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Binding Arbitration: A Bad Deal for Workers

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Under the Employee Free Choice Act (EFCA, H.R. 800), if a union and management cannot agree to terms on the first contract after a union is recognized, either side could send the dispute into binding arbitration. This means that both workers and management must accept what is, at bottom, an arbitrator's educated guess at what a fair and prudent contract might be. This has serious consequences for workers.

The most obvious consequence is that employees could be stuck working for less than they might get at another company. And because of the way that binding arbitration affects some obscure provisions of the National Labor Relations Act, workers would be stuck with the union that very well may have let them down, perhaps by not accepting a better offer from management when it had the chance or by putting on a poor presentation in front of the arbitration panel. And those workers would usually be stuck with paying union dues out of their disappointing wages. No matter how badly the union let them down, workers who believe they have lost an arbitration ruling would be unable to even attempt to remove that union for several years.

Leaving a Union Difficult. The National Labor Relations Act (NLRA) provides for the removal of a union that has lost workers' support. The process is similar to that used to join a union today: Union opponents collect petition signatures from co-workers. When they have 30 percent of workers on board, they can petition for a decertification vote. The same rule applies if workers want to bring in another union.

EFCA would change the process for joining a union. Under EFCA's card check rule, a union would be recognized once it has signatures from a majority of workers; there is no vote. EFCA does not, however, change the basic process for removing a union, and the peculiarities of the binding arbitration process mean that workers who are dissatisfied with their union would have fewer chances to start the decertification process.

Employees who oppose the union cannot just start collecting signatures; they must wait until the law presents them with an opening, because the law and the decisions of the National Labor Relations Board (NLRB) have created several "bars" to decertification.

First, there is the certification bar: After a union is recognized, workers must wait a full year before they have an opportunity to vote to remove the union or bring in another one. During this time, the union has the opportunity to negotiate its first contract.

Then comes the contract bar. Once a collective bargaining agreement is in place, a decertification election cannot be held while that contract is in effect, for up to three years.

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The upshot is that workers are left with narrow windows in which to request a decertification: Generally a decertification petition must be filed with the NLRB between 90 and 60 days before a collective bargaining agreement expires. If negotiations on an initial contract approach a year in duration without an agreement, workers may file a petition to remove the union then, too, but if there is a contract in place before that first year expires, the contract bar sets in, the window slams shut, and workers must wait up to three years before attempting to decertify.

So getting rid of a bad union is difficult enough already. Still, the current law does allow workers to remove a union if negotiations drag on too long. And depending on the rules of the union, workers can vote down a contract if they are not satisfied with its terms. Workers also have the right to go on strike or to refrain from striking, as they believe is best, if the union calls for its members to cease working. All of these rights serve to give workers some degree of autonomy and some control over the union.

Workers Lose Their Say. With binding arbitration in place, these rights would likely disappear or be rendered moot. EFCA would not allow workers to terminate the arbitration process, so no matter how long arbitration dragged on, workers would remain stuck with it—even if it lasted longer than a year, which is typical in Michigan, which employs binding arbitration for government workers.

Currently workers vote to ratify the contract their union has negotiated on their behalf. If they do not like the terms, they can vote the contract down and send the union back to the negotiating table. This does not happen with binding arbitration. Once an arbitrator is called in, his or her word is final, so a vote to reject the contract is out of the question.

The typical arbitration process in Michigan takes nearly 15 months. This poses serious problems for employers, who must prepare for the possibility of back pay awards while waiting for an arbitrator's decision. The possibility of a 15-month wait for a raise is not a particularly good situation for workers either, because the wait involves months of uncertainty and of working without knowing how much they are actually earning. And in states that do not have a right-to-work law, the arbitrator's ruling is almost guaranteed to have a forced-dues provision, because forced dues are relatively common in collective bargaining agreements, and arbitrators are likely to follow this widespread precedent. This means that even workers who are dissatisfied with their unions' representation would have to pay dues to it.

Traps Workers in a Union. Not only would EFCA force workers and management into binding arbitration, but it would also make card check certification mandatory, meaning that if a union is able to collect signed authorization cards from a majority of workers, it must be recognized as the representative for all of them. Card check leaves workers vulnerable to deception and intimidation at the hands of union organizers and is likely to result in unions being installed in workplaces where they do not have the true support of a majority of workers.

Combining card check and binding arbitration, as EFCA does, would result in a system where union officials can bully their way into representing workers who do not really want them there, and those workers would be obliged to wait several years—and pay union dues for two years—before they would have the chance to get rid of the unwanted union. This state of affairs would make a mockery of one of the basic premises of American labor law: The will of a majority of workers should determine whether or not a union represents them.

As difficult as it is to remove a union, workers have the right to do so, and they have that right for a reason: A union should not represent workers when they have lost all confidence in it. EFCA's binding arbitration process would have the effect of making it even more difficult for workers to remove a union, and it would leave no possibility that workers could reject a bad arbitrator's ruling. Instead, it would leave them stuck with an arbitration process and an arbitrator that they did not choose and could not remove, no matter how long it takes or how stingy the arbitrator turns out to be.

Conclusion. Whether in combination with card check or standing on its own, mandatory binding arbitration is risky for workers. Under EFCA, they

would not get the chance to vote to ratify the contract that an arbitrator imposes, and they would have to wait at least two years before they could vote to decertify their union. Employees should not be forced into binding arbitration against their will.

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