

# Facilitating Initial Labor Agreements Through Mediation and Arbitration

*The Employee Free Choice Act provides that either employers or employees may request mediation of the Federal Mediation and Conciliation Service (FMCS) if no agreement on a first contract has been reached after 90 days of bargaining. If the FMCS is unable to bring the parties to agreement after 30 days of mediation, the dispute must be referred to binding arbitration.*

**First contract mediation and arbitration is necessary because management can frustrate employee free choice by refusing to bargain.** Even when employees surmount the many obstacles to forming a union, management frequently denies them the benefits of collective bargaining by refusing to agree on a first contract.

- According to Cornell University researcher Kate Bronfenbrenner, more than a year after voting for union representation, workers are unable to negotiate initial collective bargaining agreements 32 percent of the time.<sup>1</sup>
- According to labor relations scholar John Logan: “Consultants advise management on how to stall or prolong the bargaining process, almost indefinitely—‘bargaining to the point of boredom,’ in consultant parlance. Delays in bargaining allow more time for labor turnover, create employee dissatisfaction with the union and prevent the signing of a contract. Without a contract, the union is unable to improve working conditions, negotiate wage increases or represent the workers effectively with grievances; and by exhausting every conceivable legal maneuver, certain firms have successfully avoided signing contracts with certified unions for several decades.”<sup>2</sup>
- According to a 2000 report by Human Rights Watch, “The problem is especially acute in newly organized workplaces where the employer has fiercely resisted employee self-organization and resents their success.”<sup>3</sup>

**First contract mediation and arbitration is needed because current law provides no effective remedies against management’s refusal to bargain.** Management understands that it can get away with suppressing employees’ collective bargaining rights through bad faith or surface bargaining because there is virtually no legal deterrent.

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<sup>1</sup> Kate Bronfenbrenner, “Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages and Union Organizing,” *U.S. Trade Deficit Review Commission* (2000).

<sup>2</sup> John Logan, “Consultants, Lawyers and the ‘Union Free’ Movement in the USA Since the 1970s,” 33 *Industrial Relations Journal* 197 (August 2002).

<sup>3</sup> Human Rights Watch, “*Unfair Advantage: Workers’ Freedom of Association in the United States Under International Human Rights Standards* (2000).

- If management and employees reach a stalemate at the bargaining table, current labor law allows management to impose working conditions unilaterally.
- The National Labor Relations Act (NLRA) prohibits bad faith bargaining (“surface bargaining”), but this is an exceedingly difficult charge to prove.
- No enforceable court order requiring bargaining will typically issue until three or four years after certification of the union.
- The penalty for bad faith or surface bargaining is typically an order to resume bargaining.
- Following an order to resume bargaining, recalcitrant employers frequently resume bad faith bargaining all over again.

**First contract mediation and arbitration has been successful in Canada.**

Labor laws in the Canadian provinces of Manitoba, British Columbia, Ontario, Quebec, Newfoundland, Saskatchewan and the federal jurisdiction all provide for first contract mediation and binding arbitration.

- First contract arbitration laws were enacted in several provinces in the 1970s and were strengthened in Ontario and British Columbia in the early 1990s. A substantial portion of the Canadian workforce is now covered by first contract arbitration laws.
- First contract arbitration has been an incentive for management and labor to bargain productively and has improved labor-management relationships.
- First contract arbitration is seldom used. It has not been invoked as a standard response to bargaining deadlocks, but rather as a corrective response to employers’ refusal to recognize newly organized unions and bargain a first contract.
- The overwhelming majority of cases are resolved through mediation or settlement between the parties.