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Mandatory Binding Arbitration: Is it Fair and Voluntary?

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Recently, there have been several Congressional hearings to determine the effects of mandatory binding arbitration. The question is often asked, is it “fair and voluntary”?¹ This barely seems to graze the surface of the gravity of this concept. In short, mandatory binding arbitration is certainly not voluntary and is far from fair to employers or employees.

This short paper describes the concept of mandatory binding arbitration in the context of employer-employee relations as presented legislation such as S. 560 / H.R. 1490, the Employee Free Choice Act, aka EFCA. As you know, any legislative decisions on mandatory binding arbitration and its use in the workplace will set precedent for future and pending legislation. Mandatory binding arbitration will have negative economic effects for both employers and employees should such legislation become law.

Arbitration, in its most basic form, is a tool used by two parties (in this case unions and employers) to resolve disagreements on contracts, benefits, responsibilities or any number of issues. Usually, arbitration is reserved as a means to resolve disputes between two previously contracted parties outside a formal courtroom.

If mandatory binding arbitration is passed, the arbitration process will be fundamentally changed: shifting the power from private businesses and workers to a partial governmental entity (i.e., a government-appointed arbitrator).

Current arbitration legislation is founded on the principle of mutual consent. Section 8 of the National Labor Relations Act requires employer and employee representatives to meet and bargain “in good faith with respect to wages, hours, and other terms and conditions of employment,” correctly encouraging negotiating members to compromise.²

“Good-faith bargaining” that occurs during present-day arbitration is preferred by both parties. This prevents each side from making unreasonable demands.

The current process saves both parties time and money by encouraging a good-faith effort outside the courtroom. Mandating government intervention changes the rules of the game, and thus how negotiations will take place.

Under several mandatory binding arbitration proposals, negotiations between labor and business parties cannot exceed a set time period. For EFCA, this is 120 days. If they do, a government-appointed arbitrator enters the dispute and imposes a binding ruling on both parties.

¹ Subcommittee on Commercial and Administrative Law. September 15, 2009. 1:00 P.M. in 2141 Rayburn House Office Building Hearing on Mandatory Binding Arbitration: Is it Fair and Voluntary? By Direction of the Chairman

² NATIONAL LABOR RELATIONS ACT. Also cited NLRA or the Act; 29 U.S.C. §§ 151-169 [Title 29, Chapter 7, Subchapter II, United States Code]

Current negotiations last approximately 10 months.³ The majority of labor disputes will end up being resolved by the government, a non-interested third party who has no stake in either side. Employees' hands will be tied. The threat of government arbitrators creates faulty incentives that deter consent among negotiating parties.

Perhaps the most dangerous outcome of mandatory binding arbitration is that the government arbitrator may not have full knowledge of all economic situations and potential devastating outcomes of their decision. There are no set limits on issues or applications that an arbitrator can make a binding decision upon.

Most damaging, is that there are no limits in current labor provisions that restrict the use of mandatory binding arbitration being used to force employers to participate in failing multi-employer defined benefit pension plans or simple multiemployer pension plans, known as MEPPs. It is estimated that MEPPs are collectively underfunded by over \$165 billion.⁴

Currently, less than one in every 160 workers is covered by a union pension with required assets. Under mandatory binding arbitration, government arbitrators can force businesses to fund failing pensions. The Pension Benefit Guarantee Corporation (PBGC) already supports upwards of 30,000 pension plans. PBGC, the governmental pension insurer, will assume \$86.7 billion in liabilities by 2015. However in 2007, the PBGC reported a deficit of \$955 million, a \$216 million increase from the previous year. Due to their shortcomings, the PBGC limits the benefits in multi-employer plans to \$13,000 a year per retiree, compared with roughly \$52,000 for single-employer plans.⁵

These staggering numbers may lead some to believe that forcing companies to pour money into these failing plans is the only way for the MEPPs to remain economically viable – this could not be farther from the truth. Not only would this result in hundreds of companies shutting down due to the absorption of massive liability, but the net economic effect on employees and their retirement would be catastrophic.

Without getting too deep in the financial history of funding requirements due to the Pension Protection Act of 2006, it is necessary to discuss the principle of “Last Man Standing” and the negative effects this will have on companies if mandatory binding arbitration forces them to participate in an MEPP.

Due to the nature of the work in trucking, retail, construction and others, it has been established that it is economically impractical for any one company to provide pensions to members of these workforces. This notion led to “risk-pooling” which resulted in MEPPs. Under MEPPs, if a participating company in the plan is no longer able to make contributions due to bankruptcy or other circumstances, the remaining participants will have to make up this shortfall by increasing their contributions to cover the pool. For example, if there are five construction companies paying in to an MEPP and four go bankrupt, the remaining liabilities for all workers originally covered under then plan now fall on the last company – hence “last man standing.”

Therefore, the risk associated with sponsors entering into MEPPs, specifically with their funding in such jeopardy, is extremely high. Mandatory binding arbitration can force companies to enter these plans; thus placing their economic viability at risk. Many companies, several I have spoken with directly, will decide to close as the risk associated with being forced into an MEEP is far too great.

³ Estimates obtained via representative of the U.S. Chamber of Commerce.

⁴ Moody's Global Corporate Finance. Growing Multiemployer Pension Funding Shortfall is an Increasing Credit Concern. September 2009.

⁵ *Ibid.*

The mandatory binding interest arbitration, as established in legislation such as EFCA, will be the deciding force in establishing compensation packages through a government board appointed by the Federal Mediation and Conciliation Service – this includes forcing companies to join MEPPs. While it is true that this forced funding of MEPPs under mandatory binding arbitration will result in a short-term inflow of assets to the MEPPs, this will directly jeopardize the future livelihood of not only the companies involved, but the workers, retiree's and their families.

In conclusion, mandatory binding arbitration in any piece of legislation will have negative consequences for employer-employee relations that will have a drastic effect on workers' retirement and the stability of their job. Mandatory binding arbitration ties the hands of employer-employee relations and places decisions in the hands of an external government appointed entity that has no economic stake in the viability or interests in the party as a collective.

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