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February 13, 2009

Senator Edward M. Kennedy  
Chairman, Committee on Health, Education, Labor and Pensions  
U.S. Senate  
317 Russell Senate Building  
Washington, D.C. 20510

Senator Michael B. Enzi  
Member, Committee on Health, Education, Labor and Pensions  
U.S. Senate  
379A Senate Russell Office Building  
Washington, DC 20510

Congressman George Miller  
Chairman, Committee on Education and the Workforce  
U.S. House of Representatives  
2205 Rayburn House Office Building  
Washington, DC 20515

Congressman Howard P. McKeon  
Member, Committee on Education and the Workforce  
U.S. House of Representatives  
2184 Rayburn House Office Building  
Washington, D.C. 20515

**Re: Interest Arbitration Provisions of the "Employee Free Choice Act"**

Dear Senator Kennedy, Senator Enzi, Congressman Miller, and Congressman McKeon:

I am writing at the request of the United States Chamber of Commerce. My name is R. Theodore Clark, Jr. and I am a senior partner in the Labor and Employment Law Department at Seyfarth Shaw LLP.<sup>1</sup>

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<sup>1</sup> I would like to acknowledge Seyfarth Shaw LLP attorneys James Baird, Bradford Livingston, Camille Olson, William Schurgin, and Amanda Sonneborn for their invaluable assistance in the preparation of this letter.

This letter contains our perspective regarding serious concerns we have with the mandatory binding interest arbitration provisions contained within the proposed “Employee Free Choice Act” (H.R. 800, S. 1041, 110<sup>th</sup> Congress) (“EFCA”). While most of the debate over EFCA has centered on the substitution of card check recognition for secret ballot elections to determine whether employees desire to be represented by a union, the mandatory binding interest arbitration provisions of EFCA (which would be applicable to negotiation of all first contracts regardless of the way by which the union came to be recognized) must be critically analyzed in terms of their potential impact on American business and the employer-employee relationship.

## Introduction

We believe that our extensive experience in mandatory interest arbitration proceedings in the public sector throughout the United States provides an important perspective as to the potential problems that would arise if this mechanism was applicable to first contract negotiations throughout the United States, as currently contemplated by EFCA.

By way of background, today over 350 Seyfarth Shaw attorneys provide advice, counsel, and representation on all aspects of labor and employment law to employers throughout the country and in virtually every sector of the economy. Seyfarth Shaw is uniquely positioned to speak on the issue of interest arbitration. Originally formed in the 1940s as a firm committed to advising employers regarding labor relations matters, Seyfarth Shaw has long been a leader appearing before administrative agencies, courts, arbitrators, and legislatures on union-management issues. Throughout the last sixty years, we have assisted employers in successfully negotiating—with virtually every national labor union—well over 1,000 first or initial collective bargaining agreements, and a far greater number of successor labor contracts. Indeed, under the National Labor Relations Act, the give-and-take of negotiation and an ultimate mutual agreement has been the model for private sector employers and labor unions to reach compromise and achieve labor peace.

While interest arbitration is uncommon for most private sector employers, it is used often in the public sector. Public sector labor relations is one key component of Seyfarth Shaw’s traditional labor practice, including a specialization in interest arbitration-related issues. For decades, Seyfarth Shaw has represented public jurisdictions, including local, state, and federal employers, in interest arbitration proceedings. We have successfully negotiated more than 500 contracts with public sector entities where interest arbitration was the endpoint of the dispute resolution process. In addition, Seyfarth Shaw has represented employers in over 100 binding public sector interest arbitration proceedings. Through these experiences, Seyfarth Shaw has become well versed in the realities of interest arbitration for labor contracts and the implications of using such a system in the private sector.

With respect to my own personal experience, I have practiced public sector labor relations law with Seyfarth Shaw for more than 40 years, during which time I have led our group of lawyers in that area. I have served as an adjunct professor in public sector labor relations law at Northwestern University Law School, and as a consultant to the Illinois Advisory Commission

on Labor-Management Policy for Public Employees and the Advisory Committee of the Illinois Educational Labor Relations Board. I co-author with U. S. Appellate Court Judge Harry Edwards and Professor Charles Craver the main law school textbook on Public Sector Labor Law entitled: Labor Relations Law in the Public Sector: Cases and Materials (Bobbs-Merrill 1974), now in its fourth edition. I have also authored over 50 published articles on labor relations collective bargaining issues. My experience representing public employers in interest arbitration proceedings includes: the U.S. Postal Service; the cities of San Francisco, Boston, Baltimore, Jacksonville (Florida), and Metropolitan Dade County; the Metropolitan Las Vegas Police Department; the Virgin Islands Water and Power Authority; the Washington Metropolitan Area Transit Authority; and numerous public employers in the State of Illinois.

### Summary of Position

I oppose the interest arbitration provisions of EFCA for the following five reasons<sup>2</sup>:

- Most alarmingly, a third party arbitrator (who will potentially have little knowledge of the industry or the employer's business) may impose sweeping terms and conditions of employment that will lead to disastrous results for both employees and employers.
- Imposed interest arbitration awards constitute a form of government intrusion that is directly contrary to a free economic system—instead a third party would mandate all disputed terms and conditions of employment for employees and employers.
- Employees lose the opportunity to vote on the terms of an interest arbitration award. Instead, the decision is imposed upon employees and the employer without regard to freedom of choice.
- Interest arbitration is a time-consuming, expensive process that can take years to complete.
- During the interest arbitration process, an employer is required to maintain the status quo and cannot make changes needed to succeed as a business—which can result in significant job losses and uncompetitive conditions, especially in uncertain economic times.

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<sup>2</sup> In addition to the numerous problems with interest arbitration addressed in this article, EFCA's interest arbitration provisions are also subject to serious constitutional challenge. *See, e.g., Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935) (holding the delegation of authority to the President to control certain interstate shipments unconstitutional because the statute lacked clear standards governing that delegation of authority).

## Summary of EFCA's Interest Arbitration Provisions

EFCA mandates binding interest arbitration for first contracts if either party elects to refer the matter to arbitration after negotiations and mediation do not produce a ratified contract within 120 days. Interest arbitration is a process by which a third-party arbitrator determines the economic and non-economic terms of the relationship between the union and the employer. Unlike grievance arbitration, in which a third-party arbitrator resolves narrow disputes between two parties about the meaning of collective bargaining agreements or other employment policies that already exist, interest arbitration requires a third-party arbitrator to actually set the terms of the parties' relationship by creating a contract potentially covering every workplace and employee of the employer and any issues relating in any way to employment, not merely interpreting the terms the parties have agreed to previously. Thus, interest arbitrators essentially step into the shoes of the marketplace and set whatever labor costs they deem appropriate.

EFCA, as passed by the House, provides that if no agreement on a first contract is reached after 90 days of bargaining, and if the Federal Mediation and Conciliation Service ("FMCS") "is not able to bring the parties to agreement by conciliation" within 30 days of the date mediation is requested, FMCS, at either party's request, "shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service." EFCA further provides that "[t]he arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties."

These EFCA time frames are unrealistic when one considers that first contracts almost always take much longer than successor contracts because the parties start from scratch and have to reach agreement on every word (including all the basic provisions of a collective bargaining agreement such as grievance procedures, seniority provisions, no strike clauses, leave of absence provisions, etc.). As a result, first contract negotiations frequently take one year or longer to complete. To mandate compulsory arbitration, at either party's request, after just 120 days will virtually assure binding interest arbitration for all first contracts.

## Interest Arbitration Will Result in Arbitrators Making Business Decisions About Which They Will Potentially Have Little or No Knowledge

A major concern regarding interest arbitration of first contracts is that important business decisions on key strategic operational issues will be delegated to arbitrators who may have little or no firsthand knowledge of the employer's business operations. Many issues that may well be mandatory subjects of bargaining but which vitally affect an employer's operations will be subject to arbitral determination, including the following:

- Whether the employer will have the right to decide whether to contract out certain operations or components of operations.
- Whether the employer's supervisors will continue to have the right to assist or fill in for bargaining unit employees in the performance of bargaining unit work.

- Whether the employer will have the right to adjust work schedules, shift schedules, manning assignments, etc., in order to meet the needs of the business.
- Whether the employer will have the right to promote only the most qualified employees, especially to positions involving the operation of costly equipment or to positions where the image and reputation of the business are at stake.
- Whether a compensation structure based on performance should be changed to a strict seniority-based compensation structure.

In today's fiercely competitive and challenging economy, employers have to make tough decisions every day to survive. To entrust the decisions regarding all disputed terms and conditions of employment to an arbitrator who may have, at best, a fleeting familiarity for the employer's business and what it takes to succeed is courting disaster. Moreover, arbitrators will generally lack a strong background and understanding of the specific business challenges confronting a particular industry. A grocery store faces significantly different business challenges than a hospital. Compounding these issues and countless others is the fact that arbitrators do not have any accountability for the decisions that they render.

In an economy where the only constant is the need for change, sometimes on literally a daily basis just to survive, the clearly predictable effects of interest arbitration of first contracts, which I have observed firsthand, include the following:

- It will foster a "one size fits all" mentality, thereby stifling an employer's—and ultimately the economy's—ability to innovate by doing things differently than the competition or other local employers.
- It will result in a regression to the mean, but based on my experience, this will only be a one-way regression, *i.e.*, employers who are deemed to be below the mean will see their labor costs increased, but employers who are above the mean will be required to maintain their position. This results in an insidious upward pressure on wages and benefits, including not insignificant additional labor costs that employers and their customers will have to bear.
- Without control over labor costs which will be set for the term of a two-year contract, employers and their investors will be less willing to make investments in their businesses and/or hire more employees.
- While interest arbitrators are naturally inclined to award unions wage and benefit increases, they are positively disinclined to award reductions in wages or benefits, even though the employer's competitive circumstances may require such reductions.
- Interest arbitration is not well suited to deal with change.

Even in the best of economic times, interest arbitration of first contracts poses serious risks to the economy. But for a recessionary economy in desperate need of encouragement, it would be, in a word, disastrous.

### **It Is Inappropriate to Mandate Interest Arbitration Over Major Policy Issues**

Apart from wages and economic fringe benefits, the following are among the issues that unions are likely to advance to interest arbitration:<sup>3</sup>

- Restrictive work rules.
- Elimination of merit pay or pay based on performance.
- Work preservation clauses (*e.g.*, prohibitions/limitations on subcontracting, performance of bargaining unit work by non-bargaining unit employees, etc.).
- Promotions based on seniority or heavily weighted toward seniority.
- Limitations on an employer's ability to discipline.

Each of these issues involves significant policy considerations, the resolution of which can vitally affect an employer's ability to compete successfully in a global marketplace. While an employer is legally obligated to negotiate in good faith over these issues upon a union's request because they are mandatory subjects of bargaining, it is an entirely different matter to say that such issues can be decided by an interest arbitrator who has no stake in the business or any accountability for the consequences of his/her decisions on such issues.

Concern in Massachusetts over the adverse effects of interest arbitration on collective bargaining and traditional management prerogatives led Governor Michael Dukakis in 1977 to propose dramatic changes. As Governor Dukakis stated:<sup>4</sup>

[M]y proposal would restrict binding arbitration only to cases where the state's Labor Relations Commission has found municipal officials guilty of bargaining in bad faith. I am also proposing that the scope of bargaining be limited to the traditional issues of wages, fringe benefits, hours, and the like. Our present binding arbitration has removed legitimate management prerogatives in the area of staff assignments, [and] transfers from the control of municipal officials at a

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<sup>3</sup> It can also be assumed that in states without "right to work" laws unions will also be submitting union security clauses to interest arbitration.

<sup>4</sup> Letter of Governor Michael S. Dukakis to Paul Barter, City Clerk of Melrose, MA, dated April 19, 1977 (emphasis in original). I should note, I was retained by the Massachusetts League of Cities and Towns during the same time period and in that capacity assisted in drafting the legislation that Governor Dukakis proposed. Unfortunately, the proposed legislation failed to pass. Just two years later, however, the voters of Massachusetts approved a ballot initiative that, in effect, eliminated the existing form of compulsory interest arbitration.

time when they are under severe pressure to improve their management and make savings.

I believe that a compromise of this sort will be fair to labor in that it will guarantee that municipalities bargain in good faith. At the same time it will give back to municipalities the tools they need to run their agencies.

In summary, as the above quotations illustrate, knowledgeable labor relations observers and elected officials who are recognized advocates of organized labor have spoken out against the problems posed by interest arbitration. Those problems cause great concern to employers and employees alike.

### **Experience Demonstrates That Interest Arbitration Can Lead to Disastrous Results**

Not infrequently, interest arbitration awards have produced unbelievable results, as the following short summary of just a few such awards shows:

- In a 1993 case involving the City and County of San Francisco and SEIU Local 660 involving a bargaining unit of 12,000 employees, Arbitrator John Kagel awarded compensation increases of 12% per year for two of the three years covered by his award, at an estimated cost of over \$140 million dollars!<sup>5</sup> The dissenting opinion submitted by the San Francisco's panel member summarized the serious problems posed by this award:<sup>6</sup>

The decision to burden the City with these unwarranted additional costs could not have come at a worse time. The uncontradicted evidence shows that the City has a deficit of nearly \$200 million dollars. Never mind that State funding has been abruptly slashed; never mind that desperately needed public services such as health care are being obliterated; never mind that libraries are being closed and more will be closed as a result of this decision.

The public will pay dearly for the majority's award. And so will hundreds or thousands of City employees who will lose their jobs as a result of this award.

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<sup>5</sup> *SEIU Locals 790, 250 & 535 and City and County of San Francisco* (Arb. John Kagel, May 24, 1993). Following the filing of a lawsuit to vacate the award in which I personally participated, the matter was resolved and the end result was that wage increases were dramatically reduced.

<sup>6</sup> Dissenting Opinion of Jerry J. Spain, June 1, 1993, at p. 1.

- In a case involving a wage re-opener for the fourth year of first contract between the Village of Downers Grove, Illinois and IAFF Local 3234,<sup>7</sup> Arbitrator John Fletcher awarded the union's offer of a 21% increase, plus a reduced work week that further increased compensation costs by approximately 9%. In so ruling, the Arbitrator, in effect, conceded that this award for a one-year increase in compensation was by far the most costly ever awarded under the Illinois Act. The arbitrator blithely observed that he did "not believe that any arbitration panel functioning under the Act is privileged to reject or adopt one party's proposal based on the cost ranking of that proposal in relationship to the cost rankings of other awards previously made under the Act."
- In a first contract interest arbitration case in Canada involving Wal-Mart and the United Food & Commercial Workers, the arbitrator awarded first-year wages increases of 33%. As a result of the dramatic increase in its labor costs, Wal-Mart closed its Tire & Lube Express department. Wal-Mart noted that a "major cost increase like that couldn't be sustained in its tire and lube express operation." Wal-Mart further observed, "Our business model is based on delivering value to our customers. That isn't possible when an operation is unprofitable."<sup>8</sup>

One can also envision a situation where a union selectively chooses its targets by first organizing an economically weak employer in an industry or labor market, and thereby obtains a very favorable agreement or arbitration award based more on the employer's weakness than any external business justification. Thus a weak employer may capitulate in negotiations and accept a "bad deal" rather than face the costs of interest arbitration before a well-armed and experienced labor union. While unions can currently use economic muscle against individual employers that lack the resources to resist, it is far different when this leverage will likely be used to establish an alleged industry or local pattern that will then be used against other employers that otherwise have the resources to negotiate or arbitrate for a better result. The interest arbitration model rewards unions for "dividing and conquering" weaker employers first.

### **Private Sector Limitations on the Use of External Comparability Data Make Meaningful External Comparisons Virtually Impossible**

One of the most frequently invoked criteria in public sector interest arbitration is external comparability. In the public sector, once the external comparables have been identified, obtaining copies of collective bargaining agreements and wage and fringe benefit data for the external comparables is greatly facilitated by the fact that such information is, by definition, public information that can be readily obtained, either voluntarily or through use of a state's freedom of information act. In the private sector, however, obtaining such information on a timely basis will be infinitely more difficult, if not impossible. In the first place, there are no laws requiring private employers to provide such information. Moreover, other comparable

<sup>7</sup> *Village of Downers Grove and IAFF Local 3234*, ISLRB Case No. S-MA-94-246 (Arb. John Fletcher, December 6, 1994).

<sup>8</sup> Wal-Mart Canada Closes Operation Over Wage Increase Under Union Contract, 202 *Daily Labor Report* A-7.

employers are more than likely to be competitors who will not be willing to provide such information. And, in any event, efforts by an employer to obtain such information will be encumbered by limitations imposed by antitrust laws. According to the U.S. Department of Justice Antitrust Division and the Federal Trade Commission, the following guidelines should be adhered to in order to avoid antitrust exposure:<sup>9</sup>

- A third party such as a consultant should be used to collect and disseminate sensitive wage and fringe benefit data.
- The Antitrust Division and FTC recommend that to qualify for an “antitrust safety zone,” wage surveys should ask only about wages paid at least three months prior to the date survey participants complete the survey.
- The information must be sufficiently aggregated so that recipients will not be able to identify the wages and benefits paid by any particular company survey. The Antitrust Division and FTC thus recommend that surveys should include at least five employers.

For anyone familiar with application of the external comparability standard in public sector interest arbitration, it is easy to see the problems that lie ahead if EFCA is enacted into law. First and foremost, outside of situations where the external employer’s employees are covered by a collective bargaining agreement,<sup>10</sup> it will be impossible to obtain employer-specific wage and fringe benefit data. Additionally, the data that is collected will be old data rather than current. The fact that these limitations exist is yet another reason why interest arbitration should not be mandated.

### **Interest Arbitration Takes Away Employee and Employer Free Choice**

A fact often ignored by proponents of interest arbitration is that an arbitrator’s award is not only imposed on the employer, but upon employees. Today, employees as a rule have an opportunity to vote on the employer’s final contract offer. Moreover, it is not uncommon for employees to reject an offer, even if it is supported by the union, and send the parties back to the bargaining table. This concept of “employee contract ratification,” in practice, forces the union and the employer engaged in labor negotiations to remember that ultimately the employees must endorse any contract settlement. Under a mandatory interest arbitration process an employee’s opportunity to vote on ratification is lost.

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<sup>9</sup> See U.S. Department of Justice and Federal Trade Commission Statements of Enforcement Policy and Analytical Principles Related to Health Care and Antitrust, Statement 6 on Provider Participation in Exchange of Price and Cost Information (August 1996). FTC officials have said that these principles, while initially directed to the health care industry, are broadly applicable to other industries.

<sup>10</sup> Another very real concern is the fact that many interest arbitrators in the public sector have held that the group of external comparables should only include similar employees working under union contracts. Application of this precedent in the private sector would mean that comparisons would be exceedingly limited since only about 7% of the private sector work force is covered by collective bargaining agreements.

## EFCA's Mandatory First Contract Interest Arbitration Provisions Directly Conflict With Longstanding National Labor Policy

While mandatory interest arbitration has been legislated in over 20 states, it is important to emphasize that in almost all instances such legislation only covers employees who provide essential public services such as police officers and firefighters where a union work stoppage could lead to public disorder. Thus, the principal rationale for such legislation is, as one state statute explains, "to protect the public health and safety of the citizens . . ." The rationale for mandatory interest arbitration covering essential public services is simply not applicable to employees covered by the NLRA.

Free collective bargaining has been the bedrock principle underlying private sector labor relations policy in this country since the enactment of the NLRA in 1935. As the Supreme Court noted in its *H.K. Porter* decision in summarizing the legislative history of the National Labor Relations Act<sup>11</sup>:

The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. . . . But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement.

EFCA's proposed interest arbitration provisions are diametrically at odds with free collective bargaining. As George Meany, the former long-time president of the AFL-CIO, explained: "[C]ompulsory arbitration—the favorite proposal of certain editorialists—just will not work because it is an abrogation of freedom. The crucial difference between voluntary and compulsory arbitration is the difference between freedom and its denial."<sup>12</sup>

Additionally, some of organized labor's past supporters have similarly rejected compulsory arbitration of collective bargaining disputes. For example, Willard Wirtz, President John F. Kennedy's Secretary of Labor, made the following observation on what would have happened if compulsory arbitration were statutorily mandated as a substitute for a strike:<sup>13</sup>

<sup>11</sup> *H.K. Porter v. NLRB*, 397 U.S. 99, 103-04 (1970) (emphasis added).

<sup>12</sup> Quoted in "What's Wrong With Public Employee Labor Relations In Michigan," Address of Coleman A. Young to Legislative Forum on New Directions for Public Employee Labor Relations, Lansing, Michigan, December 4, 1979, at p. 19 (emphasis added).

<sup>13</sup> Wirtz, "The Challenge to Free Collective Bargaining," in 1963 Proceedings of the National Academy of Arbitrators, at pp. 303, 304 (emphasis added).

... The trouble is that it would become, if provided by statute, a substitute for collective bargaining. ...

The difficulty is that in virtually every dispute one bargainer or the other feels that his chances are better, or that he can evade responsibility for a hard decision, if he lets the issue go to arbitration. No effective way has yet been devised or suggested of limiting the availability of such procedures to cases in which “the collective bargaining processes ... have been exhausted.” The record is that if arbitration is assured, the collective bargaining processes are never really used at all.

In a similar vein, Derek Bok, a past President of Harvard University, and John Dunlop, a pre-eminent labor economist and a past Secretary of Labor under President Gerald R. Ford, made the following observations in their book, Labor and the American Community:<sup>14</sup>

Compulsory arbitration ... tends to undermine an important ingredient in productive labor-management relations, namely the willingness of the parties to bargain conscientiously over their differences. If both sides realize that their differences may ultimately go to arbitration, they may well be less willing to compromise—either because they prefer to pass the responsibility on to some third party or because they fear that in the event of arbitration any concessions they make will cause the arbitrator to reach a compromise settlement less favorable to their interests. These tendencies seem to have been confirmed by experience both here and abroad, for arbitration statutes have often led to an erosion of the bargaining process in favor of more frequent resort to the government tribunal.

Mayors of major cities have also lamented the existence of compulsory interest arbitration. Consider, for example, the following comments of former Detroit Mayor Coleman Young:<sup>15</sup>

[Compulsory arbitration] was a new idea and we felt it was certainly worth a try.... I say “we” because I was a member of the State Senate at the time, and voted for it too. We now know that compulsory arbitration has been a failure. Slowly, inexorably, compulsory interest arbitration destroys collective bargaining and collective bargaining relationships and, even more disastrous for Detroit, compulsory arbitration destroys sensible fiscal management.

And, as Roman Gribbs, also a former Detroit Mayor noted:<sup>16</sup>

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<sup>14</sup> D. Bok & J. Dunlop, *Labor and the American Community* at p. 237 (1970) (emphasis added).

<sup>15</sup> “What’s Wrong With Public Employee Labor Relations In Michigan,” Address of Coleman A. Young to Legislative Forum on New Directions for Public Employee Labor Relations, Lansing, Michigan, December 4, 1979.

<sup>16</sup> Statement of Roman S. Gribbs, in *Handbook for Legislators on P.A. 312—1969*, at p. 5 (Public Labor Relations Association of Michigan).

Arbitrators have to become instant financial wizards at municipal finance. A study of the decisions indicates an absence of understanding of fiscal problems and an appalling disregard of the ability of government units to meet the additional costs created by their awards.

### **The Pitfalls of Interest Arbitration Are Magnified When First Contracts Are At Issue**

The criticism of interest arbitration by Willard Wirtz, Derek Bok, and John Dunlop is especially applicable to first contracts. It is difficult to overemphasize the deleterious effects of mandating interest arbitration for first contracts.<sup>17</sup> In this regard, it is important to understand that negotiations for a first contract include the writing of every word of the *entire* agreement, from the preamble through the duration and term of agreement, including along the way, salaries, hours, and literally dozens of other terms and conditions of employment.

Consider even a relatively minor issue such as overtime work: Will working overtime be mandatory, voluntary, or mandatory to a certain number of hours per day or week (or on certain days) and voluntary thereafter? If there are insufficient volunteers, can management require an employee to stay over, and if so, whom? Are there maximum limits on daily or weekly overtime? If it is available, is it offered based on seniority, to the person "on the job" and then performing the work where the overtime is needed, or on some rotational schedule? If it is on a rotating basis, what are the effects of an employee declining an opportunity? Do the hours "count" against him or her in the rotation or will he or she be first in line for the next opportunity? How does the employer prove it offered the opportunity or tried to contact the employee? Is overtime limited to certain classifications, groups or departments, or offered on a voluntary—or mandatory—basis outside the classification if there are insufficient volunteers from within? If overtime is equalized amongst employees, are there limits on the extent to which imbalances may exist amongst employees? How much advance notice is required for overtime work? Does it differ for daily overtime and weekend overtime? If weekend overtime is scheduled, is there a minimum guaranteed number of hours? If so and there is not enough work to keep the employee occupied for that minimum number of hours, may the employee volunteer to go home without the employer incurring pay for the extra "guaranteed" hours? How is overtime work to be paid? At what rate and after how many hours per day or week? Are Saturdays and Sundays treated differently than other days? Does the rate change after 10 or 12 hours in a day or the 48th hour in a week?

Similarly complicated questions arise in the area of job bidding. Does an employer have to post a new job? Where does the employer have to post a new job? What information needs to be included on the notice? How long does the notice have to be posted? How does an employer

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<sup>17</sup> An Illinois Study Committee headed by Professors Martin Wagner and Milton Derber explained the pernicious effect of compulsory interest arbitration as "particularly acute in situations where both parties are relatively inexperienced in negotiating and where responsible patterns of accommodation have not developed. Such relationships are likely to exist during the developmental stage of collective negotiations in the public sector" and, by definition in negotiations for a first contract. Illinois Governor's Advisory Commission on Labor-Management Policy for Public Employees, *Report and Recommendations* 32 (March, 1967).

have to communicate the posted position to employees? How does an employer have to communicate the posted position to the union? How does an employee express interest in a position? How does an employer select the winning job bidder? Does the employer have to use strict seniority to select the winning job bidder? If it is strict seniority, is it plant wide seniority or departmental seniority or union seniority? If the employer can consider merit in the job bidding analysis, what factors determine whether an individual has merit? Does seniority count at all if merit is the determining factor?

Similarly complicated questions arise over the sensitive issue of seniority and its role in promotion and layoff. While the idea of allocating benefits or status by seniority may seem relatively straightforward, consider the impact on employers obligated to select the most senior employee for promotion without regard to qualification. While this result may seem absurd, an arbitrator might well decide that a senior employee who has the potential to learn the job with adequate training should be promoted over a more qualified junior employee. Similar questions arise in the context of layoffs. Do part-time employees have to be laid off before full-time employees? Should seniority be plant-wide, department-wide, or classification-based for purposes of layoff? Where seniority is a consideration in layoff, what is the role of physical ability and skill where the junior employee is clearly more qualified? Does a senior employee have the right to bump a junior employee out of a job to avoid a layoff? If so, what level of fitness and ability in the sought-after job must the senior employee demonstrate? Can the senior employee bump a junior employee in a higher-rated job classification or merely because the senior employee wants the job of the junior employee, regardless of whether a layoff is involved?

These questions arise frequently and are resolved in many different ways. They are multiplied with the scores of additional major as well as “minor issues” that exist in every labor contract, such as job and shift assignments, temporary transfers, vacation scheduling, etc., with the many decisions that must be made regarding each. These issues are something that the parties themselves should decide, not something that should be mandated by a third party, no matter how qualified that third party may be.<sup>18</sup>

My own personal experience in interest arbitration proceedings involving the negotiation of first collective bargaining agreements demonstrates the inherent problems with mandating interest arbitration for first contracts. While I could provide additional examples, the following two cases—involving first contracts decided by nationally prominent arbitrators—highlight many of the real problems with first contract interest arbitration. I represented the Village of Wilmette in an interest arbitration hearing involving a firefighter bargaining unit represented by

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<sup>18</sup> As a general rule, the first collective bargaining agreement is by far the most important. Mistakes made in a first contract—perhaps inadvertent or the result of concessions where the implications of new contract language are unclear—can create untold problems down the road, primarily because it is exceedingly difficult for employers to try to get back what was previously negotiated. While it is one thing for an employer mistakenly to agree to restrictive contract provisions, it is an entirely different thing when these restrictive contract provisions are the result of interest arbitration in a situation where the employer has effectively lost its right to say “no.”

Service Employees International Union (“SEIU”) Local 73 before Arbitrator Steven Briggs.<sup>19</sup> Once interest arbitration was invoked and negotiations ceased, this interest arbitration case involved 50 unresolved issues, required 16 days of hearing and took close to three years to resolve from the time the arbitrator was selected to the issuance of an award. Similarly, I represented Elk Grove Village in an interest arbitration hearing with the Elk Grove Village Firefighters Association (“IAFF”) Local 3398 before Arbitrator Harvey Nathan. This interest arbitration case involved 49 unresolved issues, required 11 days of hearing, and took 17 months to resolve from the time the arbitrator was selected until the issuance of an award.<sup>20</sup>

These experiences are not unique. Interest arbitration of first contracts frequently takes as much or more time than would be required to negotiate an agreement and requires an arbitrator to ultimately decide literally dozens of unresolved issues.<sup>21</sup> As a matter of public policy, the resolution of these issues should be left to the parties themselves.

### **The “Status Quo” Doctrine As Applied To First Contract Interest Arbitration**

Another major issue with mandating interest arbitration for first contracts is the application of the NLRB’s “status quo” doctrine. Thus, it is black letter law that after a union is certified as the exclusive bargaining representative, an employer is obligated to maintain the status quo, *i.e.*, it is an unfair labor practice to change the current conditions unless the union agrees or the parties are at impasse. In *NLRB v. Katz*, a case involving negotiations for a first contract, the U.S. Supreme Court stated:<sup>22</sup>

A refusal to negotiate in fact as to any subject which is within 8 (d), and about which the union seeks to negotiate, violates 8 (a)(5) though the employer has every desire to reach agreement with the union upon an overall collective agreement and earnestly and in all good faith bargains to that end. We hold that an employer’s unilateral change in conditions of employment under negotiation is similarly a violation of 8 (a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of 8 (a)(5) much as does a flat refusal.

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<sup>19</sup> *Village of Wilmette & SEIU Local 73*, ISLRB Case No. S-MA-00-0088 (Arb. Steven Briggs, June 4, 2004).

<sup>20</sup> *Village of Elk Grove Village & Elk Grove Village Firefighters Association*, IAFF Local 3398, ISLRB Case No. S-MA-93-231 (Arb. Harvey Nathan, October 1, 1994).

<sup>21</sup> While some might be tempted to suggest that it was the employer’s unwillingness to agree to reasonable provisions that led to so many issues being arbitrated, in the cases summarized above the employer substantially prevailed on the vast majority of the issues arbitrated.

In a study of police/fire interest arbitration in Massachusetts, the author concluded that “the average case took over a year to complete.” Somers, “An Evaluation of Final Offer Arbitration in Massachusetts,” (November, 1976), at p. 28. For further evidence that interest arbitration can be a time consuming process, see *City of Portland*, Case No. IA-06-03 (Arb. Carlton Snow, 2004), in which the arbitration proceeding lasted 21 days over a period of seven months and, according to the arbitrator, the parties generated over “200 pounds of evidence” consisting of 5,600 pages of transcript and 18 volumes of exhibits. As Arbitrator Snow correctly observed, “[t]his is a case in which the Oregon design of Last Best Offer interest arbitration did not work.”

<sup>22</sup> 369 U.S. 736, 743 (1962).

Normally, under current NLRB precedent, an employer can unilaterally change the status quo on a mandatory subject of bargaining if it has negotiated in good faith to the point of impasse. However, the prevailing view in the public sector is that an employer cannot make a unilateral change in a mandatory subject of bargaining unless and until an interest arbitrator has ruled in the employer's favor on that issue. For example, the Wisconsin Employment Relations Board has ruled that "there is no available impasse-based defense to a unilateral change in a mandatory subject in disputes that are subject to final and binding ... interest arbitration."<sup>23</sup> Thus, if interest arbitration is mandated for first contracts and the NLRA is interpreted in the same way that most public sector interest arbitration statutes have been interpreted, an employer will not have the right to make a unilateral change even though the parties are at impasse on the issue.

The implications of this doctrine are especially significant where employers need to react promptly to remain competitive. For example, employers typically assess and modify the terms of their health insurance plans annually. Despite the possible urgent economic need to find ways to stem the ever-increasing cost of health insurance by changing carriers, third-party administrators, coverage, deductibles, co-pays for prescription drugs, an employer would be prohibited from making any such changes during negotiations for a first contract unless it received the union's consent or an arbitrator granted the employer the right to make such changes.

Similarly, when business levels decline, employers often need to implement layoffs promptly. The NLRB has held that layoffs are a mandatory subject of bargaining.<sup>24</sup> As such, if an employer during first contract negotiations deemed that economic circumstances required the layoff of bargaining unit employees, the status quo doctrine as applied by most public sector labor boards would mean that the employer would be prohibited from implementing a layoff unless the employer was able to convince the union of the need to layoff employees or an interest arbitrator gave the employer the right to implement the layoff. It is not too difficult to envision the vast problems that application of the status quo doctrine would have in times like the present, where employers nationwide have had to layoff employees because of the severe economic downturn. In such situations, time is almost always of the essence—delay only increases the employer's economic distress. To require that such decisions first get an interest arbitrator's blessing highlights the serious problems with requiring interest arbitration of first contracts.

<sup>23</sup> *Green County*, Decision No. 20308-B (Wis. Emp. Rel. Comm'n 1984).

<sup>24</sup> The NLRB and the courts have held that economically motivated layoffs are mandatory subjects of bargaining. *Adair Standish Corp.*, 292 NLRB 890, n.1 (1989), *enforced in relevant part*, 912 F.2d 854 (6th Cir. 1990) (finding unlawful failure to bargain over economically motivated layoffs); *Garment Workers Local 512 v. NLRB (Felbro, Inc.)*, 795 F.2d 705, 711 (9th Cir. 1986) (employer must bargain with union over economic layoff).

Public sector precedent has even extended the status quo doctrine to negotiations over the “effects” of a decision over which an employer is not required to negotiate. For example, ordinarily an employer is not required to negotiate over a decision to exit a line of business, but the effects of that decision are normally subject to mandatory negotiations.<sup>25</sup> Consider, then, an employer who is negotiating a first contract pursuant to the provisions of EFCA. If that employer determined that it was necessary to exit a line of business and that decision had an adverse effect on bargaining unit employees, the employer would have to negotiate over the effects of the decision and if the employer could not get the union’s agreement, the matter would presumably have to be submitted to an interest arbitrator. In this economic environment, such a requirement would create enormous problems for such an employer.

### Conclusion

In conclusion, EFCA’s interest arbitration provisions would have a very detrimental effect on the employer-employee community throughout the United States. Thank you for the opportunity to provide this information. Please do not hesitate to contact us or the United States Chamber of Commerce’s Labor, Immigration, and Employee Benefits Division, if we can be of further assistance in this matter.

Respectfully submitted,

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cc: Mr. Randel K. Johnson, Esq.

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<sup>25</sup> See *Providence Hosp. v. NLRB*, 93 F.3d 1012, 1018 (1st Cir. 1996) (“[U]nions generally enjoy the right to bargain over the effects of decisions which are not themselves mandatory subjects of collective bargaining.”); *NLRB v. New England Newspapers, Inc.*, 856 F.2d 409, 413 (1st Cir. 1988) (“Although the employer is not obligated to bargain regarding the decision to sell its business, the effects of that sale are ... a mandatory subject of bargaining . . .”).