AMERICAN RIGHTS AT WORK

www.americanrightsatwork.org

The Employee Free Choice Act: Solutions to a Flawed Labor Law

A growing, bipartisan coalition of policymakers supports the Employee Free Choice Act, proposed legislation that would ensure that workers have a free choice and a fair chance to form a union and bargain with their employees for higher wages, benefits, and better working conditions. This fact sheet examines how the core provisions of the bill address weaknesses in current U.S. labor law and its enforcement by the National Labor Relations Board (NLRB).

PROBLEM: EMPLOYER LAWLESSNESS

Under the National Labor Relations Act (NLRA), an employer found guilty of illegally firing an employee for union activity must only give backpay to that employee—minus whatever he or she earned in the interim. And when employers violate the law by issuing threats of closings or interrogating employees, they are only required to post a notice telling workers that they will not break the law. **Many employers find the punishment for illegal activity a bargain**, if firing a pro-union employee scares others from supporting the union.

- Every 23 minutes in America, an employer fires or retaliates against a worker for their union activity.
- In 2005, the average amount employers paid to victims of illegal firing was only $2,667.
- Some executives refer to the paltry cost of breaking the law as a "hunting license."

SOLUTION: STRENGTHEN PENALITES

The Employee Free Choice Act would increase monetary penalties against employers who illegally fire or retaliate against pro-union workers during an organizing campaign or an effort to obtain a first contract.

- Employers would have to **pay victims three times the amount of backpay** owed to them.
- Employers would be **fined up to $20,000 for illegal acts** committed during organizing or first contract negotiations.

Smithfield: A case for stronger penalties

When pork processing company Smithfield was faced with a union election in 1997 in North Carolina, it threatened to close the plant and spied on, interrogated, and physically assaulted its employees. The NLRB only ordered Smithfield to read, post, and mail a note to employees saying they will not break the law. In 2006, the NLRB offered a new remedy for the misbehavior—a new election.

PROBLEM: EMPLOYERS DENY WORKERS FREE CHOICE

Employers often **manipulate the system to silence employees** who attempt to form unions. According to unionbusting consultants used by 82 percent of employers faced with organizing drives, "the greatest achievement is not having [an NLRB election] at all." To achieve this goal:

- 25 percent of employers illegally fire pro-union workers;
- 51 percent illegally coerce workers into opposing unions with bribery and favoritism; and
- 91 percent force employees to attend one-on-one anti-union meetings with their supervisors.

SOLUTION: UNION RECOGNITION THROUGH MAJORITY SIGN-UP

The Employee Free Choice Act would **require an employer to recognize its employees' union through "majority sign-up,"** a process in which workers present signed authorization cards to demonstrate their choice to belong to a union. Majority sign-up provides a viable alternative for workers who typically experience obstacles in the corrupted NLRB 'election' process.

Cingular Wireless: A case for majority sign-up

At Cingular Wireless, over 17,000 employees chose to join a union in less than a year when the company and union agreed to remain neutral and allow workers to indicate their choice through majority sign-up. Said Executive VP of Human Resources Rick Bradley, "We believe that employees should have a choice...Making choice available to them results, in part, in employees who are engaged in the business and who have a passion for customers."

PROBLEM: EMPLOYERS USE LENGTHY APPEALS TO GAME THE SYSTEM

Employers know that if they fire a worker during an organizing effort, it will likely be **years before they are ordered to reinstate that worker—long after the damage is done.**

- In 2005, the median time between the filing of an unfair labor practice charge and a ruling by the NLRB was 659 days.
- The NLRB has the power to issue injunctions to swiftly and temporarily reinstate a fired worker or remedy other violations, but rarely uses it. Between June 2001 and December 2005, the Bush-appointed NLRB only used this authority 70 times, a 74 percent decline compared to the years of the Clinton Administration and a 61 percent decline compared to the G.H. Bush Administration.

SOLUTION: SWIFT JUSTICE FOR WORKERS

The Employee Free Choice Act would **require the NLRB to seek injunctive relief** when it has reasonable cause to believe an employer significantly violated its employees' rights through termination, discrimination, threats, or other illegal acts during an organizing campaign or first contract effort.

Dynasteel: A case for injunctive relief
In 2001, Dynasteel fired two employees at its Mississippi plant who were active in the union organizing effort. The NLRB promptly issued a complaint against the company, and at that point, it could have pursued an injunction to reinstate the workers. Instead, the agency let the case proceed through the normal legal channels, and in late 2005, the Board ordered the company to reinstate the two workers—more than four years after they were fired, and long after the company had successfully dampened the workers' organizing efforts.

PROBLEM: EMPLOYERS AVOID CONTRACT NEGOTIATIONS

The intent of the NLRA is to facilitate reaching a first contract that determine wages, hours, and employment conditions. Yet **anti-union employers often drag workers through lengthy negotiations** by delaying bargaining sessions, withholding relevant information, and putting forth bogus proposals. Even though these tactics are illegal, the law provides no effective deterrents to prevent "surface bargaining." In the event the NLRB proves an employer engaged in surface bargaining, it can only order the employer to return to negotiations, where typically the cycle repeats itself.

- In 32 percent of organizing campaigns, workers lack a collective bargaining agreement more than a year after demonstrating majority support for union representation.

SOLUTION: MEDIATION AND ARBITRATION TO END CONTRACT DELAYS

Under the Employee Free Choice Act, **employers or employees can request mediation** by the Federal Mediation and Conciliation Service if they are unable to negotiate a first contract after 90 days of bargaining. If the parties are unable to reach an agreement after 30 days of mediation, the dispute is referred to binding arbitration, guaranteeing that workers will achieve a first contract within a reasonable period of time.

Champion Homes: A case for mediation and arbitration
Workers at Champion Homes in California formed a union in 2000. After months of failed negotiations, the union filed charges with the NLRB. In January 2003, an administrative law judge ordered the company to bargain in good faith. The company has filed appeal after appeal to avoid contract negotiations, and as of 2007, the workers are still without a union contract.

For more information and citations, visit **www.americanrightsatwork.org**.

AMERICAN RIGHTS AT WORK

Employee Free Choice Act Bill Summary (H.R. 1409 / S. 560)

The Employee Free Choice Act (HR.1409 /S.560) was introduced for the 111th Congress in the Senate on March 10, 2009 by Representative George Miller (D-CA) and Senator Tom Harkin (D-IA), Here is a summary of the bill's core provisions.

1. Certification on the Basis of Signed Authorizations

Provides for certification of a union as the bargaining representative if the National Labor Relations Board finds that a majority of employees in an appropriate unit has signed authorizations designating the union as its bargaining representative. Requires the Board to develop model authorization language and procedures for establishing the authenticity of signed authorizations.

2. First Contract Mediation and Arbitration

Provides that if an employer and a union are engaged in bargaining for their first contract and are unable to reach agreement within 90 days, either party may refer the dispute to the Federal Mediation and Conciliation Service (FMCS) for mediation. If the FMCS has been unable to bring the parties to agreement after 30 days of mediation, the dispute will be referred to arbitration and the results of the arbitration shall be binding on the parties for two years. Time limits may be extended by mutual agreement of the parties.

3. Stronger Penalties for Violations While Employees are Attempting to Organize or Obtain a First Contract

Makes the following new provisions applicable to violations of the National Labor Relations Act committed by employers against employees during any period while employees are attempting to organize a union or negotiate a first contract with the employer:

- Mandatory Applications for Injunctions: Provides that just as the NLRB is required to seek a federal court injunction against a union whenever there is reasonable cause to believe that the union has violated the secondary boycott prohibitions in the Act, the NLRB must seek a federal court injunction against an employer whenever there is reasonable cause to believe that the employer has discharged or discriminated against employees, threatened to discharge or discriminate against employees, or engaged in conduct that significantly interferes with employee rights during an organizing or first contract drive. Authorizes the courts to grant temporary restraining orders or other appropriate injunctive relief.

- Treble Back Pay: Increases the amount an employer is required to pay to three times the amount of the employee's back pay when an employee is discharged or discriminated against during an organizing campaign or first contract drive.

- Civil Penalties: Provides for civil fines of up to $20,000 per violation against employers found to have willfully or repeatedly violated employees' rights during an organizing campaign or first contract drive.

AMERICAN RIGHTS AT WORK

Why Workers Need the Employee Free Choice Act

The Problem: Employers Silence Workers Who Attempt to Form Unions

Under the current labor law system, employers often use a combination of legal and illegal methods to silence employees who attempt to form unions and bargain for better wages and working conditions. When faced with organizing drives, 25 percent of employers fire at least one pro-union worker; 51 percent threaten to close a worksite if the union prevails; and, 91 percent force employees to attend one-on-one anti-union meetings with their supervisors.

In addition, the system designed to protect workers is severely broken. Laws and enforcement fail to sufficiently protect workers, offering penalties that are too weak to deter violations . For example, an employer found guilty of illegally firing an employee for union activity must only give backpay to that employee—minus whatever he or she earned in the interim. Many employers find the punishment for breaking the law a bargain if firing a pro-union employee scares others from supporting the union. Further, if workers successfully form a union despite such tactics, the employer is allowed to repeatedly appeal the results, which can take years. Such delays weaken union support by inviting more opportunities for employee turnover, harassment, and firings by management.

The Impact: Economic Opportunity Stolen from America's Working Families

Protecting the right to form unions is about maintaining the American middle class. It's no coincidence that as union membership numbers fall there are growing numbers of jobs with low pay, poor benefits, and little to no security. More than half of U.S. workers—60 million—say they would join a union right now if they could. Why? They know that coming together to bargain with employers over wages, benefits, and working conditions is the best path to getting ahead. Workers who belong to unions earn 30 percent more than non-union workers, and are 63 percent more likely to have employer-provided health care. Without labor law reform, economic opportunity for America's working families will continue to erode.

The Solution: Labor Law Reform that Gives Workers a Free Choice and a Fair Chance

A growing, bipartisan coalition of policymakers supports the Employee Free Choice Act, proposed legislation that would ensure that workers have a free choice and a fair chance to form a union. The Employee Free Choice Act would level the playing field by strengthening penalties against offending employers; requiring mediation and arbitration to help employers and employees reach a first contract in a reasonable period of time; and, permitting workers to form a union through "majority sign-up," a process in which workers present signed authorization cards as demonstration of their choice to belong to a union.

The Results: Employer/Employee Partnerships Are Working at Top U.S. Companies

The provisions of the Employee Free Choice Act mirror successful strategies already in use by industry-leading employers such as Cingular Wireless and Kaiser Permanente. These companies have replaced adversarial relationships pitting employers against workers' unions with cooperative labor relations models that include voluntary recognition of unions through majority sign-up and fair contracts. At Cingular, for example, over 17,000 employees chose to join the Communications Workers of America in less than a year when the company and union agreed to remain neutral during the organizing drive. The nation's top wireless carrier and Wall Street darling continues to boost profits and advance a positive labor relations model enabling its union employees to grow.

While many companies would lead us to believe that cutting jobs, slashing wages and benefits, employing temporary and cheap labor, and busting unions are necessary to remain profitable in the global economy, Cingular and others have found another way that works for their bottom lines, their employees, and their valued customers.

AMERICAN RIGHTS AT WORK

The Employee Free Choice Act: Creating An Economy that Works for Everyone

America's workers are struggling to make ends meet. Paychecks are shrinking and health care costs are skyrocketing while CEOs earn millions. The Employee Free Choice Act can restore the balance, giving more workers a chance to form unions and get better health care, job security, and benefits – and an opportunity to pursue their dreams. When workers are free to choose to join a union, our economy can work for everyone again.

By making it easier for women and men to join a union in their workplace, the Employee Free Choice Act will:

Help America's working families improve their standard of living. Workers in unions earn 14% higher wages and are 28% more likely to have employer-provided health insurance, even when controlling for factors like education, occupation, and experience.1

Fix a broken system that gives corporations far too much power. When workers try and organize unions, they are often harassed and intimidated; 25 percent of companies unlawfully fire pro-union workers.2

Restore fairness and the promise of the American Dream, with a robust middle class, economic growth, and shared prosperity.

In today's economy, we need policies that give workers a fair shake. The Employee Free Choice Act will help bring back balance to our economy by ensuring that workers have a free choice and a fair chance to form a union. This legislation will:

Strengthen penalties against employers who break the law. Too many unscrupulous employers get away with breaking labor laws because the current penalties are too weak. The Employee Free Choice Act would increase penalties against employers who illegally fire or retaliate against pro-union workers during an organizing campaign or an effort to obtain a first contract.

Allow employers or employees to request mediation if they're unable to negotiate a first contract. Under current law, anti-union employers often drag workers through lengthy negotiations by delaying bargaining sessions, withholding relevant information, and putting forth bogus proposals. Even though these tactics are illegal, there are no effective deterrents to prevent "surface bargaining." The Employee Free Choice Act will strengthen workers' ability to achieve a first contract within a reasonable period of time.

Give workers the right to form a union through "majority sign-up." Majority sign-up is an efficient, fair and democratic union organizing process where the NLRB certifies a union when a majority of employees sign written union authorization forms. Majority sign-up is permitted under the existing law, but only through the voluntary agreement of an employer. Currently, an employer can insist on an NLRB election, and refuse to recognize a union even when 100 percent of employees have signed authorization cards. The bill would allow employees, and not employers, to choose either the NLRB election process or a majority sign-up process in order to form a union.

1. Mishel, Lawrence, Jared Bernstein, and Heidi Shierholz. "The State of Working America 2008/2009." Economic Policy Institute, 2008.

2. Kate Bronfenbrenner. "Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages and Union Organizing," U.S. Trade Deficit Review Commission, 2000.

AMERICAN RIGHTS AT WORK

www.americanrightsatwork.org

Why Workers Want Majority Sign-up

The Employee Free Choice Act allows workers, not their employers, to decide how workers will form a union: through National Labor Relations Board-supervised majority sign-up or through NLRB so-called elections.

WHAT IS MAJORITY SIGN-UP?

Already widely used, majority sign-up (also known as "card check") is an efficient, fair, and democratic organizing process whereby if a majority of employees sign cards to demonstrate their desire to form a union, then they are legally recognized as a union by the National Labor Relations Board (NLRB) and the employer. **Since 2003, more than half a million Americans have formed unions through majority sign-up**, more than the number who formed unions using elections.[1] In fact, in recent years only about 20 percent of workers form unions through elections; the other 80 percent used other methods, including majority sign-up.[2]

HOW THE EMPLOYEE FREE CHOICE ACT CREATES A FAIR PROCESS

The Employee Free Choice Act (H.R. 1409 / S. 560) puts the decision of how to form a union in the hands of workers, not employers. Under the measure, workers would continue the long-established process of collecting signatures on cards from their coworkers indicating that they support forming a union.[3] If a majority of workers sign cards voting for a union, and if those cards are validated by the NLRB, the agency will certify the workers as a union. The employer would be legally required to recognize the workers' union and bargain with them. Employees could still choose to use their signed cards to petition for an NLRB election. But given the many flaws with that process, many will choose to avoid conflict-ridden elections.

WHY MAJORITY SIGN-UP IS NEEDED

Under current law, management can refuse to recognize a union even when 100 percent of employees have signed union authorization cards, and even if the employer has no reason to doubt the validity of the cards. Instead, **employers can insist on an election process that enables them to take advantage of weak labor laws and launch a one-sided campaign to intimidate their employees out of supporting a union.** When workers try and form unions, 91 percent of employers force employees to attend one-on-one anti-union meetings with their supervisors, 51 percent coerce workers into opposing unions with bribes or special favors, and 30 percent fire pro-union workers.[4] In fact, these elections don't measure up to the most fundamental standards of democracy.[5]

NLRB elections invite more coercion and intimidation than majority sign-up. That's why majority sign-up is so critical – it helps level the playing field and offers workers a fair and direct path to form unions. **During NLRB elections, 46 percent of workers report management pressure compared to only 14 percent of workers reporting union pressure during majority sign-up.** And it is very rare for workers who organized their union through majority sign-up to report any incidence of union pressure.[6]

While 12 states and more than 1,000 employers have adopted majority sign-up with great success,[7] **the vast majority of America's workers are denied the fair and democratic process that majority sign-up provides.** It's time for this to change. Workers want a voice at work now more than ever,[8] and recent national polling indicates that nearly 60 million U.S. workers would join a union if they could.[9] The Employee Free Choice Act would change the law to extend the right to majority sign-up to these workers, and make it easier for them to choose to form unions to bargain for better wages, health care, and job security.

---

1. "Half a Million and Counting," American Rights at Work, 2008. 2. Brudney, James J., "Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms," *Iowa Law Review*, Vol. 90, 2005. 3. Ibid. 4. *Undermining the Right to Organize*, Chirag Mehta and Nik Theodore, American Rights at Work, 2006. 5. For more on National Labor Relations Board elections, see *Free and Fair? How Labor Law Fails U.S. Democratic Standards*, Gordon Lafer, American Rights at Work, 2005. 6. *Fact Over Fiction: Opposition to Card Check Doesn't Add Up*, Adrienne Eaton and Jill Kriesky, American Rights at Work, 2006. 7. "Half a Million and Counting." 8. "Do Workers Still Want Unions? More than Ever," Richard Freeman, Economic Policy Institute, 2007. 9. AFL-CIO calculation based on Peter D. Hart Research Associates survey, December 2006.

AMERICAN RIGHTS AT WORK

Secret Ballots Aren't Enough

Opponents of the Employee Free Choice Act have a one-note strategy to derail reform of our broken labor law system. The anti-union, right-wing, business lobby simply spins the same broken record of lies, over and over again. Track 1 is the bogus assertion: "The bill does away with secret ballot elections, and, elections without secret ballots are undemocratic." Track 2 is the counterfeit claim: "Elections for union representation are just like elections for Congress."

American Rights at Work can't turn off their cacophony, but we can expose the lies of these lip synchers. First off, a quick read of the legislation reveals that the bill does not eliminate secret ballot elections. The Employee Free Choice Act gives workers the chance to choose their union formation process-elections or majority sign-up.

Union Representation Elections ≠ Federal Elections

Democratic Election Standard	Federal Elections	NLRB "Elections"
Equal Access to the Media	√	✗
Freedom of Speech	√	✗
Equal Access to Voters	√	✗
Voters Free of Coercion	√	✗
Campaign Finance Regulation	√	✗
Timely Implementation of the Voters' Will	√	✗
Secret Ballot	√	√

Source: Gordon Lafer, Ph.D, Free and Fair? How Labor Law Fails U.S. Democratic Standards, a report for American Rights at Work, June 2005

Second, as the chart makes clear, current union elections involving secret ballots bear no resemblance to political elections.

The chart illustrates the analysis of University of Oregon political scientist Gordon Lafer, Ph.D., who measured the current union representation process involving secret ballots against the range of American democratic election standards used to elect public officials. In his 2005 study, Free and Fair? How Labor Law Fails U.S. Democratic Election Standards, Lafer discovered that current union representation elections fall alarmingly short of the democratic process Americans envision when we use the term "election." Concluded Lafer, the presence of the secret ballots can't overcome the undemocratic nature of the current process.

AMERICAN RIGHTS AT WORK

Lies & Distortion on the Secret Ballot

Business special interest groups have launched a $120 million campaign to derail reform of the nation's broken labor law system by lying about the Employee Free Choice Act. Their only line of attack - that the bill somehow takes away so-called "secret ballot" elections for joining a union - is blatantly false.

The Employee Free Choice Act not only strengthens the current process for workers forming unions, but also provides for a more fair and democratic method for men and women to join unions.

Here are the facts to refute the opposition's fiction about the Employee Free Choice Act:

Fiction: The "legislation would end the rights of employees to secret ballot elections." – Center for Union Facts

FACT: The Employee Free Choice Act does not abolish elections or "secret ballots." Under the proposed legislation, workers get to choose the union formation process—elections or majority sign-up. Under current law, the choice to recognize a union rests only with employers.

What the Employee Free Choice Act does prevent is an employer manipulating the flawed system to influence the election outcome. When faced with organizing campaigns: 25 percent of employers illegally fire pro-union workers; 51 percent of employers illegally threaten to close down worksites if the union prevails; and, 34 percent of employers coerce workers into opposing the union with bribes and favoritism.

Fiction: "Legal recognition of a union has traditionally been achieved through secret ballot elections…just like how a person votes for a senator or congressman." – Center for Union Facts

FACT: Current union elections involving "secret ballots" bear no resemblance to political elections. Workers' free speech rights are squelched, employers practice various forms of economic coercion, and labor law allows employers to indefinitely delay recognition through drawn-out appeals. Says University of Oregon political scientist Gordon Lafer: "The presence of secret ballots can't overcome the corrupt nature of NLRB elections."

Fiction: NLRB elections are "the only way to guarantee worker protection from coercion and intimidation." – Coalition for a Democratic Workplace

FACT: Workers are more susceptible to coercion in NLRB elections than majority sign-up. Workers in NLRB elections are twice as likely (46 percent vs. 23 percent) as those in majority sign-up campaigns to report that management coerced them to oppose the union. Further, less than one in 20 workers (4.6 percent) who signed a card with a union organizer reported that the presence of the organizer made them feel pressured to sign the card.

Fiction: Majority sign-up is a "new approach" to forming unions. – Center for Union Facts

FACT: Majority sign-up is a longstanding and common way to form unions. Since the National Labor Relations Act was passed in 1935, a quarter of the certifications issued by the National Labor Relations Board were based on non-election evidence of majority support.1 Since 2003, more than half a million Americans formed unions through majority sign-up. Even major corporations like AT&T allow their workers to join unions using majority sign-up. The Employee Free Choice Act is necessary today because employers have become increasingly bold in violating employees' rights and the law under the NLRB election process. When that process was developed, employers did not routinely engage in the massive legal and illegal violation of workers' rights that is commonplace today.

1. Becker, Craig. "Democracy in the Workplace: Union Representation Elections and Federal Labor Law," 77 Minn. L. Rev. 495 (1993

The Washington Post

A War Against Organizing

By Kate Bronfenbrenner
Wednesday, June 3, 2009

Angel Warner, an employee at a Rite Aid distribution center, sat next to me recently in a congressional briefing room and described what happened when she and her fellow workers tried to form a union in their California workplace. She talked about the surveillance, constant threats and harassment they endured; how she and other workers were repeatedly taken aside and interrogated, one on one, about how they planned to vote; how two co-workers were fired; and how the rest lived in fear that any day they, too, might get a pink slip. The union filed numerous charges of unfair labor practices and eventually won the organizing election. But three years after the campaign began, Warner and her fellow Rite Aid workers still don't have a contract.

Like most U.S. companies, Rite Aid takes full advantage of current labor law to try to keep workers from exercising their full rights to organize and collectively bargain under the National Labor Relations Act. Far from an aberration, such behavior by U.S. companies during union organizing campaigns has become routine, and our nation's labor laws neither protect workers' rights nor provide disincentives for employers to stop disregarding those rights.

Late last month I published a study, "No Holds Barred," that was presented at the hearing at which Angel spoke. I looked at a random sample of more than 1,000 union elections over a five-year period to determine the parameters of employer behavior during union representation elections in the private sector and the limitations of the labor law system established to regulate that behavior.

In 34 percent of the elections I studied, companies fired employees for union activity. In 57 percent of elections, employers threatened to shut down all or part of their facilities, and in 47 percent, employers threatened to cut wages and benefits.

In 63 percent of campaigns, supervisors met with workers one on one and interrogated them about their union activity or whether they or others were supporting the union. In 54 percent of the elections, supervisors used these one-on-ones to threaten individual workers.

The bottom line is that there has been a steady decline of workers' rights in the past several decades. Colleagues and I have examined this issue in a series of studies over the past two decades. My new data show that employers are more than twice as likely as they were in the 1990s to use 10 or more tactics -- including threats and firings -- to thwart workers' organizing efforts, and they are more likely to use more punitive and aggressive tactics such as interrogations, discharges and threats of plant closings, while shifting away from softer tactics such as social events, promises of improvement and employee involvement programs.

For the vast majority of workers who want to join unions today, the right to organize and bargain collectively -- free from coercion, intimidation and retaliation -- is at best a promise indefinitely deferred. In election campaigns overseen by the National Labor Relations Board, it is now standard practice for companies to subject workers to threats, interrogation, harassment, surveillance and retaliation for union activity.

The failure of the system to defend workers' rights in a timely manner multiplies the obstacles workers face when seeking union representation, creating delays that favor employers. Employers appeal a high percentage of the cases to the NLRB, and in the most egregious instances, the employer can count on a final decision being held up by three to five years.

A key aspect of proposed labor law reform, the Employee Free Choice Act, concerns revisions to the rules surrounding arbitration of the first contract. My findings show that this provision may be among the most crucial of the legislation. Fifty-two percent of workers who form a union are still without a contract a year after they win an election, I found, and 37 percent remain without a contract two years after the election. For employers, labor law provides yet another means to indefinitely delay unionization.

It doesn't have to be this way. My survey data from the public sector portray an atmosphere in which workers may organize free from the kind of coercion, intimidation and retaliation that so taints the election process in the private sector. Most of the states in the public-sector sample have laws allowing workers to choose a union through card check or voluntary recognition. And more than a third of public-sector workers in the United States are members of unions.

Unless Congress passes serious labor law reform with real penalties, only a small fraction of the workers who seek union representation will succeed. If recent trends continue, there will no longer be a functioning legal mechanism to effectively protect the right of private-sector workers to organize and collectively bargain. Our country cannot afford to make workers defer their rights and aspirations for union representation any longer.

The writer is director of labor education research at Cornell University's School of Industrial and Labor Relations. Her paper "No Holds Barred -- The Intensification of Employer Opposition to Organizing" was published last month by the nonprofit Economic Policy Institute.

Economic Policy Institute

FACT SHEET

AMERICAN RIGHTS AT WORK EDUCATION FUND

MAY 0, 2009

NO HOLDS BARRED

The Intensification of Employer Opposition to Organizing

BY KATE BRONFENBRENNER

Overall, 12.4% of U.S. workers are represented by unions, a density far below what would be the case if all workers who wanted to belong to a union could freely do so. In fact, studies have shown that if workers' preferences were realized, as much as 58% of the workforce would have union representation. Yet, this low overall unionization rate obscures a striking imbalance – while almost 37% of public-sector workers belong to unions, less than 8% of private-sector workers do. A 2009 study by Cornell University researcher, Dr. Kate Bronfenbrenner, offers a detailed look at why.

Employers continue to punish workers for supporting a union

In the last two decades, private-sector employer opposition to workers seeking their legal right to union representation has intensified. Compared to the 1990s, employers are *more than twice as likely* to use 10 or more tactics in their anti-union campaigns, with a greater focus on more coercive and punitive tactics designed to intensely monitor and punish union activity.

It has become standard practice for workers to be subjected by corporations to threats, interrogation, harassment, surveillance, and retaliation for supporting a union. An analysis of the 1999-2003 data on NLRB election campaigns finds that:

- 63% of employers **interrogate workers** in mandatory one-on-one meetings with their supervisors about support for the union;
- 54% of employers **threaten workers** in such meetings;
- 57% of employers **threaten to close the worksite**;
- 47% of employers **threaten to cut wages and benefits**; and
- 34% of employers **fire workers.**

Employers have increased their use of more punitive tactics ("sticks") such as plant closing threats and actual plant closings, discharges, harassment, disciplinary actions, surveillance, and alteration of benefits and conditions. While at

the same time, employers are less likely to offer "carrots," such as granting of unscheduled raises, positive personnel changes, bribes, special favors, social events, promises of improvement, and employee involvement programs.

These private-sector campaigns differ markedly from public-sector campaigns. Survey data from the public sector describe an atmosphere in which workers organize relatively free from the kind of coercion, intimidation, and retaliation that so dominates in the private sector. *Most of the states in the public-sector sample have laws allowing workers to choose a union through the majority sign-up process.*

In ***No Holds Barred: The Intensification of Employer Opposition to Organizing,*** published by American Rights at Work and the Economic Policy Institute (EPI), Dr. Bronfenbrenner provides a comprehensive, independent analysis of employer behavior in union representation elections supervised by the National Labor Relations Board (NLRB). Her research identifies the range and incidence of legal and illegal coercive tactics used by employers in NLRB elections and the ineffectiveness of current labor law to protect and enforce workers' rights during the process.

Dr. Bronfenbrenner's report also compares employer behavior in this study's time period (1999-2003) to previous studies that she and her research teams have conducted over the last 20 years.

Punitive behaviors lead to charges of unfair labor practices

Workers filed Unfair Labor Practice (ULP) charges in about 40% of elections, and the highest percentage of allegations were threats, discharges, interrogation, surveillance, and wages-and-benefits cuts for supporting a union. These findings and previous research suggest that workers file ULPs in fewer than half of elections for three main reasons: filing charges where the election is likely to be won could delay the election for months if not years; workers fear retaliation for filing charges, especially where the election is likely to be lost; and the weak remedies, lengthy delays, and the numerous rulings where ALJ recommendations for reinstatement, second elections, and bargaining orders have been overturned, delayed, or never enforced, have diminished trust that the system will produce a remedy.

- 23% all ULP charges and 24% of serious charges—such as discharges for union activity, interrogation, and surveillance—were filed before the petition for an election was filed; confirming that employer campaigning begins even before a formal election campaign kicks into effect.
- 45% of the cases where ULPs are filed result in "wins" for the union: the charges are either settled by the employer or found meritorious by the NLRB and courts.

Employers tend to appeal most NLRB Administrative Law Judge decisions, and in the most egregious cases the employer can count on a final decision being delayed by three to five years. Of the few cases in the sample where a penalty was imposed, the heaviest penalty was backpay, minus the worker's interim wages.

Many employers resist collective bargaining long after workers form their union

- One year after a successful election, 52% of newly formed unions had no collective bargaining agreement.
- Two years after an election, 37% of newly formed unions still had no labor agreement.

Dr. Bronfenbrenner's study reaffirms the glaring problems that block workers from exercising their freedom to organize and bargain for a better life, with serious repercussions for our entire economy.