How to Break the Ideological Gridlock on Labor Law

Thomas A. Kochan and John Paul Ferguson

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Once again Congress is trying to break the gridlock that has long prevented it from fixing and modernizing the nation's labor law. The last such effort was in the early 1990s, when a bipartisan Commission on the Future of Labor-Management Relations concluded that "labor law is not achieving its stated intent of encouraging collective bargaining and protecting workers' rights to choose whether or not to be represented at the workplace." The commission got the diagnosis right, but--as with earlier efforts--ideological divisions between business and labor kept policymakers from acting on the facts and evidence at hand.

This time, the effort takes the form of the Employee Free Choice Act, which has been passed in the House and is now being debated in the Senate. The bill provides for union certification if a majority of workers sign cards indicating that they want a union, strengthens the weak penalties for violating workers' legal rights and provides for arbitration of an initial contract if the parties cannot negotiate one on their own.

Unfortunately, those same ideological divisions threaten once again to obscure what is wrong with labor law and what we need to do to fix it. The bill's proponents argue that the election process is so badly broken that it no longer gives workers a fair chance to organize; hence the need for card-check recognition. The bill's opponents ignore the evidence for or against that argument; instead they make pious arguments about "free elections as a bulwark of democracy" and say that card checks will free unions to intimidate workers.

Lost in these arguments is evidence for either position. Yet consider the results from a study we have just completed. We used the Freedom of Information Act to request data on the organizing process from the National Labor Relations Board and the Federal Mediation and Conciliation Service, the two agencies that oversee organizing drives and contract negotiations. We tracked the progress of more than 22,000 organizing drives between 1999 and 2005, from filing a petition for an election through holding an election to negotiating a first contract. We discovered four main things:

1. Only one in five cases that filed an election petition ultimately reached a first contract. This is despite all the cases already having shown substantial and likely majority support for representation.

2. The presence of an unfair labor practice charge (a charge of illegal conduct) against the employer reduced the chances of reaching a contract by 58 percent. That is, fewer than one tenth of cases with a charge reached a first contract.

3. Unfair labor practice charges have their biggest effect before the election is ever held. Cases with charges were 36 percent less likely to hold elections that cases without charges.

4. Even where an election was held and the union won, only 56 percent of the cases reached a first contract.

Reconsider those pious arguments in light of these findings. How can anyone who thinks elections are a bulwark of democracy support a system in which a third of those interested in an election never get to hold one? Why would anyone put faith in a process that offers them a one-in-five chance of success? Even if the *potential* for union intimidation exists, can it be more devastating than employer violations

of the law, which can reduce the already low chances of success by more than half?

We must break this ideological impasse. Let us appeal to the evidence; let us hold labor policy to the same standards as other economic and social policies by testing which view is more correct. We propose enacting the Employee Free Choice Bill, with two additions. First, the bill should instruct the federal agencies to gather the data needed to track the effects of both card checks and elections, to see how each meets the law's objectives and promotes the cooperative and productive labor relations that workers and employers want and that the economy needs. Second, the bill should instruct the Secretary of Labor to make these data available for independent evaluation and to eventually report the results (say, three years from now) to Congress for its assessment. In both cases, the bill should ensure the agencies the resources they would need to do this.

Such a fact-based approach might just help break this gridlock, and get on with the task of building labor-management relations suited to the 21st century.

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Thomas A. Kochan is the George M. Bunker Professor of Management at the MIT Sloan School of Management and Co-Director of the MIT Institute for Work and Employment Research. He was a member of the Commission on the Future of Worker Management Relations. John Paul Ferguson is a PhD student at MIT's Institute for Work and Employment Research.