

## The Facts Behind the Employee Free Choice Act

*Protecting the right to form unions is about maintaining the American middle class. It's been 30 years since this country came close to amending the National Labor Relations Act to offer more protection for workers trying to organize. Yet in 2007, a bipartisan majority of the House passed the Employee Free Choice Act, which would ensure that workers have a free and fair choice to form a union. Though the threat of a filibuster in the Senate killed the legislation in 2007, Congress will revisit the bill after the 2008 election of more worker-friendly Senators. Thus to aid those seeking more information on the Employee Free Choice Act, we have assembled credible sources that provide insight into the issues related to each provision of the bill, bolstering the case for why we need labor law reform. The following is a summary of each provision, arguments making the case why the provision is needed, and rebuttals to common critiques of the provision.*

### **Provision: Majority sign-up**

Summary: A union is certified if the National Labor Relations Board (NLRB) finds that a majority of employees have signed written union authorization forms. Under current law, it is only through the voluntary agreement of their employer that employees can currently form a union through majority sign-up. The bill would allow employees, and not employers, to choose whether to proceed through the NLRB election process or majority sign-up process in order to form a union.

#### Justification for the provision

##### **1. NLRB elections fail to guarantee employee free choice.**

American law recognizes that fair elections require certain ground rules:

- Equal access to voters by both parties
- Equal access to media
- Free speech for both candidates and voters
- Protection of voters from economic coercion
- Secret ballots

With the partial exception of the secret ballot, the NLRB system fails every single one of these tests for basic fairness.<sup>1</sup> In 2002, the State Department condemned elections in Ukraine because employees of state-owned enterprises were pressured to support the ruling party and the governing party enjoyed one-sided media coverage, while the opposition was largely shut out of state-run television. These practices are legal under the NLRB election system.

##### **2. Majority sign-up would make it easier for workers to form unions, with fewer delays exposing workers to employer anti-union campaigns.**

Workers organized unions successfully in 62.5 percent of majority sign-up campaigns,<sup>2</sup> higher than the win rate of 55.7 percent for NLRB elections.<sup>3</sup> Research has demonstrated

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<sup>1</sup> Lafer, Gordon. "Free and Fair? How Labor Law Fails U.S. Democratic Election Standards," American Rights at Work report, June 2005. <<http://www.americanrightsatwork.org/publications/general/free-and-fair-how-labor-law-fails-u.s.-democratic-election-standards.html>>

<sup>2</sup> Eaton, Adrienne and Jill Kriesky. "Union Organizing Under Neutrality and Card Check Agreements," 55 INDUS. & LAB. REL. REV. 42, 45 (2001).

that the “aggressive and hierarchical nature of employer communication” explains why the more an employer communicates to workers during organizing campaigns, the less likely workers are to vote union.<sup>4</sup>

### **3. Majority sign-up is already commonly practiced.**

Since 2003, over half of a million American workers formed unions through majority sign-up.<sup>5</sup> There are now 22 laws in 12 states that grant certain public and private employees the right to form unions through the majority sign-up process.<sup>6</sup> In 2004, Oklahoma granted municipal employees the right to majority sign-up to encourage “labor peace.”<sup>7</sup>

### **4. Majority sign-up benefits labor-management relations.**

In a survey of employers who voluntarily agreed to majority sign-up, 81 percent of those who had previously experienced organizing efforts reported that they responded differently to organizing after the agreement, where they “softened or even eliminated their campaign behavior.”<sup>8</sup> According to Kaiser Permanente, the company agreed to the majority sign-up process because all the parties “recognized that the protracted and often adversarial NLRB election process frequently undermined the ability of everyone involved to focus on the primary mission of providing quality health care.”<sup>9</sup>

### **5. Majority sign-up strengthens the middle class.**

Given the greater success workers have had organizing through the majority sign-up process than through the NLRB election process, the Employee Free Choice Act would lead to expanded union representation. On average, union members earn 30 percent more than non-union workers.<sup>10</sup> When controlling for factors such as education, occupation, and experience, union members still earn 14 percent higher wages than non-union employees.<sup>11</sup> The difference is even greater for Latinos, with a union wage advantage of 18 percent, and for low-wage workers, where union membership raises wages by 21 percent.<sup>12</sup> Unions also raise the wages of African American members by 12 percent,<sup>13</sup> and

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<sup>3</sup> Annual Report of the National Labor Relations Board for Fiscal Year 2006.

<[http://www.nlr.gov/publications/reports/annual\\_reports.aspx](http://www.nlr.gov/publications/reports/annual_reports.aspx)>

<sup>4</sup> Brudney, James J., “Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms,” *Iowa Law Review*, Vol. 90, 2005. <<http://law.bepress.com/cgi/viewcontent.cgi?article=1002&context=osulwps>>

<sup>5</sup> American Rights at Work. “Half a Million and Counting,” Issue brief, September 2008.

<<http://www.americanrightsatwork.org/publications/general/half-a-million-and-counting-20080917-654-116-116.html>>

<sup>6</sup> Ibid.

<sup>7</sup> State of Oklahoma Legislature, 49<sup>th</sup> Session, Senate Bill 1529, “The Oklahoma Municipal Employee Collective Bargaining Act,” as introduced on the floor. <<http://webserver1.lsb.state.ok.us/WebBillStatus/main.html>>

<sup>8</sup> Eaton, Adrienne E. and Jill Kriesky. 2006. “Dancing With the Smoke Monster: Employer Motivations for Negotiating Neutrality and Card Check Agreements,” in *Justice on the Job: Perspectives on the Erosion of Collective Bargaining in the United States*, ed. by R. Block, S. Friedman, M. Kaminski, and A. Levin. (Upjohn: Kalamazoo, MI).

<sup>9</sup> Amicus Brief on Behalf of Kaiser Foundation Health Plan, Inc., filed in *Dana Corp.* 6-RD-1518, 6-RD-1519 (2004). <<http://www.nlr.gov/nlr/about/foia/DanaMetaldyne/Kaiser.pdf>>

<sup>10</sup> U.S. Department of Labor, Bureau of Labor Statistics, *Union Members in 2007*, Jan. 25, 2008.

<sup>11</sup> Mishel, Lawrence, Jared Bernstein, and Heidi Shierholz. *The State of Working America 2008/2009*. Economic Policy Institute, 2008.

<sup>12</sup> Schmitt, John. 2008. “Unions and Upward Mobility for Latino Workers,” Center for Economic and Policy Research, Washington, DC; Schmitt, John. 2008. “The Union Wage Advantage for Low-Wage Workers,” Center for Economic and Policy Research, Washington, DC.

<sup>13</sup> Schmitt, John. 2008. “Unions and Upward Mobility for African-American Workers,” Center for Economic and Policy Research, Washington, DC

for women union members by 11 percent.<sup>14</sup> They are also 59 percent more likely to be covered by employer-provided health insurance.<sup>15</sup> Yet the benefits of union representation extend far beyond just members. Studies have demonstrated that high union density in a region or industry can raise wages for non-union employees.<sup>16</sup>

### Critiques to the provision and rebuttals

#### **1. The bill does away with the secret ballot election process and replaces it with majority sign-up, which exposes workers to coercion by their co-workers or union representatives who pressure them to sign union authorization cards.**

First, the bill would not remove the NLRB election process, it just gives workers a choice between an election or majority sign-up. Secondly, the NLRB election fails every test for a free and fair election, and the presence of a secret ballot fails to erase the impact of employer coercion. Finally, majority sign-up is a less coercive process than the NLRB election process. According to a recent survey of workers, of those who signed an authorization card in the presence of the person who gave it to them during a majority sign-up, 94 percent said that the presence of this person did not make them feel pressured to sign the card; only 17 percent reported that co-workers and 14 percent that union staff pressured them to support the union during the majority sign-up process, and 23 percent reported that management pressured them to oppose the union. In contrast, 46 percent of workers reported that management pressured them to oppose the union during the NLRB election process.<sup>17</sup>

#### **2. The problems of the current election process could be solved simply by shortening the election process and increasing penalties to prevent illegal coercion.**

Even without long delays, the NLRB election process is still fundamentally flawed. Once the NLRB notifies an employer that a petition for an election has been filed, it can pursue an aggressive and entirely legal anti-union campaign within a mere week of an election. Among some of the legal but intimidating tactics used by employers are the following:

- Predict that voting for a union will result in the employees losing their jobs.<sup>18</sup>
- Interrogate employees to find out whether or not they want union representation.<sup>19</sup>
- Fire employees for discretely leaving captive audience meetings.<sup>20</sup>

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<sup>14</sup> Schmitt, John. 2008. "Unionization Substantially Improves the Pay and Benefits of Women Workers," Center for Economic and Policy Research, Washington, DC

<sup>15</sup> U.S. Department of Labor, Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in Private Industry in the United States, March 2007*, Aug. 2007.

<sup>16</sup> Mishel, Lawrence and Matthew Walters. "How Unions Help All Workers," Economic Policy Institute Briefing Paper #143 Aug. 2003. < [http://www.epi.org/content.cfm/briefingpapers\\_bp143](http://www.epi.org/content.cfm/briefingpapers_bp143)>

<sup>17</sup> Eaton, Adrienne and Jill Kriesky. "NLRB Elections vs. Card Check Campaigns: Results of a Worker Survey," INDUS. & LAB. REL. REV., forthcoming 2008.

<sup>18</sup> See *NLRB vs. Gissel Packing Co.*, 395 U.S. 575 (1969). The Supreme Court ruled that an employer is free to predict the economic consequences it foresees from union representation as long as the prediction is based on objective facts outside of the employer's control.

<sup>19</sup> See *NLRB v. Lorben Corp.*, 345 F.2d 346 (1964). An employer passed around a paper asking employees to check whether or not they wanted union representation. The court ruled that since there was no showing of hostility, the employer did not violate the law. Employer interrogation of employees as to their desire for union representation is not held to be coercive on its face.

<sup>20</sup> See *Litton Sys., Inc.*, 173 NLRB 1024, 1030 (1968). The Board found the employer did not violate the law when it fired an employee for discretely leaving a captive audience meeting, affirming the administrative law judge's holding that workers have "no statutorily protected right to leave a meeting which the employees were required by management

- On the day of the election, managers can talk to each individual employee and tell her to vote against the union.<sup>21</sup>
- Monitor employees as they enter and exit the election site, checking employees' names off a list.<sup>22</sup>

Under majority sign-up, workers can make a decision about forming a union with greater privacy. Employees do not have to notify their employer of their intention to form a union through the NLRB until they have already voted by signing cards.

### **3. Workers fail to hear management's side in a majority sign-up, and employers deserve the right to be notified about a union effort and to campaign against union representation.**

Employers always have the opportunity to express their views on unions. From the first day an employee shows up at work, employers can force new hires to watch videos during orientation, post its anti-union position on bulletin boards, and send anti-union emails and letters to all employees. According to a survey of workers who signed cards in a majority sign-up recognition, 81 percent felt they had enough information on the union recognition process, 70 percent had enough on the union itself, and 73 percent had enough on management's attitude toward the union.<sup>23</sup>

### **4. Unions cannot organize workers through NLRB elections, so they are pushing for majority sign-up, which would guarantee them millions of new members.**

The Employee Free Choice Act does not guarantee that anyone will join a union—it simply adds greater options and protections for workers seeking to form unions. No one knows how workers will respond when they are presented with that choice. And while workers have more success organizing unions through majority sign-up, there is clearly no guarantee of forming a union through this process—as a 62.5 percent win rate attests.<sup>24</sup> Liz Claiborne recently wrote that the company “has had success in employing card checks... While we have had card checks that resulted in recognition of [the union], we have also had card checks where insufficient support for the union was established.”<sup>25</sup>

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to attend on company time and property to listen to management's noncoercive antiunion speech designed to influence the outcome of a union election.”

<sup>21</sup> See *Peerless Plywood* 107 NLRB 427 (1953). The Board found the employer's anti-union speech to a group of employees coercive because of the “mass psychology” of the group, and announced a prohibition of “election speeches on company time to massed assemblies of employees” within the twenty-four hours preceding an election. Under this rule, employers can still campaign within the last twenty-four hours before an election, even addressing every employee individually, as long as they don't hold captive audience meetings.

<sup>22</sup> See *American Nuclear Resources, Inc.*, 300 NLRB No. 62 (1990). The Board upheld an election where one company supervisor checked off the names of employees on a list as they entered the employer's van to ride to the polls, and another checked off their names as the employees entered the employer's facility housing the polls. The Board argued that the employees at this plant were accustomed to being monitored, and that listkeeping was a “normal security procedure.”

<sup>23</sup> Eaton, Adrienne and Jill Kriesky. “NLRB Elections vs. Card Check Campaigns: Results of a Worker Survey,” *INDUS. & LAB. REL. REV.*, forthcoming 2008.

<sup>24</sup> Eaton, Adrienne and Jill Kriesky. “Union Organizing Under Neutrality and Card Check Agreements,” *55 INDUS. & LAB. REL. REV.* 42, 45 (2001).

<sup>25</sup> Amicus Brief on Behalf of Liz Claiborne, Inc., filed in *Dana Metaladyne* NLRB case.  
<<http://www.nlr.gov/nlr/about/foia/DanaMetaladyne/Liz%20Clairborne.pdf>>

## **Provision: Strengthening enforcement**

Summary: The bill increases penalties employers must pay when they illegally fire or discriminate against employees, tripling the amount of back pay and providing for civil fines of up to \$20,000 for violations of employees' right to join a union. The NLRB is required to sue for injunctive relief if it has reasonable cause to believe that an employer has illegally engaged in any violation of the National Labor Relations Act (NLRA) that significantly interferes with employees' right to self-organization. Both provisions only apply to employer violations of the law during organizing efforts or negotiations for a first contract.

### Justification for the provision

#### **1. Weak penalties in the NLRA fail to prevent widespread illegal activity during NLRB elections.**

When an employer illegally fires a worker for union activity, it is only obligated to pay backpay plus interest—an average of \$4,026 in 2006.<sup>26</sup> Among employers faced with organizing campaigns, according to a recent study, 30 percent fire pro-union workers, 51 percent of coerce workers with bribery or favoritism, and 49 percent threaten to close the facility.<sup>27</sup> Nearly identical findings were reported in a 2000 study.<sup>28</sup> Another recent study found that workers allege that employers engage in illegal intimidation in 46 percent of NLRB elections.<sup>29</sup>

#### **2. Injunctive relief provision levels the playing field with management.**

Under current law, it is up to the discretion of the NLRB whether to seek injunctive relief when an employer breaks the law, yet the NLRB is required to seek injunctions when unions break the law.

#### **3. With the exception of the National Labor Relations Act, nearly every federal employment law, including discrimination, health and safety, and minimum wage laws, orders employers to pay fines or punitive damages for violating employees' rights.**

#### **4. Current remedies fail to address the chilling effect of firings on union activity.**

When a worker is fired for union activity, the impact of that firing extends not only to the worker fired, but to her coworkers who receive the anti-union message from the employer. For every pro-union worker who is fired, 395 others witness the termination.<sup>30</sup> Yet between 1999 and 2007, only 11 percent of the 86,000 workers that filed charges they were illegally fired for union activity ended up receiving an NLRB ruling determining they were eligible to get their jobs

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<sup>26</sup> Seventy-First Annual Report of the National Labor Relations Board, for the Fiscal Year ended September 30, 2006. (Washington: NLRB, 2005). Table 4. <[http://www.nlr.gov/publications/reports/annual\\_reports.aspx](http://www.nlr.gov/publications/reports/annual_reports.aspx)>

<sup>27</sup> Mehta, Chirag and Nik Theodore. "Undermining the Right to Organize: Employer Behavior During Union Representation Campaigns," Center for Urban Economic Development, University of Illinois at Chicago. Report commissioned by American Rights at Work, December 2005. <<http://www.americanrightsatwork.org/publications/general/undermining-the-right-to-organize-employer-behavior-during-union-representation-campaigns.html>>

<sup>28</sup> Bronfenbrenner, Kate. "Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing," U.S. Trade Deficit Review Commission, 2000. <http://digitalcommons.ilr.cornell.edu/reports/1/>

<sup>29</sup> American Rights at Work. "Out of Control: Employer Misconduct During Union Organizing More Common Than You'd Think," September 2008. <<http://www.americanrightsatwork.org/publications/general/out-of-control-employer-misconduct-during-union-organizing-far-too-common-20080917-653-116-116.html>>

<sup>30</sup> American Rights at Work. "The Chilling Effect: It only takes one to send a message," issue brief, October 2008.

back.<sup>31</sup> By immediately reinstating fired workers, injunctions mitigate the impact of the firing on union activity.

Critique to the provision and rebuttal

**1. Current law already provides adequate remedies to illegal activity because the NLRB can seek injunctions when it believes employers break the law.**

By making it mandatory for the NLRB to seek injunctions when employers violate the law, the bill mitigates the impact of politics on the use of injunctions. The number of injunctions authorized by the Bush NLRB declined by 74 percent since the Clinton Administration and 61 percent since the G.H. Bush Administration.<sup>32</sup>

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<sup>31</sup> American Rights at Work. "Tip of the Iceberg: The Consequences of Employer Lawlessness in a Weak System, ," forthcoming issue brief, October 2008.

<sup>32</sup> National Labor Relations Board, "End-of-Term Report on Utilization of Section 10(j) Injunction Proceedings, June 1, 2001 through December 31, 2005," Memorandum GC 06-02, Jan. 2006.

[http://www.nlr.gov/shared\\_files/GC%20Memo/2006/GC%2006-02%20End%20of%20Term%20Report%20on%20Utilization%20of%20Section%2010j.pdf](http://www.nlr.gov/shared_files/GC%20Memo/2006/GC%2006-02%20End%20of%20Term%20Report%20on%20Utilization%20of%20Section%2010j.pdf); Data based on NLRB documents produced pursuant to a FOIA request by the AFL-CIO, Mar. 2006.

## **Provision: First contract arbitration**

Summary: If the employer and union fail to reach a first collective bargaining agreement within 90 days, either party may request assistance from the Federal Mediation and Conciliation Service (FMCS). If after 30 days of working jointly with the FMCS the parties have still not reached an agreement, either party may refer it to a neutral arbitrator, who could create an agreement for the parties that would be binding for two years. All time limits can be extended by mutual consent of the parties.

### Justification for the provision

#### **1. The NLRA fails to prevent bad faith bargaining, and grants employers wide latitude to frustrate negotiations and cause employees to give up.**

An estimated 38 percent of unions certified through the NLRB election process end up achieving a first contract after one year, and only 56 percent after two years.<sup>33</sup> Where an unfair labor practice charge is present, the likelihood of getting to a first contract falls by 30 percent.<sup>34</sup>

#### **2. The public sector has had positive experiences with arbitration, with laws in 25 states and the District of Columbia.<sup>35</sup>**

The following can be concluded from this experience:

- The passage of an arbitration law has little to no effect on wages or benefits.<sup>36</sup>
- Wage increases and contract terms resulting from arbitration tend to be very similar to those won through voluntary negotiations.<sup>37</sup>
- The vast majority of contracts are settled voluntarily rather than through arbitration.<sup>38</sup>

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<sup>33</sup> Ferguson, John-Paul. "The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999 – 2004," *Industrial and Labor Relations Review*, in press.

<sup>34</sup> Ibid.

<sup>35</sup> States with voluntary or compulsive arbitration include: AK, CT, DE, DC, HI, IL, IN, IA, ME, MA, MI, MN, MT, NE, NV, NH, NJ, NM, NY, OH, OK, OR, PA, RI, TX, VT.

<sup>36</sup> Ashenfelter, Orley and Dean Hyslop. 2001. "Measuring the effect of arbitration on wage levels: The case of police officers," *Industrial and Labor Relations Review*, Vol. 54, No. 2, pp. 316-328; Bloom, David E. 1981. "Collective Bargaining, Compulsory Arbitration, and Salary Settlements in the Public Sector: The Case of New Jersey's Municipal Police Officers." *Journal of Labor Research*, Vol. 2 (Fall), pp. 369-84; Feuille, Peter, John Thomas Delaney, and Wallace Hendricks. 1985. "Police bargaining, arbitration, and fringe benefits," *Journal of Labor Research*, 6: 1-20; Feuille, Peter, John Thomas Delaney, and Wallace Hendricks. 1985. "The impact of interest arbitration and police contracts," *Industrial Relations*, 24: 161-181; Ichniowski, Casey, Richard B. Freeman, and Harrison Lauer. 1989. "Collective Bargaining Laws, Threat Effects, and the Determination of Police Compensation," *Journal of Labor Economics*, Vol. 7, No. 2, pp. 191-209; Katz, Harry C. and Thomas A. Kochan. 2004. An introduction to collective bargaining and industrial relations (3rd ed.) p. 347 (Boston, MA: McGraw Hill Irwin); Lipsky, David B. and Harry C. Katz. 2006. "Alternative Approaches to Interest Arbitration: Lessons from New York City," *Public Personnel Management*, Vol. 35, No. 4; Weitzman, J.S. 1980. "Attitudes of arbitrators towards final-offer arbitration in New Jersey," *Arbitration Journal*, 35, 33.

<sup>37</sup> Ashenfelter, Orley, James Dow, Daniel Gallagher, and Dean Hyslop. 1997. "Arbitrator and Negotiator Behavior under an Appellate System." Unpublished manuscript, August, cited in Ashenfelter, 2001; Benjamin, E. 1978. "Final-Offer Arbitration Awards in Michigan, 1973-77," unpublished manuscript, Institute of Labor Relations, The University of Michigan-Wayne State University, cited in Johnson, Brian R., Greg Warchol, and Kathleen Bailey. 1997. "Police-Compulsory Arbitration in Michigan: A Logistic Model Analysis of Environmental Factors," *Journal of Collective Negotiations*, Vol. 26(1) 27-41; Bloom, 1981; Delaney, John Thomas. 1983. "Strikes, Arbitration, and Teacher Salaries: A Behavioral Analysis," *Industrial and Labor Relations Review*, Vol. 36, No. 3, pp. 431-46; Doherty, Robert E. 1986. "Trends in Strikes and Interest Arbitration in the Public Sector," *Labor Law Journal*, August; Feuille, 1985, *Industrial Relations*; Feuille, Peter and John Thomas Delaney. 1986. "Collective bargaining, interest arbitration, and police salaries," *Industrial and Labor Relations Review*, 39:228-240; Kochan, Thomas A., Mironi Mordehai, Ronald G. Ehrenberg, et al. 1979. Dispute Resolution under Fact Finding and Arbitration: An Empirical Evaluation, New York: American Arbitration Association.

**3. First contract mediation and arbitration is available in six Canadian provinces and the federal jurisdiction. There is no evidence that the overall Canadian experience with this process has been detrimental to employers or employees.**

Critiques to the provision and rebuttals

**1. Arbitrators will impose settlements that are unworkable for employers, particularly small businesses, and will put them out of business.**

In the public sector, the passage of an arbitration law has little to no effect on wages or benefits,<sup>39</sup> wage increases and contract terms resulting from arbitration tend to be very similar to those won through voluntary negotiations,<sup>40</sup> and arbitrators tend not to impose innovative contract terms.<sup>41</sup> Arbitrators make decisions that reflect what is occurring in comparable jurisdictions and that they weigh the factors included in the statute, and there is a widely shared norm among arbitrators that innovations are best left to the parties to negotiate on their own.<sup>42</sup>

In terms of small businesses, retail employers with sales under \$500,000 annually and non-retail employers with sales under \$50,000 annually do not fall under the NLRB's jurisdiction and their employees have no collective bargaining rights under the NLRA.<sup>43</sup>

**2. Unions will stall voluntary collective bargaining in order to force employers into the arbitration process, where they will win more generous contracts.**

First, as the experience in the public sector demonstrates, the vast majority of contracts are resolved voluntarily.<sup>44</sup> It's more threat of arbitration, not the actual use of the procedure, which encourages parties to voluntarily settle. Secondly, there is no reason to believe a union would benefit more from arbitration than an employer; as stated above, wage increases and contract terms resulting from arbitration tend to be very similar to those won through voluntary negotiations in the public sector.

**3. Arbitration would result in long delays. In Quebec, it takes an average of 290 days from the time a dispute is referred until a decision is rendered.**<sup>45</sup>

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<sup>38</sup> Ashenfelter, Orley. 1987. "Arbitrator Behavior," *American Economic Review Papers and Proceedings*, Vol. 77, pp 342-46; Doherty, 1986; Feuille, Peter and Gary Long. 1974. "The Public Administrator and Final Offer Arbitration," *Public Administration Review*, November/December; Friedman, David R. and Stuart Mukamal. 1984. "Wisconsin's Mediation-Arbitration Law: What Has It Done to Bargaining?" *Journal of Collective Negotiations*, Vol. 13(2); Lester, Richard A. 1984. Labor Arbitration in State and Local Government: An Examination of Experience in Eight States and New York City (Princeton: Industrial Relations Section, Princeton University); Lipsky, 2006; Roberts, Gary E. and John R. McGill. 2000. "New Jersey Interest Arbitration Reform Act," *Review of Public Personnel Administration*, Summer.

<sup>39</sup> Ashenfelter, 2001; Bloom, 1981; Feuille, 1985, *Journal of Labor Research*; Feuille, 1985, *Industrial Relations*; Ichniowski, 1989; Katz, 2004; Lipsky, 2006; Weitzman, 1980.

<sup>40</sup> Ashenfelter, 1997; Benjamin, 1978; Bloom, 1981; Delaney, 1983; Doherty, 1986; Feuille, 1985, *Industrial Relations*; Feuille, 1986; Kochan, 1979.

<sup>41</sup> Ashenfelter, 1987; Friedman, 1984.

<sup>42</sup> Internal memo prepared by Thomas Kochan for American Rights at Work, 2007.

<sup>43</sup> Government Accountability Office. 2002. GAO-02-835. *Collective Bargaining Rights: Information on the Number of Workers With and Without Bargaining Rights*. Washington, DC: United States General Accounting Office.

<sup>44</sup> Ashenfelter, 1987; Doherty, 1986; Feuille, 1974; Friedman, 1984; Lester, 1984; Lipsky, 2006; Roberts, 2000.

<sup>45</sup> Amber, Michelle. "Mandatory First Contract Arbitration Violates Constitution, Management Attorney Contends," *BNA Daily Labor Report*, 11 June 2008.

The time span in public sector between filing for arbitration and the actual award was roughly eight months, with some states managing to winnow that process down to only three to six months.<sup>46</sup> Currently, there are no time constraints on how long first contract negotiations can go on, as long as the employer is bargaining in “good faith.” By delaying negotiations, employers can cause workers to grow frustrated and lose faith in their ability to be treated as equals at the bargaining table. Arbitration will likely compel the majority of negotiations to be resolved voluntarily, and any delays in the actual process are far outweighed by the incentive it creates to bargain.

**4. Arbitration removes employees from the process and would let the arbitrator impose a binding contract without an employee vote.**

According to NYU law professor Cynthia Estlund, “Federal law does not now guarantee employees the right to vote on the ratification of a collective bargaining agreement, yet most unions grant employees that right. . . It is reasonable to expect most unions to give employees a voice in deciding whether to accept or reject employers’ final offers and whether to seek mediation and binding arbitration.”<sup>47</sup> She adds that the bill “provides that any contract that comes out of binding arbitration can be modified by written agreement of the parties. That allows for additional opportunities for voluntary bargaining and employee voice.”<sup>48</sup>

**5. Arbitration is unconstitutional. The Supreme Court noted that if the NLRA had including binding arbitration provisions, then it likely would be an unconstitutional infringement on the right to contract.<sup>49</sup> It would violate the “takings clause” in the Constitution, and would violate the Supreme Court’s ruling in *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 73 LRRM 2561 (1970).**

Congress already has the power to impose binding arbitration for private contract disputes that affect the national interest, and it has used this power to mandate arbitration in railroad negotiations.<sup>50</sup> The Congressional Research Service notes that “judicial challenges to this legislation have been unsuccessful.”<sup>51</sup> The holding in *H.K. Porter* was that the NLRB did not have power under the Act to compel employers or employees to agree to any substantive contractual provision of a collective bargaining agreement. The Court's decision does not in any way purport to address whether Congress could constitutionally enact legislation requiring binding arbitration.

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<sup>46</sup> Lester, 1984.

<sup>47</sup> Estlund, Cynthia. Response to First Contract Questions Posed By Senator Mike Enzi, 2007, on file with American Rights at Work.

<sup>48</sup> Ibid.

<sup>49</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

<sup>50</sup> Miller, Ronald. “Compulsory impasse procedures: recent American experience,” *Industrial Relations Journal*, Vol. 10, Issue 4, pp 43-48.