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## Arbitration promotes good-faith bargaining

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Labor law protects employees' right to unionize. But some employers reject that right. Former Wal-Mart CEO Lee Scott said in October 2008, "We like driving the car and we're not going to give the steering wheel to anybody but us." Three years earlier, Wal-Mart closed a store in Quebec six months after employees there unionized -- a warning to Wal-Mart employees elsewhere.

Legislation now before Congress, the Employee Free Choice Act (EFCA), aims to prevent employers from using tough tactics to interfere with employees' right to unionize. One EFCA section provides for first-contract arbitration. This worthy idea is an important reason why Congress should pass the bill.

First-contract arbitration addresses a common problem: about half the time, employees cannot secure a collective bargaining contract within a year of unionizing. Recalcitrant employers hope that, without a first contract, employees will give up on their newly formed union.

EFCA makes first-contract arbitration a last resort. The parties must first bargain for at least 90 days. Then, either side can ask the Federal Mediation and Conciliation Service (FMCS) to mediate. If mediation fails, FMCS will submit any remaining issues to an arbitration panel. The panel's decision is binding for the first collective bargaining contract. Subsequent contracts are negotiated by the parties.

FMCS has long experience with arbitration. When disputes arise about alleged violations of existing collective bargaining agreements, the parties often ask FMCS for a list of grievance arbitrators who are acceptable to both management and labor and well informed about collective bargaining contracts. EFCA would add interest arbitration, in which the arbitration panel writes the first contract rather than interpreting an existing contract. While interest arbitrators and grievance arbitrators have different roles, FMCS knows how to administer a system of appointing qualified, neutral third parties to serve as arbitrators.

Many states use interest arbitration to decide contract terms for public safety employees such as police and firefighters. Major league baseball likewise has salary arbitration. But interest arbitration for police and firefighters or salary arbitration for baseball players are not limited to first contracts.

EFCA focuses on first contracts because these are an extension of the union organizing process. Some employers, hoping to undermine a new union, engage in surface bargaining -- going through the motions of collective bargaining, but without any good-faith effort to reach an agreement.

Federal labor law now lacks effective remedies for bad-faith bargaining. The National Labor Relations Board (NLRB) can order an employer back to the bargaining table, but the parties still may not reach agreement. Agreements reached after NLRB "cease and desist" orders need not be retroactive to the date when bad-faith bargaining became evident. Even in egregious cases, the NLRB cannot fine employers for violating labor law.

EFCA would help prevent bad-faith bargaining. Employer defiance of federal labor law might lead to the imposition of unwanted contract terms by an arbitration panel. To avoid this risk, employers would need to bargain in good faith -- bargaining hard on matters that are high priorities for the employer, but trying to reach a negotiated agreement so that the dispute does not go to arbitration.

Scholarly studies of public-sector interest arbitration show that arbitrators do not systematically favor one side or the other. Arbitrators who seem biased against employers get vetoed during the arbitrator selection process.

EFCA would protect law-abiding employers who fear being undercut by unethical rivals. Employers offering substandard compensation are especially likely to interfere with employees' right to organize unions and bargain collectively. First-contract arbitration would make it harder to use surface bargaining to pay less than competing employers.

Most importantly, EFCA's first-contract arbitration provisions would turn a formal right into a real right. Since the 1930s, federal law has declared that decisions about whether to unionize are up to employees, not management. In recent years, this declaration has too often been hollow. With first-contract arbitration, forming a union will not be a futile gesture; rather, it will result in a collective bargaining contract.

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