COALITION FOR A
DEMOCRATIC WORKPLACE

Obama Administration Forcing EFCA by Regulatory Edict
Economic Study Suggests Job Loss in Millions

Recently proposed regulations by the NLRB and DOL and other initiatives will bypass Congress to achieve the goals of the misnamed "Employee Free Choice Act" by promoting job-killing "micro unions" and denying employees an informed choice about union representation.

The National Labor Relations Board (NLRB) has grabbed headlines in recent months for the outrageous actions of its Acting General Counsel, who has attempted to mandate where and how one company—Boeing—can operate and expand its business and what the company may tell the public and its employees about costs related to collective bargaining. The Board has now followed up with two August 26, 2011 decisions—one that allows the creation of micro-unions and another that strips workers of the right to contest card check via secret ballot elections—and a new and very biased posting requirement that bring us closer to administrative imposition of the legislatively dormant and grossly misnamed Employee Free Choice Act (EFCA).

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Introduction

The NLRB's actions over recent months have been called unprecedented by those who headed up the NLRB during the Clinton and Bush administrations.[1] The attack on Boeing not only could eliminate thousands of jobs in South Carolina, but has injected an uncertainty into the economy that is sure to cost many more unemployed Americans the opportunity to return to work as domestic and international businesses attempt to avoid similar reckless prosecution. With an estimated six million workplaces falling within the NLRB's jurisdiction, the Board's irresponsible actions have sent ripples through the economy. As the Washington Post noted, the NLRB suit

[1] *See* remarks of former Clinton NLRB Chair William Gould at http://www.slate.com/id/2294834/ and of former George W. Bush NLRB Chair Peter Schaumber at http://shopfloor.org/2011/04/former-nlrb-chairman-anti-boeing-move-unprecedented/20267.

"substitutes the government's judgment for that of the company [and t]his is neither good law nor good business."

All of the NLRB's outrageous actions, from Boeing to the stripping of voting rights and the blessing of micro-unions, are only *part* of the story. The Department of Labor (DOL) and the NLRB have both released proposed rules that are designed to work in concert to limit communication by employers to employees about the general disadvantages of unions or about issues with the specific union attempting to organize its employees. The proposed rules, which were released within one day of each other, seem an orchestrated maneuver designed to deny employees crucial information needed for an informed choice about whether or not to pay for union representation. In conjunction with the ruling in *Specialty Healthcare*, which allows organizers to gerrymander bargaining units and form "micro-unions," and the recent decision in *Mastec Direct TV* and *Communications Workers Local 3871*, where the Board turned a blind eye to union supporters' threats and intimidation of co-workers during an election,[2] the proposals serve to achieve the goals of the legislatively dormant and grossly misnamed Employee Free Choice Act (EFCA). As labor attorney Gene Scalia wrote in the Wall Street Journal about EFCA, "unions don't want to eliminate voter intimidation -- they want a monopoly on it." More on the efforts to enact EFCA through the backdoor and the impact on American jobs and the economy is set forth below.

Economic Data on EFCA

Study Shows EFCA Leads to Chronic Double Digit Unemployment and Millions of American Jobs It's quite simple: EFCA, a legislative effort to increase union density at the expense of an employees' right to vote by secret ballot, would cost millions of jobs and leave the U.S. facing chronic double digit unemployment. That's one reason why 74% of voters and union households oppose EFCA (see polling data at www.myprivateballot.com). One prominent study estimates EFCA's predicted increase in union density would spike unemployment by as much as 3.5% in one year and by over 9% over 10 years.[3] This would drive the unemployment rate from 9% to above 13%, cost millions of jobs in a single year, and lead to persistent double digit unemployment for the next decade and beyond. Congress recognized that EFCA would kill jobs and refused to pass the bill. Now, unions and their allies in the Administration are forcing the real-world equivalent policies of EFCA through the NLRB and DOL and the intended impact is the same—to force increases in union density at the expense of informed employee choice,

[2] The intimidation included a threat to "whip" a specific employee's "ass" and to sabotage his work; an anonymous call to another employee's home threatening to "get even" with him if he "back-stabbed" the pro-union employees; a threat made in front of three or four employees to "bitch slap" two other employees, or to "whip their f—n' ass" if they "cost us the election;" and to "whip [a supervisor named] Eddy's ass" if the union lost. The Board held that the two employees making threats were not agents of the union (which would have triggered a lower standard of misconduct required to set aside the election) despite their being on an "organizing committee" and being the main points of contact between the union organizers and their fellow employees.

[3] See AN EMPIRICAL ASSESSMENT OF THE EMPLOYEE FREE CHOICE ACT: THE ECONOMIC IMPLICATIONS, Anne Layne-Farrar, March 3, 2009 available at www.myprivateballot.com. The study states that "The precise effect on unemployment will depend on the degree to which EFCA increases union density, but for every 3 percentage points gained in union membership through card checks and mandatory arbitration, the following year's unemployment rate is predicted to increase by 1 percentage point and job creation is predicted to fall by around 1.5 million jobs…. [if] EFCA were to increase the percentage of private sector union membership by between 5 and 10 percentage points, as some have suggested, my analysis indicates that unemployment would increase by 2.3 to 5.4 million in the following year and the unemployment rate would increase by 1.5 to 3.5 percentage points in the following year." "[T]he effect of this increase in union membership would be to raise the unemployment rate by between 8.6% and 9.2% by 2018."

jobs, and economic prosperity. Lawmakers must stop this attack on the economy. Jobs should not be sacrificed for political payback or to ensure future political support from unions.[4]

Specialty Healthcare
Gerrymandering & Micro-Unions = Economic Disaster

The most significant of the Board's recent actions is its August 26, 2011 decision in *Specialty Healthcare and Rehabilitation Center of Mobile and United Steelworkers, District 9*, 357 NLRB No. 83 (2011). This ruling sets the stage for the gerrymandering of elections and the organization of "micro-unions." The Board's ruling radically changes the standard for determining an appropriate bargaining unit for all of the estimated six million workplaces covered by the National Labor Relations Act. The key issue is the extent to which a union may organize a group of employees into a bargaining unit without due consideration of the commonality of interests those employees share with other employees outside the proposed unit. The NLRB has historically applied a clear set of standards in determining a unit appropriate for bargaining – this case would turn those standards upside down. The impact on employers, who could face a proliferation of micro-unions with competing needs and demands, and employees, who could lose out on opportunities to build skills and advance their careers, would be significant. Because this is a representation case, there is no opportunity for direct judicial review and the Board may begin implementing the decision immediately. In order to appeal the determination of unit appropriateness under this new standard, an employer would have to refuse to bargain, wait for the union to file an unfair labor practice charge (ULP), and then raise unit appropriateness as a defense. This would take years.

Gerrymandering The decision makes it easier for unions to organize by cherry picking a unit composed of the subset of employees most likely to organize, with little regard for whether those employees constitute a practical unit. As a result, unions will often organize by forming smaller bargaining units that exclude those similarly situated employees who oppose unionization, effectively disenfranchising them. For example, a union may choose to organize poker dealers at a casino, rather than all dealers, because it knows the poker dealers support the union, while the blackjack, craps, roulette and other dealers may not. Similarly, a union may organize a small group of employees working on one machine rather than all machinists in a manufacturing facility, because the majority of machinists do not want union representation. In a retail store, a union may organize just the "greeters," rather than all employees interacting with customers, even though they have similar pay scales and work duties, because those employees do not want a union. This is in contrast to the law before *Specialty Healthcare*, under which bargaining units generally must include employees that share a community of interest. Smaller units are only permissible where the employees in the proposed unit have interests that are "sufficiently distinct from those of other employees to warrant the establishment of a separate unit." This prevents proliferation of small "fractured units" or micro-unions.

Multiple Micro-Unions Pulling Businesses Apart Under *Specialty Healthcare,* with the potential for micro-unions and fractured units, businesses may have to manage multiple small units of similarly situated employees with increased chances of work stoppages and potentially different pay scales, benefits, work rules, bargaining schedules, and grievance processes for similarly situated employees (e.g., different collective bargaining agreements for poker and blackjack dealers, cashiers and stockers, manufacturing production employees with similar skills

[4] Several articles highlight past expense by unions and threats to withhold future political support without sufficient payback. http://www.foxnews.com/politics/2011/05/20/afl-cio-chief-warning-dems-unions-lose-support/

but working on different machines, etc.). This could overwhelm businesses, particularly small businesses, with administrative requirements forcing them into a constant state of bargaining. Imagine a small business franchise owner with 4 fast food restaurants managing 8 or more separate bargaining relationships with different unions or a manufacturer with a different unit for each different piece of machinery in the facility. In addition, any one of these micro-unions could cripple the business with work stoppages, creating a situation where a union representing a handful of employees could threaten the economic well-being of the rest of the company's employees, nonunion and union alike, and their families.

U.S. Competition and Employee Opportunities Crippled as Micro-Unions Prevent Flexible Staffing Fractured units also would greatly limit an employer's ability to cross train and meet customer and client demands via lean, flexible staffing as employees could not perform work assigned to another unit. The impact on business productivity and competitiveness would be significant. Employees also would suffer from reduced job opportunities as promotions and transfers would be hindered by organization-unit barriers. Global competition is challenging enough without government-fostered barriers that cripple productivity and hamper opportunities for skill and career development.

In allowing for the formation of micro-unions, the NLRB has overturned precedent that was well established, worked well for employers and workers, and had been virtually unchallenged. Indeed, the ruling goes far beyond what was actually necessary to decide the case. Further, there was almost no urging from any interested party for the sort of sweeping overhaul the Board carried out. The Board, on its own initiative, intending to use the case as a platform for its activist agenda, solicited input from the public as to whether it should overhaul the unit determination process—and received almost no input encouraging such changes. While this clear lack of need and support for changes should have ended the initiative, the Board was determined to turn unit determination upside down and blatantly hand unions an organizing tool that almost certainly violates the NLRA. (The law states that a union's choice of which employees to organize cannot be the determinative factor in considering unit appropriateness, which in effect is exactly what *Specialty Healthcare* does. In fact, in 1995 a Federal Court of Appeals rejected the very standard put forth by the NLRB in *Specialty Healthcare* for this very reason).

Massive Changes to Established Law The NLRB's new procedure involves first determining that a proposed group is readily identifiable and has a sufficient community of interest among its own members. If so, then in order to challenge the unit determination and have other employees added to the group, an employer has to prove that employees in the larger unit "share an overwhelming community of interest." The majority of the Board characterized that standard as what has always applied outside of the health care industry (which is subject to separate, specific unit determination rules). As dissenting member Brian Hayes points out, however, the "overwhelming" component of the standard had previously been applied only in an extremely narrow and rare situation, called an accretion, where the issue is whether a newly established group of employees (a newly-created department in an existing union facility, for example) should be added to an existing represented unit without benefit of a vote. The heightened standard of an "overwhelming" community of interest has been applied to safeguard the inclusion of employees in a unit with no election. In *Specialty Healthcare*, however, the majority glosses over this crucial point to apply the higher standard in situations where employees will be able to vote.

The Supreme Court has not considered the issue presented in *Specialty Healthcare*, but one court in 1995 (the 4th Circuit in *NLRB v. Lundy Packing Company*) struck down application of the "overwhelming community of interest" standard on the grounds that it violated the law and was

justifiable only in the context of an accretion. While another court in 2008 (the DC Circuit in *Blue Man Vegas v. NLRB*) indicated application the "overwhelming" standard was permissible in the case before it, the court did so only because the "Board's finding that the proposed unit was appropriate …was certainly reasonable and supported by substantial evidence" and in applying the standard the Board "did not give controlling weight to the extent of the Union's organization." Furthermore, as member Hayes points out in his dissent in *Specialty Healthcare,* there are flaws in the reasoning of *Blue Man*.

Lamons Gasket Company
NLRB Strips Away Election Rights

The NLRB issues its decision in *Lamons Gasket Company* on August 26, 2011, over-ruling its 2007 decision in *Dana Corp.* Over the strong dissent of Member Brian Hayes, the majority threw out *Dana,* eliminating employees' opportunity to immediately challenge card check with a secret ballot election. Under *Dana*, when an employer voluntarily recognized a union to represent a group of employees via card check and without a secret ballot election, employers were to post a notice (referred to as a *Dana* Notice), telling employees about the recognition and informing them that they (or a rival union) had 45 days to file a petition for a secret ballot election. Employees not wanting a union could seek decertification, and rival unions could seek an election to replace the original. After the 45 days, employees would be barred from challenging the election for up to a year,[5] and if a contract was signed, for up to 4 years.[6]

Over the last four years, the Board received over 1,300 requests for *Dana* notices, had 102 election petitions filed, and held 62 elections. In 17 of those elections, employees voted to oust the voluntarily recognized union, including two cases where a different union was chosen. The Board's majority contended that 17 elections out of over 1,300 notice requests showed that there was very little need for the *Dana* ruling. Dissenting member Hayes, however, focused on the fact that in about 25% of all elections held the employees voted against the voluntarily recognized union. This provides a strong indication that many employees who sign recognition cards would vote against unionization if given the chance.

The notices themselves were a point of contention for the majority, which characterized them as contrary to the Board's long-standing practices and improperly implying that the Board was biased against voluntary recognition. In its discussion, the Board overlooked the fact that an official Board notice is required when a union has filed a petition for election, as well as its own recent rule (discussed below) requiring employers to post notices describing organizing rights and explaining how to contact the NLRB. As member Hayes pointed out in dissent, the Board has no problem requiring postings and upholding traditions only when they are likely to assist in union organizing.

The ruling is all the more significant because the election bar imposed would last from approximately six months to as much as four years after voluntary recognition. The Board ruled that after voluntary recognition an election is barred, in the absence of agreement on a contract,

[5] The National Labor Relations Act imposes an "election bar" where new elections are barred for one year after a conclusive NLRB election. The NLRB has extended this bar in situations where an employer voluntarily recognizes a union based on cards. The *Dana* case ensured employees facing card check were afforded the limited opportunity within the 45 days for a secret ballot election before the bar took effect.

[6] A collective bargaining agreement may serve as a bar to an election for 3 years.

for no less than six, and no more than twelve, months after the parties' first bargaining session. If an agreement is reached, the bar applies until the agreement expires. For contracts of short duration (under three years), the bar would end at expiration. For contracts longer than three years, the Board applies an "administratively burdensome" rule, under which a petition may be filed even thought the contract has not yet expired. For contracts of three years' duration or longer, this would result in a bar of about four years given that, absent unfair labor practice charges (which would themselves have an effect on the ability to petition for an election), a first agreement would normally be reached within the first year after recognition.

The decision represents another step toward an agency-created EFCA.

Propaganda – The NLRB's Biased Notice Requirement

NLRB's new regulation requires, for the first time in the seventy-five year history of the NLRA, that employers post detailed notices outlining organizational rights and providing contact information for the NLRB. This regulation comes out ironically four days after the *Lamons Gasket* decision, explained above, where the majority's stated reasons for over-ruling *Dana* included *Dana*'s requirement of posting notice of the right to seek an election after a voluntary recognition. The *Dana* notice, according to the majority, undercut the Board's status as a neutral agency. Yet, it is not the *Dana* notice, but the noticed required by the rule that is a manifestation of the Board's bias. For the Obama NLRB, any notice that tells employees how to contact the Board, or that a petition for election has been filed (required for decades) is just fine, but any notice that tells employees who never got to vote how they can ask the Board for an election just sends the wrong message.

Aside from bias, the notice itself and the posting requirements are beyond the Board's authority to require, unclear, confusing, incredibly burdensome and, predictably, biased in favor of unions.

First, the NLRB has no legal authority to require all six million covered employers to post a notice. Unlike many other workplace laws, the NLRA does not contain a posting requirement. Congress certainly knows how to require the posting of notices, but has never directed or authorized the NLRB to do so. Moreover, the NLRA gives the Board the power to act with respect to any given employer *only* if (a) a petition for election has been filed; or (b) an unfair labor practice charge has been filed. A strong argument exists that the Board cannot do *anything* that requires action of all employers absent a petition or charge.

Second, the notice itself is long, confusing and one-sided. It informs employees of their right to organize and bargain collectively, about restrictions on employers, and about petitions for election and unfair labor practice charges, but it does not adequately inform them about the following equally clear and important rights and information:

- The right to refuse to pay union dues to the extent they are used for political purposes.
- The right to refuse to join a union or pay dues in Right-to-Work states.
- The right to decertify an unwanted union.
- The downsides to unionization, such as loss of the ability to negotiate directly with their employer, the fact that economic strikers can be permanently replaced or that unions can fine their own members.

NLRB Proposed Rule on Ambush Elections

On June 22, 2011, the Board issued a Notice of Proposed Rulemaking (NPRM) over the dissent of the sole Republican Board Member, Brian Hayes. A copy of the NPRM can be found on the Board's site www.nlrb.gov. The Board's majority, under the direction of radical former SEIU lawyer Craig Becker, claims the rule is intended to streamline procedures for elections to determine whether or not employees wish to be represented by a union. The total effect of the proposed changes, however, would be to drastically alter the entire election process in favor of unions by increasing union access to employees' personal information and greatly limiting communication by employers to employees about the general disadvantages of unions or about a specific union attempting to organize its employees. In doing so, the proposal would trample businesses' free speech and due process rights, while also greatly limiting worker access to information needed to make an informed choice about union representation. The changes are unnecessary and fly in the face of what the Supreme Court has called "congressional intent to encourage free debate on issues dividing labor and management." The proposal is nothing more than a naked attempt to promote unionization by silencing the opposition—a concept Becker has supported in an article he published in the past.

The Ambush According to Board Member Brian Hayes, these new procedures could result in union representation elections held in as few as 10 days after the filing of a union petition. The NLRB's own statistics reveal that in 2010, the average time to election was 31 days, with over 95% of elections occurring within 56 days. The current election time frames are not only reasonable, but permit employees time to make an informed decision, which would not be possible under the proposed timetables. Given that union organizers typically lobby employees for months outside the workplace without an employer's knowledge, these "ambush" elections would often result in employees' receiving only half the story. They would hear promises of raises and benefits that unions have no way of guaranteeing, without an opportunity for the employer to explain its position and the possible inaccuracies put forward by the union. Ambush elections would be particularly damaging to small businesses as the proposed changes would effectively eliminate any measure of due process by forcing elections before most employers could even understand what was happening, let alone obtain legal advice and representation.

Turning Over Employees' Personal Information The Board's proposed rules also would require that employers give the union—in addition to names and addresses—employee phone numbers, email addresses, work locations, and shift and classification details. The proposed rules offer no protection for employees barraged with emails and phone calls from union organizers paid to do so, nor do they address the fact that many people have unlisted phone numbers, often due to concerns over harassment or domestic violence. And although the Board justifies the added information by citing the rise of electronic communications, it is worth noting that while telephones clearly existed in 1966, the Board ruled at that time that names and addresses were sufficient.

Trampling Due Process Member Hayes notes that the Board's proposed changes will also "substantially limit the opportunity for full evidentiary hearing or Board review on contested issues involving, among other things, appropriate unit, voter eligibility and election misconduct." The proposal would require that all pre-election hearings occur within seven days of the petition. Businesses must file a statement within those seven days setting forth their position on all relevant legal issues. Any issues not identified in the statement would be waived forever. These unnecessary time limits put enormous pressure on all businesses, but especially small

ones, who will have enough problems finding counsel within these time frames, let alone obtaining any meaningful understanding of their rights and obligations under this complex law. The proposed changes also would in many cases result in elections where no one - not the employer, the union, nor the employees – knows which employees will be in any final bargaining unit that could result from the election. In a situation where an employer contends that some employees at issue are supervisors, the effect of the new rule would be to virtually guarantee improper influence on properly eligible employees, who would be forced into the polling place along-side their bosses.

Ignoring the Obama Administration's Regulatory Executive Order Finally, as Member Hayes points out in his dissent, the Board is rushing the proposed regulatory changes just as it would rush elections, allowing only 60 days for initial public comments and a potential two days of public hearing in Washington, DC. The last time the Board made significant changes to any of its election procedures, over 20 years ago and relating only to the health care industry, the Board allowed for two years from the first proposed rulemaking to the implementation of a final rule and held multiple hearings in various locations. President Obama has said in his executive order that 60 days should be the minimum amount for a rulemaking. While the Board is not bound by the order, there is no reason it should disregard the guidelines the administration established for good governance.

DOL's "Gag" Rule

On June 21, 2011, DOL issued a Notice of Proposed Rulemaking that would drastically change certain reporting requirements relating to the use of paid "persuaders" by employers. Since 1959 the Labor Management Reporting and Disclosure Act (LMRDA) has contained a requirement that employers file certain reports with the DOL if they use outside labor consultants to "persuade" their employees with respect to collective bargaining issues. The law was adopted in large part to "control the activities of management middlemen who flitted about the country on behalf of employers interfering with retraining and coercing employees in the exercise of the right to organize and bargain collectively…" The law contains an exception under which no reporting is required when consultants or outside attorneys provide "advice" to the employer rather than directly interacting with employees for purposes of persuasion. Since the early 1960s, the DOL has taken the position that advice includes situations where consultants or attorneys provide employers with materials and draft speeches to be used to educate employees. In these situations, DOL found no reporting requirement, as long as the consultant did not directly interact with the employees. DOL's position has been that the prepared materials constitute "advice" because the employer is free to accept or reject the written material prepared by the consultant. DOL is seeking to reverse this long-held position and would narrow the advice exception (thus broadening the reporting requirement) and expand the information that must be reported to the government when the reporting requirement is triggered.

Interfering with the Right to Legal Counsel The net effect of the proposed rule changes would be to discourage employers, particularly smaller employers, from seeking legal representation in the course of a union campaign. Under the requirements, employers and consultants would need to report details of the agreement, information about the employees affected, and all related financial data. It would also severely penalize employers, consultants, and attorneys who inadvertently fail to report activities and agreements that for nearly five decades had fallen squarely within the advice exception. In fact, certain violations could result in criminal sanctions.

Education is Not Intimidation There is a fundamental difference between intimidation and education. While the LMRDA and NLRA are both designed to address misconduct and intimidation by unions and employers, education about and debate over the advantages and disadvantages of union representation are central to our nation's labor policy. As the Supreme Court has noted, the "NLRA as a whole, 'favor[s] uninhibited, robust, and wide-open debate in labor disputes,' stressing that 'freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB.'" Yet throughout the DOL's proposal it equates any communication by employers about the potential disadvantages of unions with intimidation. In fact, the proposal goes so far that even something as innocuous as training or providing materials in a group seminar or conference for employers, could trigger reporting obligations.

DOL Relies on Defunct EFCA Studies to Support Change In justifying its proposed changes, the DOL largely relies on the same union-financed, defunct studies used to support EFCA.[7] Many of the "studies," which claim widespread coercion by employers, rely heavily on anecdotal data obtained from union organizers—hardly an unbiased source. Others seem to suggest any employer communications with employees about unions is coercive, going so far as to condemn employers for informing employees of simple facts such as union dues requirements and other basic consequences of unionization.

Letting Union Lies Go Unanswered What the DOL's proposed rules would do is hamstring the legitimate and important rights of employers to communicate with employees about the facts of union representation. The law has traditionally allowed unions to exaggerate, promise benefits it may not be able to deliver, and essentially lie to employees in organizing campaigns. In part this has been justified by the fact that election time-frames and employer free speech rights, together with stricter restrictions on what employers are allowed to say, will ensure that an organizer's inaccurate statements can be countered by employers truthfully conveying the facts. The DOL's proposed rule would effectively allow months of exaggerations, undeliverable promises, and outright lies to precede the NLRB's proposed quickie elections, while putting a gag on law-abiding employers.

[7] See www.uschamber.com%2Fsites%2Fdefault%2Ffiles%2Freports%2F0908_unionstudies_coercion.pdf.