to address the multitude of subjects that are typically covered in a first contract. Specifically, EFCA provides that if an agreement is not reached after 90 days of negotiations, either party has the right to request federal government mediation.¹³ If no agreement is reached within 30 days of the request for mediation, EFCA provides that an interest arbitration panel shall be appointed by the Federal Mediation and Conciliation Service (FMCS) in order to impose a two-year binding contract on the parties.¹⁴

II. How Interest Arbitrators Will Likely Issue Awards Under EFCA

EFCA contains no standards or factors to guide interest arbitrators in creating a first contract out of whole cloth. Congress has not addressed this issue even though standards are critical to guiding and limiting the interest arbitrator’s discretion. In the public sector, where interest arbitration is fairly common, interest arbitrators generally have a list of statutory criteria to analyze before creating contract terms.¹⁵ EFCA, by contrast, merely authorizes the FMCS to issue regulations, but it is not even clear whether those regulations are intended to cover the procedure, as opposed to the substance, of the interest arbitration process.¹⁶

⁸ ADR in the Workplace 503 (Laura J. Cooper et al. eds., Thomson West 2005).

⁹ Arvid Anderson, *Presenting an Interest Arbitration Case: An Arbitrator’s View*, 3 Lab. Law. 745, 745 (1987).

¹⁰ J. Joseph Loewenberg, *Interest Arbitration: Past, Present, and Future*, in *Labor Arbitration Under Fire* 111, 111 (James L. Stern & Joyce M. Najita eds., 1997).

¹¹ See Loewenberg, *supra* note 15, at 116.

¹² *Ins. Agents’*, 361 U.S. at 489.

¹³ H.R. 800 § (h)(2).

¹⁴ H.R. 800 § (h)(3).

¹⁵ See, e.g., Mich. Comp. Laws § 423.239(9)(a)-(h) (2007) (providing a common list of nonweighted statutory criteria for interest arbitration, including stipulation of the parties and comparative wage and benefit data).

¹⁶ H.R. 800 § (h)(3).

The FMCS is an agency that facilitates voluntary agreement between employers and unions in collective bargaining.¹⁷ The FMCS is not designed, staffed, or equipped to handle the responsibility for setting rules and enforcing the interest arbitration procedures for thousands of first contract disputes each year.

A whole host of complex procedural and substantive questions must be answered before a first contract interest arbitration process could function properly:

- (a) How many arbitrators will serve on each panel?
- (b) Will the arbitrators be government employees or private citizens?
- (c) Who will select the arbitrators?
- (d) Will the arbitration board include partisan members representing the employer and the union?
- (e) What standards will the arbitration board use to create first contracts?
- (f) What type of evidence will be allowed in the interest arbitration proceeding?
- (g) Does either party have a right to appeal, and if so, to whom?

EFCA, as currently drafted, provides no guidance on these important issues.

III. EFCA's Practical Impact on First Contract Bargaining

First contract collective bargaining, as we have known it for over 70 years, may disappear if EFCA is enacted into law. Parties will have tremendous incentives to stake out positions when negotiations begin, knowing that an interest arbitrator may—as soon as 120 days after negotiations start—decide every important issue involved in the negotiations. Bargaining strategy will vary widely depending on the standards developed by Congress or the FMCS.

For example, if government arbitrators have authority to “split the middle” regarding economic proposals, both management and unions will likely take extreme positions in an effort to shift the middle position in their favor.¹⁸ If arbitrators are limited to “final offer” arbitration, where only one party’s position is accepted, management and union negotiators have incentive to offer reasonable proposals hoping the arbitrator selects their terms.¹⁹ But the final offer, “winner takes all” approach may be ill suited for first contract disputes where parties new to collective bargaining need a more balanced outcome.²⁰ States have implemented varying interest arbitration systems with positive and negative aspects resulting from these different approaches.²¹

¹⁷ FMCS, *Mission and Values*, <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=368&itemID=19508> (last visited Nov. 14, 2008).

¹⁸ Elissa M. Meth, *Final Offer Arbitration: A Model for Dispute Resolution in Domestic and International Disputes*, 10 AM. REV. INT’L ARB. 383, 387 (1999).

¹⁹ *Id.* at 387-88; Ronald L. Miller, *High Risk Final Offer Arbitration in Oregon*, J. COLLECTIVE NEGOT. 265, 266-68 (1999).

²⁰ David Broderdorf, *Overcoming the First Contract Hurdle: Finding a Role for Mandatory Interest Arbitration In the Private Sector*, 23 LAB. LAW. 323, 345 (2008).

²¹ *Id.* at 342-44.

Above all, first contract negotiators will need to clearly understand the factors that interest arbitrators will apply when creating first contracts. Even if Congress does not provide the necessary answers, standards and factors must be articulated by the FMCS or the arbitrators themselves. In doing so, they will likely look to the precedent that exists in interest arbitration in the public and private sectors.

IV. Morgan Lewis: Skilled and Knowledgeable Advocates in Interest Arbitration

Although interest arbitration in the private sector is rare, Morgan Lewis attorneys have handled interest arbitration matters in a variety of industries, including telecommunications, airline, railroad, construction, newspaper, mail and package delivery, and professional sports.

Morgan Lewis attorneys have handled hundreds of interest arbitration proceedings in the public sector, including major interest arbitrations involving federal government agencies and in states such as Florida, Maryland, New York, and Pennsylvania. With our cutting edge legal skills and relevant business knowledge, Morgan Lewis is uniquely equipped to represent and advise employers in private sector interest arbitration proceedings, should EFCA become law.

The members of the Morgan Lewis Labor and Employment Practice are available to advise companies and their officers with respect to all aspects of labor and employment issues, including EFCA and similar pending legislation.

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