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RSC One-Pager: Mandatory Binding Arbitration and the Employee Free Choice Act

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"Compulsory arbitration is, in one sense, government dictating to employees what they will win or lose in the deal, with no opportunity to approve the 'agreement.' Why should employees pay union dues to get such a contract?"
- Former Senator and 1972 presidential nominee George McGovern (D-SD), *Wall Street Journal*, 5/7/2009

It has been widely speculated that a "compromise" on the Employee Free Choice Act (H.R. 1409 and S. 560), will likely exclude card check and maintain mandatory binding arbitration, which will force employers and unions into "agreements" with which they might not agree. The proposal will allow government bureaucrats to determine wages, benefits, and other detailed day-to-day work policies for companies which arbitrators may know nothing about. In the coming months, the deceptive anti-worker, pro-union aspects of mandatory, binding arbitration in EFCA will be the subject of heated debate.

What is mandatory binding arbitration under EFCA?

- Under EFCA, if employers and union organizers cannot reach an agreement within 90 days of union certification, either party may request mediation to negotiate terms of the contract. If an agreement does not come about within 30 days, **government-appointed arbitrators will step in and dictate the terms of the agreement**. The contract is binding for two years, and unless both parties agree to changes, none may be made.

Why is mandatory binding arbitration anti-worker and anti-democratic?

- **It forces a contract on unions and businesses** that neither party has voted on, nor agreed to the terms of. Under current law, employers and unions must agree on the terms of a contract. Mandatory binding arbitration, however, gives neither workers nor employers a say in the details of their contract, which will likely lead to internal strife in the workplace.
- **Government bureaucrats will be in the position of determining wages and benefits for private businesses.** The arbitrators will be appointed by the Federal Mediation and Conciliation Service (FMCS), an independent government agency *headed by a political appointee*, which helps settle disputes between unions and employers.
- **Arbitrators have no direct ties to the contract they are attempting to write from scratch**. They have broad latitude as to how they write the contract and may choose to model it after contracts from other companies that have very different management or operation styles.

What indications do we have that it won't work?

- Both Michigan and Massachusetts have been negatively affected by mandatory interest arbitration. According to a July 11, 2009 Wall Street Journal opinion piece, in Michigan, "… a board, convened at the request of Detroit police and firefighters in 1978, ordered the city to pay $46 million in cost-of-living adjustments. This destroyed the city's already fragile budget, ultimately triggering layoffs of a quarter of its police force." Mandatory arbitration also caused other cities like Hamtramck, Michigan to go into bankruptcy in 1999, when an arbitration board awarded police officers $2.1 million in pay raises and back pay. The state government was forced to absorb this cost.
- According to a letter to Congress from Ted Clark, a labor law expert at Seyfarth Shaw LLP, it is highly likely that most first contracts will lead to mandatory binding arbitration because most first contracts take longer to negotiate than the given 120 days (30 plus 90 outlined above). Ted Clark notes it will be costly and time-consuming to small businesses that must "maintain the status quo and cannot make changes needed to succeed as a business" during the arbitration process.
- FMCS has a low success rate for negotiating first contracts. According to a report released by the Competitive Enterprise Institute on June 25, 2009, "Between 2000 and 2004, FMCS has barely had a 50-percent success rate in reaching an agreement in first contract mediation."

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