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Interest Arbitration: Risky for Unions and Employers

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A steady decline in union membership has led union organizers and sympathetic politicians to introduce "labor reform" legislation designed to make it easier for unions to gain representation rights over more workers without becoming more accountable to those workers. The main labor reform bill before Congress, the Employee Free Choice Act (H.R. 800), contains two particularly problematic provisions. "Card check" recognition, which has received the most attention, would hurt workers by doing away with secret-ballot elections for unionization. The second provision would force "interest arbitration" on employers and unions, shifting their right to negotiate contracts to unaccountable government officials and increasing the risk of bad contracts. Congress should not force employers and unions to take this gamble.

Short-Circuiting Fair Negotiations. Arbitration is a valuable way to resolve disputes and is frequently used in labor relations to resolve grievances that arise under existing contracts. But the Employee Free Choice Act would use arbitration to create a contract when parties are unable to agree. This is known as "interest arbitration," and it is a clumsy approach seldom seen outside of government.

Currently, negotiations on an initial contract following union recognition are treated just like those for any other contract. The parties negotiate in good faith until they settle on terms. If they fail to do so, the union can call a strike, or the employer can implement its last offer. EFCA would short-circuit negotiations, allowing either party to call for a government-appointed mediator after 90 days. Either party could unilaterally submit the matter to arbitration after 30 days of mediation, and the results of arbitration would be binding on both parties for two years.

Uncertainty and Delays. In its current form, the bill specifies few details about how arbitration would be carried out, but state experience provides some guide. Michigan has been using a similar arbitration process for police officers and firefighters since 1969. Michigan's process is fairly typical among states that use interest arbitration to resolve bargaining impasses with government employees. The results are not encouraging for those who favor binding arbitration as a solution to labor strife.

Based on Michigan's statute, arbitration is supposed to be quick. Assembling the arbitration panel should take less than three weeks. Once the panel is named, the first hearing should be held within 15 days, and hearings are supposed to be wrapped up 30 days after they commence.

In reality, the process is drawn out. In the early 1990s, only one out of every six arbitration cases was resolved within 300 days of petition filing. Since then, the pace of arbitration has improved,

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but not dramatically. A review of 29 arbitration cases resolved in 2005 and 2006 showed that only seven were resolved within 300 days, fewer than one out of four. On average, arbitration takes almost 15 months from the date that a request is filed to the date that a decision is reached. This delay ties up government resources because arbitrators' awards are retroactive, meaning that pay raises awarded by arbitration often involve back pay that local officials must set aside in advance.

This uncertainty about both future pay and back pay is a serious burden on local governments. In the private sector, these delays could do even more damage, as uncertainty over future wages and working conditions would make it more difficult for companies to recruit personnel or respond to changes in the marketplace.

Empowering Unaccountable Government Officials. The proposed law does not specify how arbitration panels would be set up, and federal regulators would have considerable leeway to establish their own procedures. But one thing is certain: Binding contracts would not result from management and labor working out their differences and reaching compromises that they both can accept. Instead, both sides would be bound by the decision of arbitrators who are unaccountable and insulated from the results of their handiwork.

The arbitrator would decide what weight to put on factors like the financial health of the employer, the compensation levels of competitors, and local costs of living with little oversight and virtually no risk that his or her ruling would be overturned by the courts. Interest arbitration for initial contracts could be even less predictable, because arbitrators would not have prior collective bargaining agreements to look to for guidance.

Allowing arbitrators to write their own economic terms could also tempt them to take the safe path and avoid dealing with the merits of the parties' arguments by splitting differences down the middle. For example, if the union wants a 4 percent raise and the employer would accept a 2 percent raise, the arbitrator might just settle on the average, a 3 percent raise, without carefully considering any other factors.

The arbitration process may or may not have the confidence of both sides. The decisionmakers may be seen as fair and judicious, or they may be distrusted by one side or both. It would not matter: The arbitrators' decisions would almost always be final. And the arbitrators themselves would not have to live on the low wages that they might force on employees nor suffer layoffs or bankruptcy if their awards prove too generous.

Conclusion. Interest arbitration is a gamble, one that unions and private-sector employers seldom agree to take on their own. It is intended to accelerate contracting but rarely works out that way in the states that use it. It would put the power to set wages and the terms of employment in the hands of unaccountable government officials who would not have to live with the consequences of their decision. Congress should not force employers and unions to take that gamble.

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