

# The Employee Free Choice Act

## A Human Rights Imperative

### Summary

Congress should pass the Employee Free Choice Act to help remedy glaring deficiencies in current US labor law that significantly impair the right of workers to freely choose whether to form a union. Workers' right to organize and bargain collectively is well established under international human rights law. As a member of the International Labour Organization (ILO) and party to several important international legal instruments, the United States is legally bound to protect this fundamental right. In practice, it falls far short, and failure by US employers to respect workers' right to freedom of association is rampant.

US labor law currently permits a wide range of employer conduct that interferes with worker organizing. Enforcement delays are endemic, regularly denying aggrieved workers their right to an "effective remedy." Sanctions for illegal conduct are too feeble to adequately discourage employer law breaking, breaching the international law requirement that penalties be "sufficiently dissuasive" to deter violations.

Unfair union election rules allow employers to engage in one-sided, aggressive anti-union campaigning while denying union advocates a similar chance to respond and banning union organizers from the workplace or even from distributing information on company property. If confronted with clear evidence of employee support for a union, employers can force a formal election and manipulate the often lengthy pre-election period to pound their anti-union drumbeat and, in many cases, violate US labor laws, confident that any penalties will be minimal and long delayed.

Workers who overcome these obstacles and successfully form a union may still be unable to conclude a collective agreement, in large part because weak US labor law provisions fail to meaningfully punish illegal employer bad-faith negotiating or to adequately define good-faith bargaining requirements.

The Employee Free Choice Act, passed by the US House of Representatives in 2007 and likely to be considered by the US Congress again in early 2009, would remedy many of these deficiencies and create a more level playing field for US workers attempting to exercise their right to organize and bargain collectively. The Act would strengthen US labor law enforcement, in part by increasing penalties for violations. It would help streamline union certification and create a more democratic union selection process by requiring employers to recognize union formation based on card check. And it would facilitate the conclusion of initial collective bargaining agreements.

While not a panacea for all shortcomings in US labor law and practice, the Act would bring US law closer to compliance with international standards and go a long way toward ensuring that US workers are no longer systematically prevented from exercising their basic right to freedom of association.

## **Freedom of Association under International Standards**

The Universal Declaration of Human Rights (UDHR) sets out that “[e]veryone has the right to form and to join trade unions for the protection of his interests.”<sup>1</sup> The International Covenant on Civil and Political Rights (ICCPR), a binding instrument ratified by the United States, similarly states that “everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.”<sup>2</sup>

The ILO Declaration on Fundamental Principles and Rights at Work (ILO Declaration) unequivocally confirms the importance of this basic human right. The Declaration enumerates the “fundamental rights” which all ILO members have an obligation “to respect, to promote and to realize, in good faith” even if, like the United States, “they have not ratified the Conventions in question.” According to the Declaration, among those rights is “freedom of association and the effective recognition of the right to collective bargaining.”<sup>3</sup>

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<sup>1</sup> UDHR, adopted December 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71, art. 23(4). While the UDHR is not legally binding, it is generally considered the foundational document for the modern international human rights framework and at least in part to have customary international law status.

<sup>2</sup> ICCPR, adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171, entered into force January 3, 1976, art. 22(1). The International Covenant on Economic, Social and Cultural Rights (ICESCR), which the United States has signed but not ratified, similarly recognizes “[t]he right of everyone to form trade unions and join the trade union of his choice.” ICESCR, adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316, 993 U.N.T.S. 3, entered into force January 3, 1976, art. 8(1).

<sup>3</sup> International Labour Conference, ILO Declaration, 86<sup>th</sup> Session, Geneva, June 18, 1998.

The ILO Committee on Freedom of Association, which examines complaints from workers' and employers' organizations against ILO members and whose jurisdiction the United States has recognized, has further stated, "When a State decides to become a Member of the Organization [the ILO], it accepts the fundamental principles embodied in the Constitution and the Declaration of Philadelphia, including the principles of freedom of association."<sup>4</sup> In 1975, the Committee specifically noted that ILO members, by virtue of their membership, are "bound to respect a certain number of general rules which have been established for the common good.... Among these principles, freedom of association has become a customary rule above the Conventions."<sup>5</sup>

## Freedom of Association under US Law

Despite its clear obligations under international law to protect workers' right to freedom of association, the United States fails to do so. US labor law is weak and riddled with loopholes. Penalties for violations are minimal and further emasculated by systematic and lengthy enforcement delays. The Employee Free Choice Act, passed by the US House of Representatives in 2007 and likely to be considered by the US Congress in early 2009, would remedy many of the most pernicious legal shortcomings. Its passage, therefore, is a human rights imperative.

### A. Weak Remedies and Enforcement Delays

Penalties for breaching US labor law are so minor that employers often treat them as a cost of doing business—a small price to pay for defeating worker organizing efforts. Under US labor law, an employer faces no punitive penalties and few, if any, economic consequences for violating workers' right to freedom of association. Instead, in most cases, a guilty employer must simply complete a two-step "remediation process": restore the status quo ante by recreating working conditions prior to the violations; and post a notice conspicuously in the workplace, such as on a lunchroom or kitchen bulletin board, promising to stop and not repeat the unlawful conduct.

Under this scheme, in addition to hanging the requisite notice, an employer who fires, demotes, or suspends a worker for organizing must merely reinstate that worker to her previous post and pay back wages, minus income earned in the interim. In many cases this ends up amounting to no more than a few thousand dollars, which many employers treat as a cost worth bearing, even repeatedly, to ensure that worker organizing campaigns do not succeed.

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<sup>4</sup> International Labour Office, *Digest of Decisions and Principles of Freedom of Association Committee of the Governing Body of the ILO* (Geneva: ILO, 2006), para. 15. The ILO Committee on Freedom of Association reviews complaints alleging violation of the right to freedom of association, makes determinations based on the facts and applicable legal standards, and recommends measures to resolve the disputes.

<sup>5</sup> ILO Committee on Freedom of Association, *Fact-Finding and Conciliation Commission Report: Chile, 1975*, para. 466.

An employer who commits other forms of illegal interference and coercion must only post the obligatory notice and cease the impermissible conduct: if the employer had threatened workplace closure or benefit loss, the threats must cease; if the employer had adjusted security cameras to illegally surveil union supporters, the cameras must be re-adjusted; if the employer had transferred pro-union workers to dilute union support, they must be transferred back.

The law's meager penalties are further weakened by endemic enforcement delays. According to the most recent annual report of the National Labor Relations Board (NLRB), the US agency charged with enforcing labor law, workers wait an average of roughly nine months between the time they file unfair labor practice charges against their employer and an administrative law judge issues a decision in their case; they wait an average of over three years between the filing and a decision on any appeal to the full Board in Washington, DC.<sup>6</sup>

Such lengthy delays often render it difficult, if not impossible, even to restore the status quo ante. For example, workers fired for union activity rarely want their jobs back after years of litigation, having found new work in the interim. Likewise, a notice posted by an employer years after illegal conduct occurred is rarely seen by the affected workers whose rights were violated; most have left their guilty employer years earlier.

Employers often initiate and take full advantage of such delays, in many cases heeding the explicit advice of anti-union consultants. Employers file appeals to the courts, regardless of their merits, rather than complying with administrative orders to reinstate illegally fired workers or bargain collectively. Years more are thereby added to the protracted enforcement process.

Furthermore, the NLRB has shown itself largely unwilling to use the means at its disposal to most effectively protect workers' rights. It has a discretionary tool to help mitigate the devastating impact of paltry labor law sanctions and long enforcement delays in the most egregious cases, but that tool rests largely idle. Under US law, the NLRB *may* petition a federal district court for a "10(j) injunction" to stop alleged illegal employer activity in especially serious cases.<sup>7</sup> The Board rarely files such petitions, however, filing only 19 in fiscal year 2007.<sup>8</sup> As a result, flagrantly anti-union employer activity is allowed to accomplish its goal of derailing worker organizing efforts while legal cases are

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<sup>6</sup> NLRB, "Seventy-Second Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 2007," October 16, 2008, Table 23, p. 184.

<sup>7</sup> The 10(j) injunction was named after the labor law section creating the remedy. National Labor Relations Act (NLRA), 49 Stat. 449 (1935), as amended, sec. 10(j).

<sup>8</sup> NLRB, "Seventy-Second Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 2007," Table 20, p. 181.

pending: organizing drives whose leaders have been fired dissolve for lack of direction; workers scared by illegal threats of employer retaliation abandon union formation efforts.

The situation is markedly different when it comes to protecting employers. US labor law *requires* the NLRB to seek a “10(l) injunction” when faced with particularly egregious charges of unfair labor practices against a union. Thus, although both 10(j) and 10(l) injunctions are designed to “insure that an unfair labor practice will not succeed because the Board takes too long to investigate and adjudicate the charge,”<sup>9</sup> US law only requires the NLRB to prevent the illegal conduct from “succeed[ing]” when the rights of employers, rather than workers, are at stake.

The minimal consequences for violating workers’ right to freedom of association, the accompanying delays in their imposition, and the unequal treatment of employers’ and unions’ unlawful conduct violate US international obligations to protect workers’ right to organize and bargain collectively. Such shortcomings breach the ICCPR requirement that all parties “take the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to” the right to form and join trade unions and to ensure that any person whose right to organize is violated “shall have an effective remedy.”<sup>10</sup>

These deficiencies in US labor law and practice also run afoul of ILO Convention No. 98 concerning the Right to Organise and Collective Bargaining, which the United States has not ratified but whose principles it is obligated to uphold under the ILO Declaration. The ILO Committee on Freedom of Association has held that “to ensure the practical application of ... Convention No. 98,” a country’s “[l]egislation must ... establish sufficiently dissuasive sanctions against acts of interference by employers against workers and workers’ organizations” and “against acts of anti-union discrimination.”<sup>11</sup>

The Committee has found that to ensure “[r]espect for the principles of freedom of association,” redress for anti-union discrimination must be “expeditious,” noting:

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<sup>9</sup> *Miller v. California Pacific Medical Center*, 19 F.3d 449 (9<sup>th</sup> Cir. 1994); see also, Archibald Cox, Derek Curtis Bok, Robert A. Gorman, and Matthew Finkin, eds., *Labor Law: Cases and Materials* (Westbury, NY: The Foundation Press, Inc., 1996), p. 263.

<sup>10</sup> ICCPR, arts. 2(2), 3(a). The UN Human Rights Committee, charged with interpreting the ICCPR, has elaborated that “the positive obligations on States parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, ... against acts committed by private persons or entities that would impair the enjoyment of Covenant” and that “[a]rticle 2, paragraph 3, requires that in addition to effective protection of Covenant rights States parties must ensure that individuals also have accessible and effective remedies to vindicate those rights.... Cessation of an ongoing violation is an essential element of the right to an effective remedy.” UN Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, March 29, 2004, paras. 8, 15.

<sup>11</sup> International Labour Office, *Digest of Decisions and Principles of Freedom of Association Committee of the Governing Body of the ILO*, paras. 822, 861.

The longer it takes for such a procedure to be completed, the more difficult it becomes for the competent body to issue a fair and proper relief, since the situation complained of has often been changed irreversibly ... to a point where it becomes impossible to order adequate redress or to come back to the status quo ante.<sup>12</sup>

Similarly, the Committee has added:

The existence of legislative provisions prohibiting acts of interference on the part of the authorities, or by organizations of workers and employers in each other's affairs, is insufficient if they are not accompanied by efficient procedures to ensure their implementation in practice.<sup>13</sup>

These shortcomings in US labor law and practice also violate the basic principle, articulated by the ILO Committee on Freedom of Association, that labor law should not establish a disparate approach to employer and union illegal activity. In a case against the United States, the Committee stated:

As the Committee understands the [US] Government's arguments, it is the disruptiveness of the activity and its potential impact on neutral third parties which warrant the existence of a “mandatory”—as opposed to permissive—relief. This reasoning is quite understandable but the Committee considers that the same rationale could be applied conversely, to justify the extension of “mandatory” injunctions against employers in certain cases (for instance those unfair labour practices that hinder the freedom of association of employees), to prevent the alleged unlawful acts from accomplishing their purpose before administrative proceedings are completed, thus making administrative remedies illusory. The Committee thus requests the Government to ensure that, within the context of the application of the NLRA [National Labor Relations Act], workers and employers will be treated on a fully equal basis, in particular with respect to unfair labour practices.<sup>14</sup>

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<sup>12</sup> Ibid., paras. 820-21.

<sup>13</sup> Ibid., para. 862.

<sup>14</sup> ILO Committee on Freedom of Association, *Complaint against the Government of the United States Presented by the United Food and Commercial Workers (UFCW), the American Federation of Labor—Congress of Industrial Organizations (AFL-CIO) and the International Federation of Commercial, Clerical, Professional and Technical Employees (FIET)*, Report No. 284, Case No. 1523, Vol. LXXV, 1992, Series B, No. 3, para. 198.

## *The Employee Free Choice Act Solution: Strengthening Enforcement*

The Employee Free Choice Act would strengthen the penalties for unlawful anti-union conduct during organizing drives and first-contract negotiations. The Act would increase the amount due to workers fired, demoted, suspended, or otherwise discriminated against for their organizing activity, increasing the current “make-whole” remedy by requiring payment of “2 times that amount as liquidated damages.”<sup>15</sup> The Act would also institute civil fines, payable to the US government, of up to \$20,000 per violation for willful or repeated illegal conduct. In addition, the Act would eliminate the discrepancy between the treatment of workers’ and employers’ alleged serious labor law violations by *requiring* the NLRB to seek a 10(j) injunction if it reasonably believes that an employer engaged in unlawful anti-union activity that “significantly interferes with, restrains, or coerces employees” in the exercise of their right to organize and bargain collectively as set forth in US law.<sup>16</sup>

## **B. Unfair Union Election Procedures**

Existing US labor law governing union elections is heavily slanted in favor of employers, allowing them to exploit the rules to deny workers their right to freely choose whether to organize.

Under US law, employers are permitted to campaign vigorously against union formation—even predicting workplace closures, firings, wage and benefit cuts, and other dire consequences of organizing—so long as the “predictions” do not include actual “threat[s] of reprisal or force or promise of benefit.”<sup>17</sup> Union organizers and advocates are not entitled to a similar opportunity to convey their own message about the benefits of union formation or a comparable chance to respond to ominous anti-union “predictions.”<sup>18</sup>

Employers can legally force workers to attend anti-union captive audience meetings during work time, at which comments and questions from union supporters can be banned, and can prohibit union advocates from holding parallel meetings. Employers can issue a steady anti-union drumbeat during the workday while barring union organizers from the workplace. And in most cases,

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<sup>15</sup> H.R. 800, “Employee Free Choice Act” (EFCA), 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2007), sec. 4(b).

<sup>16</sup> EFCA, sec. 4; see NLRA, secs. 7, 8. The Act would also explicitly require the NLRB to seek an injunction upon a reasonable belief that an employer fired, failed to hire, or otherwise discriminated against a worker with respect to “any term or condition of employment” to discourage union membership or threatened such anti-union discrimination to prevent the exercise of the associational rights established in US law. EFCA, sec. 4.

<sup>17</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

<sup>18</sup> The NLRB held that “an employer does not commit an unfair labor practice if he makes a pre-election speech on company time and premises to his employees and denies the union’s request for an opportunity to reply.” *Livingston Shirt Corporation, S. J. Bilbrey, Union Bank & Trust Co., Dr. J. D. Capps, Marvin Leslie, Mitchell Leslie, Leslie Bros. Dry Goods Store, J. B. Morgan, Livingston Dry Goods Store, Clarence Davis, Lansden-Coward Drug Co., S. B. Smith, L. G. Puckett, Jenkins & Darwins Dry Goods Store, Houston Holman, Holman’s Dry Goods Store and Amalgamated Clothing Workers of America, CIO*, 107 NLRB 400 (1953); see also, Robert A. Gorman and Matthew W. Finkin, eds., *Basic Text on Labor Law, Unionization and Collective Bargaining* (St. Paul, MN: West Publishing Co., 2004), p. 252.

employers can even prevent union representatives from distributing information on company premises, including publicly accessible sidewalks and parking areas on employer property.<sup>19</sup>

US law also allows employers to refuse to recognize a union based on freely signed authorizations by a clear majority of workers explicitly indicating their desire to organize—a “card check”—and demand instead that a union demonstrate majority support through an NLRB election. The period leading up to that election, lasting at least several weeks but often longer, creates an opening for anti-union employers to make aggressive use of the tilted playing field described above and launch distorted anti-union campaigns or engage in unlawful anti-union activity with little prospect of serious legal repercussions.<sup>20</sup> Many US employers take full advantage.

Through small- and large-group mandatory pre-election meetings, managers—or, in some cases, external anti-union consultants—repeatedly explain to a captive audience of workers why an employer opposes union formation. Employers use dramatic one-sided videos, PowerPoint presentations, and impassioned speeches to portray organizing as having a devastating impact on workers.<sup>21</sup> Some employers have characterized union dues as money that goes primarily to line the pockets of corrupt union bosses and lawyers; union work rules as obstacles to increased productivity that cause companies to shut down; and collective bargaining as a risky enterprise during which every benefit is on the table and unions will trade away “just about anything” to achieve paycheck dues deductions.<sup>22</sup> Employers convey such dire anti-union messages secure in the knowledge that they can limit workers’ access to contrary viewpoints, denying pro-union workers and union representatives a comparable opportunity to counter the anti-union claims or to set forth a positive case for unionization (such as the possibility that organizing could lead to higher salaries, improved benefits, better scheduling, increased job security, and a greater worker voice in workplace decisions).

Many US employers also cross the line between permissible aggressive anti-union campaigning and unlawful coercive interference in union activity by resorting to illegal anti-union threats, discrimination, surveillance, interrogations, promises, intimidation, and retaliation, including even demotions and firings. Those efforts have a severe chilling effect on workers’ willingness to organize

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<sup>19</sup> *Lechmere, Inc., v. NLRB*, 502 U.S. 527 (1992). Union representatives must be allowed on employer premises only in those rare circumstances under which “the location of a plant and the living quarters of the ... employees place the employees beyond the reach of reasonable union efforts to communicate with them,” such as in logging and mining camps.

<sup>20</sup> For further discussion of the history of the NLRB, see James A. Gross, *Broken Promise: The Subversion of U.S. Labor Relations Policy, 1947-1994* (Philadelphia, PA: Temple University Press, 1995).

<sup>21</sup> See, e.g., Human Rights Watch, *Discounting Rights: Wal-Mart’s Violation of US Workers’ Right to Freedom of Association* (New York, NY: Human Rights Watch, 2007).

<sup>22</sup> See, e.g., Wal-Mart Stores, Inc., training videotape, “You’ve Picked a Great Place to Work!,” undated (on file with Human Rights Watch).

and often successfully derail union formation. Employers commit such labor law violations confident that, at most, they will only suffer minimal consequences, likely years after the illegal conduct occurred and long after achieving their goal of defeating nascent organizing.

US rules governing workers' selection of union representation were not always so slanted against workers' right to freely choose on an informed basis whether or not to organize. For at least ten years, from roughly the mid-1930s to mid-1940s, US employers were *required* to recognize a union that demonstrated majority support through card check rather than delaying recognition until an NLRB election. Employers were also prohibited from making anti-union speeches, holding anti-union captive audience meetings, and distributing anti-union literature.<sup>23</sup>

In 1947, however, the US Congress passed the Taft-Hartley Act. The new law amended US labor law by permitting employers to file election petitions in response to unions' demands for recognition and by establishing an "employer free speech" clause, allowing employers to engage in aggressive anti-union campaigning. Yet even after the Taft-Hartley Act, the NLRB and US courts for several years upheld union representatives' corresponding right to respond, recognizing workers' right "to hear both sides of the story under circumstances which reasonably approximate equality."<sup>24</sup>

The workers' rights protections of the 1930s through early 1950s, however, were gradually abandoned in favor of the existing union election rules that run afoul of international standards. The failure of US labor law to allow union representatives to communicate with workers on company property—both through worker meetings that could respond to employer anti-union campaigning and literature distribution that could counter employer anti-union materials—has been explicitly criticized by the ILO Committee on Freedom of Association. In a case against the United States, the Committee explained that the right to freedom of association includes workers' right to receive information from trade union representatives in their workplaces and requested the United States "to guarantee access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers, in order to apprise them of the potential advantages of unionisation."<sup>25</sup>

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<sup>23</sup> Gorman and Finkin, eds., *Basic Text on Labor Law, Unionization and Collective Bargaining*, p. 176; Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards* (New York, NY: Human Rights Watch, 2000), p. 55; Decision and Order, *Clark Bros. Co., Inc., and United Automobile, Aircraft, and Agricultural Implement Workers of America (UAW)*, CIO, 70 NLRB 802 (August 26, 1946), enforced on other grounds, *NLRB v. Clark Bros. Co.*, 163 F.2d 373 (2d Cir. 1947).

<sup>24</sup> *Bonwit Teller, Inc., and Amalgamated Clothing Workers of America, CIO, and Retail Clerks International Association, AFL*, 96 NLRB 608 (1951), remanded on other grounds, *Bonwit Teller, Inc., v. NLRB*, 197 F.2d 640 (2d Cir. 1952); see also, Gorman and Finkin, eds., *Basic Text on Labor Law, Unionization and Collective Bargaining*, p. 251.

<sup>25</sup> ILO Committee on Freedom of Association, *Complaint against the Government of the United States Presented by the UFCW, the AFL-CIO and FIET*, 1992, Series B, No. 3, para. 199(a).

The Taft-Hartley provision permitting a US employer to file an election petition in response to a union's demand for card-check recognition is also used in practice to defeat the exercise of the right to form and join trade unions. International law does not stipulate specific procedures for selecting union representation, but the ILO Committee on Freedom of Association has clearly stated that “[t]he formalities prescribed by law for the establishment of a trade union should not be applied in such a manner as to delay or prevent the establishment of trade union organizations.”<sup>26</sup> As discussed above, many US employers file union election petitions with just such an intention: to take advantage of unbalanced US union election rules, weak sanctions for illegal conduct, and lengthy enforcement procedures to create an opportunity “to delay or prevent” union formation.

### *The Employee Free Choice Act Solution: Streamlining Union Certification*

The Employee Free Choice Act would not ban employers from mounting aggressive anti-union campaigns or require them to allow union advocates and organizers an equal chance to respond, but it would significantly mitigate the negative impact of existing union election rules on workers' right to freedom of association. Under the Act, workers could opt to select union representation through card check or an NLRB election, and employers would be compelled to respect that choice. Upon NLRB confirmation that a majority of workers had signed valid union authorizations or “cards,” employers would be required to recognize and bargain collectively with the union, rather than forcing an NLRB vote.<sup>27</sup> As a result, employers would no longer be guaranteed a pre-election period during which to exploit weak US labor laws and practice “to delay or prevent” union formation or otherwise undermine workers' right to choose freely whether to organize.

## **C. Bad-Faith Collective Bargaining**

Even if US workers successfully organize, however, their fundamental right to freedom of association is still not fully secure because of shortcomings in current legal provisions governing collective bargaining.

US labor law declares that it is the policy of the United States to “encourage[e] the practice and procedure of collective bargaining.”<sup>28</sup> To these ends, the law establishes workers' right to “bargain collectively through representatives of their own choosing” and bans employers from refusing to negotiate with such representatives.<sup>29</sup> Specifically, employers are required to “meet at reasonable

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<sup>26</sup> International Labour Office, *Digest of Decisions and Principles of Freedom of Association Committee of the Governing Body of the ILO*, para. 279.

<sup>27</sup> EFCA, sec. 2.

<sup>28</sup> NLRA, sec. 1.

<sup>29</sup> *Ibid.*, secs. 7, 8(a)(5).

times” and negotiate in “good faith,”<sup>30</sup> defined as “the obligation ... to participate actively in the deliberations so as to indicate a *present intention* to find a basis for agreement, and a *sincere effort* ... to reach a common ground.”<sup>31</sup> Unfortunately, the promise of these provisions is often undercut in practice, largely due to weak remedies for violations and unclear standards for proving bad-faith bargaining in court.

Under existing US law, if an employer is proven to have engaged in the common practice of illegal “surface bargaining”—negotiating with no desire to reach an agreement—the remedy required is more bargaining: the employer must post a notice promising to refrain from further bad-faith bargaining and is ordered back to the negotiation table where the cycle of bad-faith bargaining can repeat itself, lasting in some cases for years. Because there are no significant negative repercussions for illegal conduct in this scenario, there is little incentive for intransigent employers to comply with the law. As a result, many workers who face prolonged “surface bargaining” end up abandoning the negotiating process and their union, driven by their employers to surrender their right to freedom of association.

US employers also can evade even the minimal consequences of surface bargaining by exploiting a pernicious legal loophole. US labor law fails to establish concrete criteria for demonstrating the “present intention” and “sincere effort” to reach a collective agreement required during good-faith negotiations.<sup>32</sup> Without such criteria, proving violations is extraordinarily difficult. Employers regularly take full advantage. Advised by expert counsel, employers often go through the motions of good-faith bargaining to create the appearance of lawful conduct while, in reality, they have no intention of ever concluding a contract.

The existing weak remedies for surface bargaining and the ambiguity of the good-faith negotiating standard run afoul of international norms that require the effective protection and promotion of workers’ right to bargain collectively. Under international law, “[t]he right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent.”<sup>33</sup> According to the ILO Committee on Freedom of Association, enjoyment of this right necessitates that “both employers and trade unions ... bargain in good faith making every effort to

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<sup>30</sup> *Ibid.*, sec. 8(d).

<sup>31</sup> *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676 (9<sup>th</sup> Cir. 1943) (emphasis added).

<sup>32</sup> US law is clear, however, that good-faith bargaining does not “compel either party to agree to a proposal” made by the other. NLRA, sec. 8(d).

<sup>33</sup> International Labour Office, *Digest of Decisions and Principles of Freedom of Association Committee of the Governing Body of the ILO*, para. 881.

reach an agreement.”<sup>34</sup> Consequently, international law requires states to take the measures necessary “to encourage and promote the full development and utilization of machinery” for collective negotiation “with a view to the regulation of terms and conditions of employment by means of collective agreements.”<sup>35</sup>

### *The Employee Free Choice Act Solution: Facilitating Initial Collective Bargaining Agreements*

The Employee Free Choice Act would not attempt to clarify US labor law’s amorphous definition of good-faith bargaining, but it would at least help prevent it from continuing to undermine workers’ rights. The Act would allow workers negotiating their first collective contract to seek mediation after 90 days if the negotiations are not progressing satisfactorily. If mediation failed after 30 days, the dispute would be referred to arbitration, leading to a binding contract. (The parties could mutually agree to extend the initial bargaining and subsequent mediation periods.)<sup>36</sup>

The ILO has found such provisions, which allow workers to “initiate such a procedure [binding arbitration] on their own, for the conclusion of a first collective agreement,” to be in full compliance with international norms. Specifically, the ILO has held that “experience shows that first collective agreements are often one of the most difficult steps in establishing a sound bargaining relationship, [so] these types of provisions may be said to be in the spirit of machinery and procedures which facilitate collective bargaining.”<sup>37</sup>

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<sup>34</sup> Ibid., para. 938; see also, Ibid., paras. 935-36.

<sup>35</sup> Ibid., para. 880.

<sup>36</sup> EFCA, sec. 3.

<sup>37</sup> International Labour Conference, 1994, *Freedom of association and collective bargaining: Protection against acts of interference, Report of the Committee of Experts on the Application of Conventions and Recommendations*, 81<sup>st</sup> Session, Geneva, 1994, Report III (Part 4B), para. 257. The ILO Committee of Experts on the Application of Conventions and Recommendations is composed of a group of independent experts. Its responsibilities include preparing annual reports on particular themes covered by the ILO’s conventions, reviewing reports submitted by ILO member states on their ratification of and compliance with ILO conventions and recommendations, and preparing annual reports on its general observations concerning certain countries.