

# **Denied the Right to Bargain: Why Colorado Needs First Contract Arbitration**

**May 2009**



## National and Colorado State Statistics on Elections and First Contracts<sup>1</sup>

	Total # Union Elections Won	% Winning Able to Reach a 1st Contract <sup>2</sup>	% Reaching a 1st Contract in 1 year	Average Delay from Filing to Contract
National	8159	55%	38%	412 days
Colorado	76	9%	6%	370 days

### Introduction

The goal of workers seeking to form a union is to sit at the table with the employer and bargain an agreement on their wages, benefits, and working conditions. Gaining union representation can be a long and arduous process for workers. Even when workers are able to form a union, the NLRA fails them because so many are denied the right to collectively bargain with their employer.

Recent studies document that only 38% of new unions are able to negotiate a first contract within one year of NLRB certification and only 56% are able to achieve a contract after two years.<sup>3</sup> That means that under the NLRA, 44% of new unions still don't have contracts two years after they are certified, and many newly-unionized workers never achieve a first contract.

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<sup>1</sup> See Appendix for sourcing and methodology.

<sup>2</sup> Projected. The FMCS's efforts to gather case information for all first-contract negotiations is incomplete. In all the representation cases with NLRB certification, there was corresponding FMCS contract data for only 61 percent. These figures account for this discrepancy by dividing the FMCS records with contract agreements by 0.61, the share of the total victorious election cases with matched FMCS records. These methodological considerations are explained more fully in the Appendix and in John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives*, 62 *Industrial Relations Review* No. 1, (Oct. 2008).

<sup>3</sup> John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives*, 62 *Industrial Relations Review* No. 1, (Oct. 2008).

## **The Facts in Colorado**

The situation is not any better in Colorado. The same data shows that in a five year period, 76 groups of workers successfully elected a union to represent them at the workplace.<sup>4</sup> They elected their union to be a voice for them at the bargaining table with their employers, yet of those 76 unions only 4 (9%) were successful in reaching a first contract with employers.<sup>5</sup> That is a 91% failure rate during the time of the study. Of those few unions that were able to successfully reach a first contract with employers, it took an average of 370 days from the time of filing for the election to the conclusion of the contract process.<sup>6</sup>

## **Why Current Law is Failing Workers**

Labor law is meant to protect the right of workers to “bargain collectively through representatives of their own choosing” and bans employers from refusing to negotiate with such representatives.<sup>7</sup> However, the collective bargaining process fails to protect the rights of workers because the current application of the law actually allows numerous ways for an obstructionist employer to avoid reaching a contract with its employees. Many employers, with the help of high-priced anti-union consultants and so-called “union-avoidance” specialists, delay the bargaining process, which wears down workers, creates frustration with the process, and marginalizes union supporters.<sup>8</sup> These delays

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<sup>4</sup> See Appendix.

<sup>5</sup> Number of contracts reached is based on raw data provided by FMCS.

<sup>6</sup> See Appendix.

<sup>7</sup> National Labor Relations Act. secs. 7, 8(a)(5).

<sup>8</sup> Human Rights Watch, *Unfair Advantage: Workers’ Freedom of Association in the United States under International Human Rights Standards*, (2000), <http://www.hrw.org/sites/default/files/reports/uslbr008.pdf>.

come on the heels of the lengthy and arduous fight to form the union in the first place, and are meant to undermine the union's credibility with workers.

First, it is legal for employers to only put forth proposals that fail to offer any improvements in wages or benefits, knowing that the union would never accept these proposals.<sup>9</sup> Secondly, if workers try to strike to put more pressure on the employer to make concessions, the employer can hire new workers to permanently replace them. These new workers can then vote to decertify the union, thus the employer never has to agree to a first contract.<sup>10</sup> Also, employers are permitted to withdraw recognition from the union one year after it has been certified. Employers are therefore rewarded for delaying the process past the one-year mark by allowing them to get rid of the union.<sup>11</sup>

If an employer is found to be engaging in illegal bargaining tactics, the NLRB's current remedy is basically meaningless. The employer is ordered to bargain some more, and to post an NLRB notice saying it won't violate the law again.<sup>12</sup> The lack of serious penalties for bad-faith bargaining coupled with the incentive to drag out the process past the one-year mark provides the employer with no motivation to actually do the right thing and bargain with the union in earnest.

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<sup>9</sup> Weiler, Paul. 1984. "Striking a New Balance: Freedom of Contract and the Prospects for Union Representation," 98 *HARV. L.REV.* 351, 405-12.

<sup>10</sup> *Id.*

<sup>11</sup> Schiffer, Nancy. General Counsel to the AFL-CIO. *Change We Can Believe in: the Employee Free Choice Act*, (2009)

<sup>12</sup> *Id.*

## **How First Contract Arbitration Helps**

The Employee Free Choice Act addresses these failures by removing the incentive for employers to avoid a first contract. It provides a process that ensures that an agreement can be reached by the workers, and provides a safety net should negotiations stall.

The mediation and arbitration procedures will be overseen by the Federal Mediation and Conciliation Service (FMCS). Either party to the negotiations can request mediation after 90 days of bargaining. If mediation is not successful in producing a mutually agreeable contract after 30 days, the dispute is referred for arbitration.

This is not meant as a substitute for the collective bargaining process. It is meant to incentivize meaningful bargaining, and to ensure that employees that have chosen to be represented by a union are able to negotiate successfully with their employers.

Research by former National Academy of Arbitrators President Arnold Zack, who currently teaches dispute settlement system design at the Labor and Worklife Program at the Harvard Law School, summarizes evidence from private and public sector arbitration cases over the past thirty years in the US and Canada. His research reveals that:

- Arbitration provides assurance that an agreement will be reached but is only invoked only when the parties are unable to reach agreement on their own.
- Arbitration systems can be designed to reduce likelihood of use, to maximize the incentives on the parties to negotiate their own agreements, and to maximize control of the parties over the final award.
- Arbitrators do not issue awards that prove to be unworkable.
- Arbitration does not significantly alter wages above or below the levels one would expect to achieve in collective bargaining.
- Arbitration significantly reduces the probability of strikes or lockouts.

- The arbitration award would strive to achieve the resolution the parties would have been expected to achieve had they bargained in good faith to reach their own final agreement.<sup>13</sup>

It is in this way that the Employee Free Choice Act seeks to effectively move both parties to achieve a first contract, and reverse the current failure to ensure that workers can gain a meaningful agreement with their employers, and that their right to bargain through the union they elected is finally and thoroughly protected.

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<sup>13</sup> Arnold Zack, *First Contract Arbitration: Issues and Design*, March 13, 2009; <http://lerablog.org/2009/03/15/first-contract-arbitration-issues-and-design/>