THE ECONOMIC IMPACT OF THE EMPLOYEE FREE CHOICE ACT ON THE RESTAURANT INDUSTRY

Kevin T. Burke
Trinity Capital LLC

September 2009

TABLE OF CONTENTS

EXECUTIVE SUMMARY 3

INTRODUCTION 5

FINANCIAL ANALYSIS OF EFCA IMPACT ON RESTAURANT P&L'S 8

ILLUSTRATIVE FINANCIAL IMPACT ANALYSIS 8
STANDARD QSR PROFIT & LOSS STATEMENT 9
PRO-FORMA ANALYSIS 10
SQUARE PEG, ROUND HOLE 11
AN INDUSTRY SUFFERING FROM HISTORIC SALES DETERIORATION 11
RELIANCE ON CONSUMPTION 12
INCREASING OPERATING EXPENSES 14

ORGANIZED LABOR UNIONS 15

THE RESTAURANT INDUSTRY 17

ORGANIZED LABOR AND EFCA IMPLICATIONS 21

THE ELIMINATION OF A SECRET BALLOT 21
ELIMINATION OF FAIR DEBATE 21
REDUCTION OF NOTIFICATION OF EMPLOYERS 22
PRIVACY OF EMPLOYEES VOTE 22
COMPULSORY INTEREST ARBITRATION 23
INCREASED PENALTIES FOR LABOR VIOLATIONS ONLY FOR EMPLOYERS 25

CONCLUSION 25

BIBLIOGRAPHY 28

EXECUTIVE SUMMARY

The Employee Free Choice Act ("EFCA") legislation, better known as "*Card Check*", was introduced to Congress unsuccessfully in 2007 and has been reintroduced in March of 2009 with House Resolution 1409 and in Senate Bill 560 as the "Employee Free Choice Act of 2009". This proposed bill is strongly backed by organized labor and is intended to expedite the existing process of creating a labor union. The bill also provides for binding arbitration for initial contracts and disputes and increased financial penalties for corporate infractions of labor laws and regulations.

This legislation would significantly undermine the restaurant industry by introducing additional costs and risk at a time when industry profits are at historical lows. Furthermore, the restaurant industry, the nation's second-largest employer after the federal government, has more part-time employees than any other industry. These and many full-time restaurant employees frequently are employed for very brief periods of time (an industry average of approximate 100 days) and therefore the overwhelming majority of employment in this industry is part-time or short-term. Therefore, saddling employers with union costs, compliance and wages would become more of an exercise in bureaucracy than making any employment practice improvements that a union might aspire to achieve. Finally, the restaurant industry is largely composed of very small proprietors who are not administratively or financially capable of undertaking the unionization of a workforce. It is no overstatement to claim that this would cripple the restaurant industry. The following points are significant issues underscoring the economic damage unionization of the restaurant industry would cause to industry participants such as employees, shareholders, creditors, suppliers, distributors, vendors and customers. The passage of EFCA will likely cause the following:

- Increases in labor expense and union compliance cost will precipitate restaurant closures which inevitably lead to job losses and real estate losses
- Significantly undermine the willingness for commercial banks and other capital providers to fund this industry
- Union initiatives such as minimum paid hours, sick leave, personal days or fixed benefits represent a category of expenses which are not tied to performance or sales and thus will lend to losses and closures
- Restaurants can not capitalize inventory and labor, therefore sales declines can not be recaptured by alternative customers or deferred sales. This fact represents a major difference in risk profile between restaurants and other unionized industries. This underscores the importance of market based wages, not collective bargaining wages
- Most restaurant businesses, given their size and sophistication, are not able to deal with the complicated labor law issues promulgated by EFCA
- It will be almost impossible or prohibitively expensive to deal with the onslaught of the multiple legal issues associated with EFCA without in-house counsel
- The time and cost of acquiring legal and labor regulatory expertise would be prohibitive for the average restaurant franchisee

- EFCA potentially enables organized labor to **eliminate any fair debate** between labor and management concerning the comprehensive impact of organizing a given company
- EFCA minimizes **notification of an employer** that an organized labor campaign is underway amongst its employees to as little as five days notice
- EFCA eliminates the **privacy of each employee's vote** by eliminating the secret ballot
- EFCA is in **opposition to 74 years of US Supreme and Appellate Court decisions, NLRB findings** and even organized labor requests
- Employees could very well sign up for card check and find themselves unemployed as a result directly thereof
- During the last 70 years, since the federal courts outlawed "card check", the NLRB has not certified unions based upon card check methodology
- It would be highly inappropriate to place a governmental arbitrator, who sensibly has no experience in managing a company, in a position of determining the labor contract for a restaurant company and its employees
- EFCA could lead to bankruptcies as a means to "break" an onerous labor contract which has the unanticipated consequence of elevating labor and administrative expenses to a level which consumes all of the profit margin
- EFCA provides a means for the union to guaranty a contract to potential members by virtue of the "interest arbitration" aspect of the legislation

INTRODUCTION

The proposed EFCA bill is strongly backed by organized labor and is intended to expedite the existing process of creating a labor union. This legislation is a substantial modification of the National Labor Relations Act ("NLRA"), which was passed to govern labor relations in the United States. The National Labor Relations Act, also known as the Wagner Act, was passed in 1935 promulgating federal laws to govern labor relations. The Act created the National Labor Relations Board ("NLRB") to regulate certain aspects of labor relations and to conduct secret ballot elections to engage a labor union to act as the employees' agent in their collective bargaining with employers. The Act also empowered the NLRB to "utilize any other suitable method" to certify union representation of a workforce. Accordingly, the NLRB was permitted (until 1939) to certify a union which had presented union "cards" signed by a majority of the employees in a company. In 1939, the NLRB rescinded its card check policies after recognizing that in many cases a substantial number of employees were pressured into signing cards (because of the lack of secrecy of a ballot) and the card check process enabled the union to be certified without input from a substantial block of the employees. In essence, card check was determined to be a flawed method of determination and was replaced with secret balloting.

There are three elements to *Card Check* which differ radically from existing organized labor legislation: 1) a card check process used to certify a union as opposed to a National Labor Relations Board supervised secret ballot election; 2) mandatory binding arbitration for both an initial contract as well as disputes; and 3) provisions for greater penalties for violations of the National Labor Relations Act ("NLRA") by employers, but not the unions. The purpose of this paper is to examine the potential impact of the proposed EFCA legislation on the restaurant industry.

The effect of this legislation, if passed by the Congress, will be to greatly increase the ability of labor unions to quickly and quietly organize a company's workforce without the benefit of a secret ballot, notification of the employer or the supervision of the NLRB. Eliminating the secret ballot process will undoubtedly make unionization much easier. In addition, the balance of power between management and labor would be significantly tilted in favor of organized labor upon the passage of EFCA. This is particularly problematic in the restaurant industry which is so competitive that wages and labor scheduling need to be critically managed in order to survive. Unlike industrial concerns that make a product which can be stored on a shelf and sold at a later time, restaurant demand is neither steady nor predictable. This is compounded by the fact that many of the input goods in the restaurant business are perishable and introduce a substantial risk component in predicting and meeting customer demand. Accordingly, adding burdensome labor regulations and higher labor costs will introduce an insurmountable level of risk to restaurant viability throughout much of the industry.

The card check provision would enable a union to organize by simply obtaining the signatures of 50% of a company's employees plus one. Upon presentation of the simple majority signatures of the employees to the NLRB, a union would be certified *(again, without a secret ballot, notification of the employer or NLRB supervision).* Ostensibly, a union official could enter a restaurant on a Saturday night and invite all of the employees to a nearby pub after work for a presentation on the benefits of organizing. A quick count of signatures could result in a new union within a few days upon presentation to the NLRB[1]. This simplified process would likely lead to widespread unionization in an industry completely incapable of surviving significant wage increases and costly work schedule regulation.

The card check process enables organized labor to effectively mitigate the employer's opportunity to present its view of the issues to the employees. This is particularly destabilizing for both the employer and the workforce in businesses like restaurants where effectively managing the labor expense is frequently the chief determinant of success or failure of the entity. If EFCA is implemented, in many cases a company's labor expense and union compliance cost will precipitate restaurant closures[2] which inevitably lead to job losses. It seems only fair and democratic that employees completely understand the impact to their employer of organizing their workforce into a union, especially if there is the prospect of potential work schedule reductions, job losses or even closure of the business. In addition, the circumvention of a vote allows for as many as 49% of the employees to go unheard in the debate or vote for the unionization of their workforce. This flies in the face of dozens of court opinions and years of union lobbying and litigation to ensure that all of the employees are heard from in the debate over organizing a given workforce.

The elimination of the secret ballot as well as the ability to mount a stealthy campaign to organize a company's labor force is a big advantage for organized labor. Circumventing the election process means that there's really not a campaign of two different perspectives fairly contesting for a share of the employees' votes. It means that one side will not be heard from or heard in full in the debate. This hardly seems democratic as Eugene Scalia noted in his March 23, 2009 testimony before Congress:

> "EFCA's supporters say they are proposing card check as an antidote to intimidation by employers and union elections. But the single most valuable protection against intimidation in voting is the secret ballot. If you're concerned about voter intimidation, you institute the secret ballot, you don't eliminate it. That is common sense reflected in our national tradition. The Supreme Court has

[1] There is a five day employer notification requirement in the proposed EFCA legislation.

[2] This concept applies to the hospitality industry as much as it does restaurants. Like restaurants, hospitality providers have enormous fixed costs which greatly narrow the number of profit and loss line items which can be managed to meet changing demand to make profits.

> described the secret ballot as "the hard-won right to vote one's conscience without fear of retaliation". With regard to union elections particularly, Justice White, who was appointed by President Kennedy, said: 'the expressed preference and the National Labor Relations Act for secret ballot elections assumes that *voters may act differently in private than in public*, and ordinarily guarantees to employees the ability to make a secret choice.'"[3]

The compulsory interest arbitration provision of EFCA radically alters the balance of power in negotiations between the employer and the union. Essentially, the legislation provides for the negotiating parties to engage a federal mediator (civil servant) as an arbitrator to bind both parties to an initial collective bargaining agreement if the parties are unable to reach an agreement within 120 days. A company could thereby find itself in a position of being bound to a penurious labor contract that may cause economic losses by a third party arbitrator from the Federal Mediation and Conciliation Service ("FMCS") who has no experience in the restaurant industry. This effectively places a government bureaucrat in charge of managing labor issues at the helm of either a single unit restaurant or a 1,000 unit restaurant chain. Not only is this contrary to existing case law and NLRB rules, but it is contrary to practical judgment given that most governmental bureaucrats have no experience in meeting payrolls and fierce commercial competition.

The NLRA was implemented to empower the NLRB as both a referee and a source of remedies for unfair practices by either organized labor or employers. By casting the NLRB in the role of a punitive agency, it's effectiveness as a neutral arbitrator of labor policy is effectively undermined. The NLRB was not intended to determine who will win the contest, but that the game was played fairly. There are ample court decisions which clearly underscore this intention. Therefore, it is rather bizarre for the proponents of EFCA to seek increased penalties for one side (the employers) only. Moreover, the unilateral nature of increased penalties for one side only is analogous to fines for traffic citations which are based on the violator's income, not the severity of the infraction.

Proponents of EFCA argue that employers engage in coercion and other unfair tactics to discourage the organization of unions and therefore labor organization is never given a level playing field. However, EFCA will likely accomplish just the opposite for the labor unions by mandatory "government" arbitration, circumventing elections and eliminating reasonable advance notification of the employer. Moreover, organized labor frequently fails to understand that the employer is a *customer* of employees and therefore should be able to shop for attributes which enable success in a competitive, free-market environment unfettered by excessive regulation or monopolistic labor.

[3] Mr. Scalia is a partner at the Law firm of Gibson, Dunn & Crutcher LLP, Washington, D.C., and former Solicitor, U.S. Department of Labor.

One of the most important and overlooked aspects of the potential passage of EFCA is the harmful impact the legislation will have on capital formation in the restaurant industry. In the present environment, there is limited capital available for restaurant acquisitions, expansion, new unit development or renovations from traditional debt and equity funding sources. It is highly likely that the passage of this legislation will significantly undermine willingness for commercial banks and other capital providers to fund this industry.

FINANCIAL ANALYSIS OF EFCA IMPACT ON RESTAURANT P&L's

Due to the financial weakness of the restaurant industry in today's environment, Card Check will have an adverse impact on both the owner/operators and the labor force it intends to assist. EFCA not only threatens to impose regulated labor practices on an economic model unsuitable for unionization, but it also places additional cost burdens on an industry already struggling to survive the combination of rising costs, uncertain commodity markets and declining customer traffic. Standard industry profit margins have contracted so much in fact, that the imposition of even a fraction of the estimated cost increases attributable to unionization will render many restaurant companies unprofitable or even insolvent. This is not a polemic statement, it is simply a reflection of the prevailing economics of this industry.

Illustrative Financial Impact Analysis

Ignoring the prospect of increasing operating costs and revenue declines discussed below, we have prepared an analysis of the most likely financial impact of organized labor within a typical quick service restaurant ("QSR") operation. Of all the restaurant sectors, QSRs have historically endured economic downturns with the most resilience due to their lighter expense structure and capitalization requirements. However, cash flow[4] margins in this sector have shrunk notably in recent years to ranges of 5%-10% of sales. This contraction has been troublesome to fast casual, family dining and white table cloth establishments with higher operating expenses and more intensive capitalization requirements. We will use this analysis to show the negative impact increased labor costs will have to a typical company's ability to meet its financial obligations (noting that this hardship is only amplified, on average, across the higher cost sectors of restaurants noted above).

In order to fully understand the economic impact of increased labor costs, we should note the guidance provided by the Bureau of Labor Statistics ("BLS"), on the following page. Aside from the "Other Incrementals", payroll burdens of an additional 38.7% are typical to unionized businesses according to union industry propaganda and the BLS.

[4] For the purpose of this work, we have used the generally accepted accounting principles ("GAAP") definition of earnings before interest, taxes, depreciation and amortization ("EBITDA") as a proxy for cash flow. The restaurant industry produces a wealth of unaudited and unreviewed financial statements which frequently overstate cash flows and earnings.

Exhibit A

P&L Impact to Unionized Business	
	Increases for Union Employees
Payroll [5]	
Wages and Salaries	14.0%
Vacation Benefits	3.5%
Overtime/Bonus	1.6%
Insurance [6]	9.7%
Retirement/Savings	6.2%
Legally Required Benefits [7]	3.6%
Total Payroll	**38.7%**
Other Incrementals	
D&O Insurance [8]	$10,000 / yr
HR Employee	$40,000 / yr

However, for the purpose of demonstrating the fragile tolerances of restaurants to new incremental costs, in fact, we have chosen to effect our illustrative income statement by only half (50%) of the cost impact estimates provided by the BLS. The following illustrative analysis will focus on an income statement which represents an average QSR chain restaurant cash flow margin in the prevailing environment.

Standard QSR Profit & Loss Statement

Let's assume, as an illustrative "base case", a restaurant with $1 million in annual revenues, with a typical mix of food and labor costs of approximately 60% and operating costs reflecting average QSR expenses. Prior to the impact of unionized labor, this base case restaurant generates an industry average 7% cash flow (or EBITDA)[9].

We have assumed a 1.25x fixed charge coverage ratio[10] ("FCCR") which is common in the restaurant industry for new issuance of debt. As depicted in *Exhibit B,* a restaurant producing $71,000 of EBITDA with $40,000 of annual debt service payments allows the proprietor some cushion in today's difficult operating environment. It should be noted however, that companies that have suffered through the recent margin compression trend

[5] Source: Bureau of Labor Statistics.
[6] Includes Life, Health, and Disability Insurance.
[7] Includes Social Security, Medicare, Unemployment Insurance and Worker's Compensation.
[8] Estimate based on report by Woodruff-Sawyer & Co.
[9] Earnings Before Interest, Taxes, Depreciation & Amortization.
[10] The fixed charge coverage ratio ("FCCR") is a modified form of the debt service coverage ratio originally introduced by the bond rating agencies for calculating a company's ability to service its principal and interest obligations.

closer to 1.10x FCCR. Therefore utilizing a base case with a 1.25x FCCR is both a conservative and generous starting point for the purposes of this analysis.

Exhibit B

Before Card-Check P&L [11]		
Net Sales	$ 1,000,000	100.0%
Cost of Sales	324,000	32.4%
Gross Profit	**676,000**	**67.6%**
Store Operating Expenses		
Payroll Related Expenses	275,000	27.5%
Controllables	31,000	3.1%
Advertising	60,000	6.0%
Royalties	40,000	4.0%
Occupancy	85,000	8.5%
Non-Controllables	74,000	7.4%
Store Operating Expenses	**565,000**	**56.5%**
Store Operating Profit	**111,000**	**11.1%**
G&A	40,000	4.0%
EBITDA	**71,000**	**7.1%**
Debt Service [12]	40,000	
FCCR (Industry Standard)	1.25x	
DSCR	1.78x	

Exhibit C

After Card-Check P&L [13]		
Net Sales	$ 1,000,000	100.0%
Cost of Sales	324,000	32.4%
Gross Profit	**676,000**	**67.6%**
Store Operating Expenses		
Payroll Related Expenses	328,145	32.8%
Controllables	31,000	3.1%
Advertising	60,000	6.0%
Royalties	40,000	4.0%
Occupancy	85,000	8.5%
Non-Controllables [14]	77,333	7.7%
Store Operating Expenses	**621,478**	**62.1%**
Store Operating Profit	**54,522**	**5.5%**
G&A [15]	50,307	5.0%
EBITDA	**4,215**	**0.4%**
Debt Service	40,000	
FCCR	0.71x	
DSCR	0.11x	

Pro-Forma Analysis

Despite indications of deteriorating sales and increasing costs across the industry (see page 11), we have not impacted the Pro Forma illustrative financial summary with sales deterioration or increasing operating and commodity expenses which are common in the market today. As further evidence of the industry's cost sensitivity, we have only adjusted the labor line with one-half of the cost increases suggested by the BLS. These adjustments are manifest in the Payroll Related Expenses, Non-Controllables and General and Administrative expenses ("G&A"). The result is devastating for the P&L statement of a typical restaurant proprietor. As shown in *Exhibit C*, EBITDA has been reduced to a break even result, however, the restaurant is no longer able to service its debt in spite of the fact that prior to the adjustment, it would have been considered healthy by the standards of industry lenders. Consequently, the restaurant would no longer be viable. Without a significant loan write-down or other concession from the lender, this restaurant would be closed and its 40 to 60 employees would be unemployed. In this conservative pro-forma analysis, a once healthy operation, contributing to the community, tax base and local employment would be rendered insolvent due to imprudent wage and benefit pressures from organized labor.

---

[11] Based on average P&L of typical QSR operator.
[12] New debt issuance typically requires a minimum 1.25x FCCR.
[13] Estimates based on 50% of employees in a union. Please see Exhibit A for more details.
[14] Increase based on D&O Insurance and assumes a 3-unit operator.
[15] Increase assumes a three-unit operator and a unionized District Manager that cost $80,000/year before joining a union.

Square Peg, Round Hole

When considering labor legislation, it is important to note that the restaurant industry is very different from some of the mainstay U.S. industries that have unionized over the past 50 years. Not only are customers' buying trends complicated with little or no lead-time, but restaurant products have limited shelf life and generally can not be held on the balance sheet. Furthermore, restaurant labor represents a cost generally equivalent to one-third of sales. This high percentage relative to other industries underscores the necessity of managing labor costs in real time. Restaurant operators do not receive customer orders with advance notice; therefore they cannot predict labor requirements and must have flexibility in managing labor costs and schedules in order to compete and survive. Therefore, the restaurant industry has a cost structure which cannot accommodate the wage inflexibility associated with labor unions.

Union initiatives such as minimum paid hours, sick leave, personal days or fixed benefits represent a category of expenses which are not tied to day-to-day sales results. Restaurants can not capitalize these costs, and sales declines can not be recaptured by alternate customers or deferred sales. This fact represents a major difference between restaurants and other unionized industries. For example, a widget manufacturer may create products via steady state production in order to build and replenish inventory through customer buying cycles. While the manufacturer's inventory may maintain or even increase in value over time, food quickly becomes unusable without a ready customer. The result is unrecoverable operating and opportunity losses without offsetting labor savings.

Fixed costs increase risk in the restaurant industry's discretionary consumer spending model that is already volatile by nature. Consumption patterns in restaurants are not only driven by marketing, customer service and product quality, but also by uncontrollable factors such as the state of the economy and even weather. Take for instance a snowstorm where roads are impassable and potential restaurant customers stay home. A restaurant owner experiencing weather driven lost sales with collective bargaining fixed labor costs will incur both product and profit loss. In an industry already struggling for viability, the increased and ill-fitting costs resulting from EFCA will be devastating to restaurant operators.

An Industry Suffering From Historic Sales Deterioration

There has never been a worse time for EFCA to be imposed on the restaurant industry due to the downturn in the economy and margin erosion. The majority of line item costs within restaurant P&L statements have steadily become more onerous, and now recessionary economic pressure threatens to further jeopardize the financial health of many restaurant companies. Meanwhile, the recession has reduced out-of-home dining, a trend that will continue (and may worsen) in the coming months.

Reliance on Consumption

Recent dramatic shifts in consumer spending habits have resulted from unprecedented unemployment, contracting credit and a reversal of the consumer spending to savings ratio. All of these factors serve to destroy non-essential consumer spending, the life blood of restaurant success.

Exhibit D

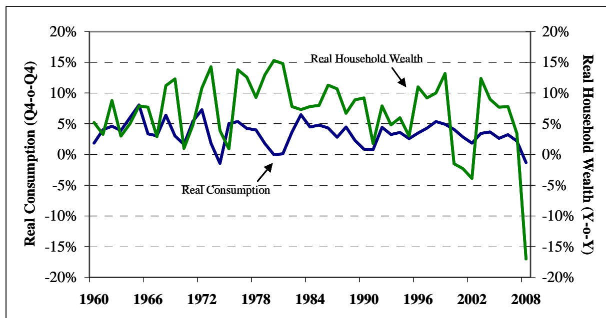
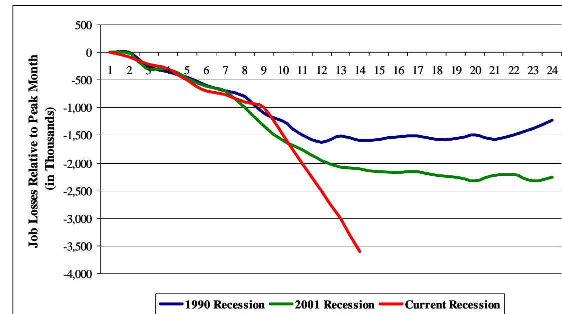


Exhibit E



Real household wealth has fallen at a pace which may lead to an even more dramatic reduction in consumer spending and consumption. The slight lag between the two, as demonstrated in the graph above, suggests a continuing decline beyond the depressed consumption the economy exhibits today. The adverse effect of these trends on the industry is best noted in the dramatic reversal of same store sales growth amongst some of the nation's largest restaurant chains as shown in *Exhibit F*.

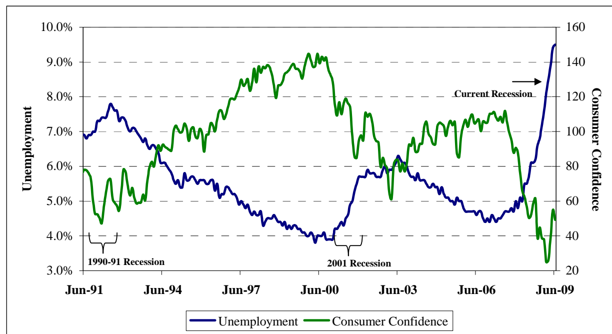
Exhibit F

Same Store Sales Analysis [16]

	2002	2003	2004	2005	2006	2007	2008	Q2 2009
QSR:								
Burger King	N/A	N/A	6.3%	3.5%	3.5%	4.7%	4.0%	5.8%
Carl's Jr	0.7%	2.9%	7.7%	2.2%	4.9%	0.9%	2.1%	3.8%
Hardee's	-2.4%	2.5%	7.0%	-0.2%	4.8%	2.0%	1.2%	1.0%
Jack in the Box	-1.8%	-0.1%	4.6%	3.2%	4.6%	5.1%	0.1%	0.4%
KFC	0.0%	-2.8%	-2.0%	6.0%	1.0%	-4.0%	-3.0%	3.0%
McDonald's	-1.5%	6.4%	9.6%	4.4%	5.2%	4.5%	4.0%	2.8%
Popeye's	0.7%	-2.7%	1.3%	3.3%	1.6%	-2.3%	-2.2%	-0.3%
Taco Bell	7.0%	2.3%	5.0%	7.0%	1.5%	-5.0%	8.0%	1.0%
Wendy's	4.7%	0.9%	2.9%	-3.7%	0.8%	0.9%	0.5%	1.0%
QSR Mean	***0.9%***	***1.2%***	***4.7%***	***2.9%***	***3.1%***	***0.8%***	***1.6%***	***2.1%***
Other:								
Applebee's	3.2%	4.1%	4.8%	1.8%	-0.6%	-2.1%	-2.2%	-4.3%
Arby's	2.1%	-2.3%	4.0%	2.0%	3.0%	0.0%	-4.0%	-8.7%
Cheesecake Factory	1.2%	0.7%	3.9%	1.6%	-1.1%	0.3%	-4.5%	-4.1%
Chili's Grill & Bar	3.4%	2.2%	2.0%	4.3%	-0.4%	-1.9%	-0.6%	-5.2%
Denny's	-1.0%	0.2%	6.0%	4.5%	3.2%	1.2%	-3.7%	-0.9%
Domino's	2.6%	1.3%	1.8%	4.9%	-4.1%	-1.7%	-4.9%	-0.7%
Olive Garden	5.9%	2.2%	4.7%	8.6%	3.5%	3.1%	3.7%	-0.6%
Pizza Hut	0.0%	-0.6%	5.0%	0.0%	-3.5%	3.5%	3.0%	-8.0%
Quizno's	N/A	0.8%	2.9%	-5.0%	0.0%	-2.4%	-7.4%	N/A
Red Lobster	6.2%	1.6%	-3.9%	4.2%	2.4%	2.4%	-1.4%	-0.6%
Ruby Tuesday	1.4%	2.0%	-1.5%	-4.7%	0.3%	-5.1%	-11.2%	-3.2%
Starbucks	7.3%	8.5%	10.5%	7.5%	5.8%	2.5%	-7.0%	-6.0%
T.G.I. Friday's	N/A	0.1%	3.3%	4.9%	-2.7%	-1.3%	-7.5%	-5.0%
Other Mean	***2.9%***	***1.6%***	***3.3%***	***2.7%***	***0.4%***	***-0.1%***	***-3.7%***	***-3.9%***

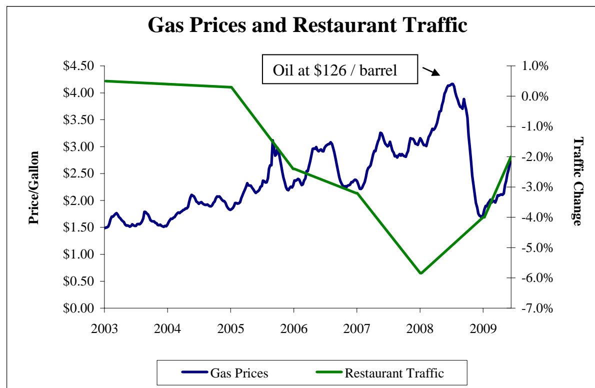
[16] Source: Restaurant Research LLC, Capital IQ, SEC filings, company websites

Exhibit G



Despite what the financial media may report, the stabilization and recovery of economic activity caused by these declines is very difficult in the short-term. While some experts say the leading economic indicators may suggest a recovery by the end of 2009, a respected group of nationally preeminent economists are decisively bearish. The bearish economists believe that while GDP may stabilize in a flat or slow growth pattern, the economy will continue to suffer from continued fallout from the banking, real estate and unemployment impact on consumer spending. Moreover, these economists believe restored levels of consumption may not return to per capita levels experienced prior to the current financial crisis for years. In the event the recession stalls or even worsens, the severe unemployment brought on in recent months will cause an ongoing lag in consumer spending. Therefore, it is reasonable to conclude that many restaurants are highly likely not to return to performance levels of recent years for some time to come.

Exhibit H



Another factor which underscores the restaurant industry's inability to economically withstand the introduction of organized labor is that of energy prices. Restaurant traffic declines associated with the rising price of oil remain a concern among industry leaders. The majority[17] of restaurant patrons in the United States drive to restaurants, and the frequency of these visits is highly sensitive to the price of gasoline. Thus, as gas prices increase, fewer cars will be on the road which will decrease restaurant traffic and sales. This pattern has been shown over time and is demonstrated in *Exhibit H*. When considering oil's recent volatility and varying opinions of future pricing, the restaurant industry's vulnerability should not be underestimated.

---

[17] Walk-up traffic, defined as patrons who do not use an automobile to visit a restaurant, is less than 7% in the restaurant industry.

Increasing Operating Expenses

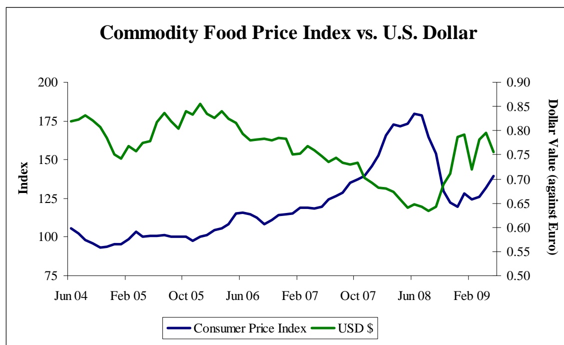
Ignoring consumer spending forecasts, industry wide financial weakness already exists. That fact is due, in part, to cost increases over the last decade, including prices of insurance, utilities, real-estate and commodities that could not be completely offset with price increases to customers. Note the historical escalation of related expenses shown in *Exhibit J.* With same store sales holding around flat among the highest performing aggregate sectors in the industry, restaurant operators must limit their cost exposure in order to survive.

Exhibit J

Historical Data Impacting the Restaurant Industry [18]

	2002	2003	2004	2005	2006	2007	2008
CPI - Food and Beverage	1.5%	3.5%	2.6%	2.3%	2.2%	4.8%	5.8%
CPI - Energy	10.7%	6.9%	16.6%	17.1%	2.9%	17.4%	-21.3%
CPI - Medical Care	5.0%	3.7%	4.2%	4.3%	3.6%	5.2%	2.6%
Employment Cost Index	2.6%	2.1%	2.3%	2.2%	4.4%	6.4%	4.0%
Construction Cost Index	3.1%	3.0%	6.6%	4.8%	2.6%	2.6%	7.5%
Retail Properties Index	3.8%	9.2%	16.8%	11.5%	16.1%	2.8%	-2.7%

Exhibit K



Along with consumer spending, future commodity pricing pressures threaten the industry. Given the continuing pressure on the US dollar and it's correlation to commodity prices, the potential for increased food and other restaurant operating costs is likely. Specifically, inflationary pressures related to recent government interventions could be ultimately devastating to restaurants.

With the U.S. monetary base set to increase fifteen times[19] from the levels of late 2008 by 2010, and $3.5 trillion in Treasury sales[20] during 2009 alone, the U.S. dollar faces significant devaluation risk. As demonstrated in the graph above, commodity prices are adversely related to the dollar and, in an inflationary environment, will increase as domestic currency falls. Generally, we would expect a period of inflation to deliver dramatic commodity and occupancy cost increases. Consumer spending generally lags

[18] Bureau of Labor Statistics, Engineering News-Record, Deloitte and Moody's; data reported on a Y-o-Y basis.
[19] According to economist Eric de Carbonnel.
[20] According to Goldman Sachs & Co.

any recovery or cause for inflation and may not occur in time to buffer the continued margin pressure that many economists are predicting. These inflationary burdens are noted as possible outcomes, and while the purpose of this paper is not to forecast the economy, we believe it is important to consider the very real need for labor cost flexibility when considering potential labor cost increases associated with unionization of the restaurant industry.

We can not legislate based on the belief that employers are capable of facilitating labor concessions simply because their doors remain open for business. Indeed, owners of restaurants will increasingly have to fight in order to simply avoid layoffs and store closures due to the dynamics that already plague the industry. The fundamental differences in restaurant operations vs. traditional union workplaces renders EFCA ineffective and dangerous even in a static economic environment, much less the financial crisis we are in today.

Based on the articulated uncertainties concerning input pricing and consumer spending in the coming months, it is demonstrably clear that restaurant operators need maximum financial cushion to ensure continued financial viability. The passage of EFCA would undermine this stability and increase the hardships on the very waiters, waitresses, drive-through operators and dishwashers it seeks to benefit. We strongly believe the final result of EFCA within the restaurant industry will be a loss of economic viability, forced closures and a significant number of jobs lost.

ORGANIZED LABOR UNIONS

The origins of large-scale labor unions emanated from trade guilds in Europe during the Industrial Revolution in the 1700's. In the United States, however, the widespread labor union movement began later in the early 19th century in urban industrial centers such as Boston, New York, Philadelphia, Cleveland and Pittsburgh. Primary issues in the labor union movement were the right to organize, work hours, working conditions, child labor and health and safety. Secondary organized labor issues included wages, job descriptions, work rules and then, later in time, pensions.

One of the biggest issues in the early days of the labor movement was the right to organize a labor union. This was obviously a hotly contested issue as working conditions and work hours were often abusive. In the early 19th century, the US was largely a rural agrarian nation and much of its population was void of experience in urban, industrial, social and employment issues. The nation began a trend of urbanization which was based on economic opportunity as industrialization swept through medium and large cities. As workers migrated from the farm to the cities, they were greeted with the cold reality of urban economics and culture. It wasn't just the workplace that provided challenges to

these rural raised citizens; it was commerce, crime, aggressive behavior, briskness, lack of traditional morality and survival of the fittest mentality.

Industrial concerns sprung up in urban centers and attracted rural workers with strong agrarian work skills and ethics. Most of these workers were used to long hours and hard work and were initially very happy to be gainfully employed and not have to worry about crops, drought, pest plagues and the other vagaries of managing family farms. Eventually, poor working conditions, low pay and abusive work schedules began to grate on urban workers. Employee commiseration soon grew into ideas of politically organizing and sharing information in order to try and remedy the complaints of the working man. Over time, workers began to sense that the injustices in the workplace could be corrected just as several generations earlier, the US had broken away from its colonial ruler, the English Crown.

The early movement of labor unions was partly based on the workers' notion that industrial concerns were able to influence state, local and federal governments to discourage them from passing laws to protect employees. In the 19th century, federalism was very prevalent which created a much different regulatory environment than what we have today. Consider that prior to 1913, there was no direct (popular) election of US Senators (they were appointed by state legislatures), no federal income tax and state and local governments were more powerful than they are today. At that time, there were no Occupational Safety and Health Administration ("OSHA"), Department of Labor ("DOL"), Environmental Protection Agency ("EPA") or dozens of other federal, state and local agencies which could exert power to protect the worker. Consequently, unions stepped in to protect workers from the void left by a federalist climate which was much more pro-industry and laissez-faire than today's heavily regulated work environment.

The primary purposes for the introduction of the Wagner Act (or National Labor Relations Act) were to protect employees primarily from 1) unsafe working conditions; 2) environmental hazards; and 3) unhealthy or excessive work schedules. The NLRA also provided other employee benefits including improvements to 1) wages; 2) employee tenure; 3) work rules and procedures; 4) employee pensions. After the passage of the Act in 1935, unions made big strides in membership growth, political power and financial means. During the next 35 years, organized labor became a powerful force in most major industries including steel, coal, automotive, garment, manufacturing and public service.

Until the 1970s, most of these industries did not have meaningful foreign competition. This enabled many employers to pass the labor cost increases onto the consumer and made employers somewhat pliable to the recurring union requests for higher wages. However, when US markets witnessed the substantial entry of foreign competitors, US industrial concerns had to reconcile wages and ultimately prices with those of global

competitors. This ended the era of big unions and closed domestic pricing of goods and services.

Essentially, the big unions provided a much-needed public service benefit to our nation and its labor force in the earlier part of the 20th century by achieving safer worker conditions, eliminating job hazards and unhealthy work schedules. Toward the later part of the 20th century, most union activity was relegated to fighting over wages and benefits, basically fighting over a share of the pie with management and financial stakeholders.

THE RESTAURANT INDUSTRY

The restaurant industry is one of largest in the United States, accounting for 9% of the workforce and 4% of gross domestic product. The restaurant business is composed of six segments: fine dining, casual dining, family dining, quick casual, quick service and institutional food service. There are approximately 975,000[21] restaurants in the United States which employ anywhere from approximately three to over 100 full-time or part-time equivalent employees in each location. Chain restaurants account for over half of the industry's $580[22] billion in annual revenues.

Historically, the restaurant industry has consistently represented some of the highest failure rates in the Standard Industrial Classification ("SIC") codes used by the US Small Business Administration in its lending activity. These failures are much more concentrated in non-chain restaurants because they often do not have the operational discipline, management consistency and resources required to successfully compete against better disciplined and well-capitalized chain restaurant competitors. One of the key elements of this discipline is the accurate measurement and control of labor costs.

The chain restaurant industry recognizes that labor is one of the most vital aspects of successful operations. Food and occupancy cost are the other two pillars of successful management of restaurant profit and loss activity. The industry measures its labor using many different metrics in order to optimize the many disciplines each employee can bring to the customer. The industry's most successful participants are steeped in the science of measuring their employees' effectiveness in terms of friendliness, speed of service, order accuracy, cleanliness of the facility and problem solving. These attributes are best implemented by a well-trained and generously staffed crew. However, generous staffing is at odds with profitability. Therein lies one of the two largest challenges in the chain restaurant industry. The other big challenge is attracting customers to the restaurants with attractive quality and value propositions and hoping that customers spending activity

[21] Source: Nation's Restaurant News.
[22] Source: Nation's Restaurant News.

will be concentrated away from the "attractive proposition" into more profitable menu items. Accordingly, profitability and success are heavily predicated on effectively managing labor costs in accordance with business activity.

In our[23] studies of over 25,000 individual restaurants during the past 13 years, we have found that as many as 15% of the units in a franchised restaurant chain produce no after-tax economic profits on a Generally Accepted Accounting Principles ("GAAP") basis. In addition, a significant percentage of chain restaurants have net income of less than 5% on a GAAP basis in the present economic, cost and tax climate. One of the key reasons behind the industry's lack of awareness of this issue is the inability of many chain restaurant operators to accurately integrate the financial reporting of daily operational financial results with GAAP accounting of their obligations arising from franchise agreements, property leases, and loan agreements. As a result, many franchisees operate on more of a "cash basis" than an "accrual basis" thereby often concluding more profitability exists in their enterprise than would actually be reported under conventional GAAP financial statements. This can lead to general and administrative cost structures and capital spending which is not consistent with a given company's limited resources. Given this "artificial" notion of profitability, the passage of EFCA and its attendant higher labor cost structure will have a dramatically higher negative financial impact on many franchise businesses than would otherwise be anticipated.

Examples of franchisees failing to integrate accrual and cash accounting are abundant, particularly with franchisees operating 10 or less restaurants. As an example, the amortization of non-cash restaurant expenditures such as franchise fees (not royalties) is seldom properly recognized in franchisee financial statements. If a franchisee paid $50,000 for a 20-year franchise agreement, the financial statements should reflect $2,500 per year in non-cash amortization expense. If this is not properly reflected in financial statements, then creditors may be misinformed concerning the fully loaded cost of operating the business. Another issue which frequently occurs in franchisee accounting is the improper journal entries associated with supplier syrup and food rebates. Lastly, franchisees seldom properly account for both deferred and future required remodeling obligations. These examples underscore how ill-prepared this industry is for the labor cost increases normally associated with organized labor's entrance into a given industry.

There is often a misconception that franchise businesses are large corporations, either Fortune 500 companies or 200 or 300 unit restaurant franchisees. The fact is, most restaurants are small businesses with unsophisticated proprietorship. For example, Yum! Brands, headquartered in Louisville, Kentucky, is the largest restaurant company in the world with over 36,000 restaurants. But in the US, approximately 12,000 of their 15,000 restaurants are owned by franchisees that average approximately seven restaurants per owner. Most of these businesses, given their size and sophistication, are not able to deal

[23] Trinity Capital LLC is a Los Angeles based investment banking boutique providing capital, consulting and restructuring services to hundreds of restaurant companies nationwide.

with the complicated labor law issues that would be promulgated by EFCA. Furthermore, it will be almost impossible or prohibitively expensive to deal with the onslaught of the multiple legal issues associated with EFCA without in-house counsel.

One of the debilitating aspects of EFCA for a restaurant proprietor is that each restaurant could be separately organized as a union by simply gaining 50% of the employee signatures plus one more signature. This means that a restaurant could be overwhelmed by the element of surprise and find themselves unionized in only as a few days. This requires paperwork, compliance with NLRB rules, potential compulsory arbitration, negotiation of a "first or initial collective bargaining contract" and many other issues of which most restaurant proprietors would not have a clue. Labor lawyers would have a field day with this, but it would be destructive to the restaurant industry and would certainly reduce employment in the industry. Only a handful of the 100,000 or so restaurant companies in the United States are in the Fortune 500. More importantly, even in those companies, the typical franchisee may operate as few as one to seven restaurants. The average franchisee is a small business owner with a back office staff of two to five employees. Requiring restaurant operators to comply with EFCA legislation will present a number of challenges including expensive NLRA compliance, monitoring and understanding regulatory and legal obligations and the attendant human resource and financial costs. The time and cost of acquiring legal and labor union expertise would be prohibitive for the average restaurant franchisee. When you couple this with the significant increase in wages and onerous work rules, many restaurants would simply cease operations if their workforce organized. Accordingly, the restaurant business is not well poised to take on significant new labor expenses and NLRB compliance costs.

Since the restaurant industry provides an abundance of above-minimum wage non-skilled labor employment, it is a large driver of the economy. One of the key components in the industry is the ability to efficiently manage labor scheduling and costs commensurate with the prevailing economic activity. Unlike widget makers that simply manufacture products all day which can be inventoried and sold anytime into the marketplace, restaurants sales are frequently impulse decisions. As a result, restaurants have to be able to deal with enormous variations in traffic, whether it's July 4th, after a Super Bowl victory, or on a snowy or rainy day. The prevailing conditions have remarkably different implications for a restaurant owner. If somebody wants to buy a new iPod and the store is closed, they simply come back the next day. Restaurants don't have the option to inventory their output of goods and services as they are a spontaneous demand service industry. This is a critical point which greatly underscores the economic reality that labor unions will not provide value to the restaurant industry.

Over 50% of the employees in the restaurant business today are between 16 and 24 years of age, are single, are not the head of household nor are they key breadwinners in their abode. Many of these employees are students who live at home and offset tuition and other expenses by their employment. The employment tenure of these employees is

commonly 100 days. The relative abundance of quick service restaurant jobs has been a leading provider of supplemental income to relatively unskilled workers. In addition, these jobs can be found throughout the nation and are not limited to certain regions. The restaurant industry is also a leading employer of minorities and inner-city residents. Passage of the EFCA legislation significantly mitigates this employment as thousands of unprofitable restaurants would be closed due to higher labor costs and inflexible work rules.

Labor unions claim to produce a better employee, e.g. the International Brotherhood of Electrical Workers ("IBEW") ostensibly produces better electricians than non-union concerns. Some of the major trade unions in this country have apprenticeships and function as a guild and therefore can deliver a premium skilled employee. This has very limited applicability in the restaurant business as most of the industry's headcount is in semi-skilled or unskilled positions. Moreover, a significant number of the employees are not looking for a career in the restaurant industry, stay in their jobs briefly and frequently relocate away from a given job market after a brief time.

A large number of restaurants in the United States provide only a job and a source of income for the owner/operator. In other words, there are no economic profits associated with the operation of these businesses. The passage of EFCA would clearly drive up labor costs and many other associated administrative and operating costs. Accordingly, many restaurants, particularly those specifically mentioned, would close as a result of unprofitability due to the compliance costs of EFCA. This would negatively impact the following list of participants and revenue sources in the marketplace:

Exhibit L

1. Inner city unskilled restaurant laborers
2. Restaurant managers
3. Single tenant occupancy real estate operators
4. Real estate service companies
5. County and state property tax collections
6. City, County and State business and sales tax collections
7. City, State and County unemployment funds
8. City, State and County business license revenues
9. City and State income tax collections
10. Federal income tax collections
11. Restaurant proprietors
12. Secondary and tertiary restaurant industry participants such as: manufacturers, suppliers and distributors
13. Shareholders, bondholders and creditors of public and private restaurant companies
14. Part-time workers including students, minorities, inner city residents and working parents

ORGANIZED LABOR AND EFCA IMPLICATIONS

The Elimination of a Secret Ballot

One of the key provisions of Senate Bill 560, the proposed Employee Free Choice Act, is the elimination of an election by the employees of a given concern if in fact a simple majority of employees choose to organize through signature cards. Proponents of the EFCA legislation will argue that elections can still take place. However, the reality is that no organized labor movement would go through the time, cost, scrutiny and uncertainty of an election if there was a belief that 50% plus one employee would vote in favor of unionization. Accordingly, there are four significant problems with the elimination of a secret ballot by employees voting for the unionization of their workforce:

1) EFCA potentially enables organized labor to **eliminate any fair debate** between labor and management concerning the comprehensive impact of organizing the labor of a given company;

2) EFCA reduces advance **notification of an employer** that an organized labor campaign is underway amongst its employees to as little as five days;

3) EFCA eliminates the **privacy of each employee's vote** by eliminating the secret ballot;

4) EFCA is in **opposition to 74 years of US Supreme and Appellate Court decisions, NLRB findings** and even organized labor requests.

Elimination of Fair Debate

Elimination of fair debate leaves employees at risk of voting on a proposition that may have material economic impact on their employer including potentially rendering their own employment at jeopardy. For example, suppose a restaurant proprietor owns 10 quick service restaurants employing 500 workers. Under normal circumstances, these 10 restaurants will stratify into five categories of profitability. The lowest two strata are breakeven and loss. Let us further suppose that three of the 10 restaurants fall within the lowest two strata, which is a very common event in the industry. Since the passage of EFCA would almost certainly lead to costly increases in labor rates and work regulations, it is very likely that the given restaurant proprietor will close the three restaurants in the lower two strata of profitability. This will eliminate approximately 150 full and part-time jobs. In addition, the remaining seven restaurants will be subject to a new profitability stratification based on higher wages and more costly work rules. Accordingly, there may be additional closures based on the proprietor's new higher labor cost structure. Eliminating an employer's right to explain the rubrics of these economic principles to the employees may render employees incapable of voting in favor of their own interest due to

lack of information. Employees could very well sign up for card check and find themselves unemployed as a result directly thereof.

Reduction of Notification of Employers

One of the greatest advantages provided to organized labor by the proposed EFCA legislation is the ability to organize without substantial advance notification of the employer. There are two principal aspects of this requirement which are potentially very injurious to both the employee and the employer. The first issue is the elimination of any information flow from the employer to the employee as highlighted in the previous paragraph. By minimizing employer notification, there is certainty that there will not be enough time for a thorough debate by both sides as in a normal democratic election. But the other issue is that minimizing employer notification disables the employer from making concessions to employees that may obviate the need for a union. It may be that the employees don't really want to pay union fees and simply have a concern over health benefits. Given the pending health-care legislation, there may be no need at all to have a union and employees may be better off saving their money as their employer complies with the federally mandated healthcare regulations. Or perhaps the employer simply believes that a bonus plan should be reworked with more input from employees. This may satisfy the employees and again render organizing unnecessary. Reasonable advance notification also provides the employer with the ability to explain to his or her employees the costs of compliance with the NLRB once the workforce becomes unionized. Small business owners do not have the sophistication, staff or resources to comply with big labor union issues and tactics. Employees have the right to understand this, explained in simple language so they have a clear understanding of what may happen if they support a union.

Privacy of Employees Vote

EFCA potentially undermines employee's rights to privacy in his or her decision to support an organized labor initiative. This gives rise to both potential coercion by union officials as well as other employees or even family members. The idea of a secret ballot was embraced by the National Labor Relations Board in 1939, four years after the passage of the original NLRA Act, as the board recognized that "card check" was an inherently inferior method for determining employee support for a union. In fact, the NLRB found "although in the past we have certified representatives without an election upon [card check], we are persuaded by our experience that the policies of the Act will be best effectuated if the question of representation which has arisen is resolved in an election by secret ballot"[24]. Indeed for the last 70 years, the NLRB has not certified unions based upon card check methodology[25].

---

[24] Cudahy Packing, 13 NLRB 526 (1939).

[25] Card check may be used as a process to determine whether or not to hold an election for organization as a union.

Eliminating the employee's right to secrecy gives rise to abuse and coercion by union organizers. It is well documented that unions have been known to visit people's homes to enlist the support of a spouse or other family members when attempting to organize a workforce. This can both prey on the potential lack of sophistication of a spouse or other family member who is not properly informed of the economics in the given situation. Moreover, in a business where several family members are employed by the same company, unions have historically been known at times to use family pressure to align all the family members with organized labor. Indeed, the 110th Congress held hearings in 2007 in the House Subcommittee on Health, Employment, Labor and Pensions (in discussions over HR 800) in which several former labor organizers testified to heavy-handed tactics used by unions to enlist workers in an effort to unionize their workforce (see Congressional Record 110th U.S. Congress).

Another issue is that, embracing card check, as opposed to the privacy of a secret ballot, may indeed expose many workers who do not support the union effort to abuse from fellow pro-union employees. Union organizers are very experienced in soliciting the efforts of opinion leaders in the workforce to pressure coworkers into supporting union organization. When you combine this pressure with home visits and potential family member lobbying, it can create a situation where an employee will sign anything to end the nonstop lobbying for his or her support of the union's agenda. This can be eliminated by the use of a secret ballot. Finally, the Supreme Court says it best when it describes the secret ballot as "the hard-won right to vote one's conscience without fear of retaliation."[26]

Compulsory Interest Arbitration

While the card check element of EFCA has generated a lot of public interest, the compulsory interest arbitration component of this legislation has a much more profound economic impact on businesses, employees and the restaurant industry. Interest arbitration is not to be confused with collective bargaining agreements, which are negotiated at arms length by companies and their unions without interference from the government or any other party. In collective bargaining, an arbitrator can be called upon to settle grievance arbitration by interpreting a particular aspect of the present agreement. This arbitrator does not have the power to bind anything. They merely interpret the existing documentation in order to attempt to bring both sides of a labor dispute closer together once a proper understanding of the document is achieved. Interest arbitration however, will be used in cases wherein at the inception of a union, ostensibly by card check, there is no agreement on an initial collective bargaining document. Under EFCA, the FMCS interest arbitrator will be empowered to impose terms and conditions of labor agreement on the company and its union in the event they are unable to agree within 120 days. This is decisively contrary to existing court decisions and NLRA rules. In effect, this gives an arbitrator the ability to contractually bind a company to a labor agreement which can ostensibly render a company unprofitable or potentially insolvent.

[26] McIntyre v. Ohio Elections Commission, 514 U.S. 334, 342 (1995).

Compulsory interest arbitration is clearly not the intent of the many existing Supreme Court decisions or the National Labor Relations Act concerning private bargaining between employers and labor unions. Companies are required under NLRA to bargain with the union in good faith, but they are not required to accept a given agreement. The NLRA specifically avoids putting the government in the position of mandating labor terms to a company. Instead, the Act subjects employers to penalties under the enforcement sections of the NLRB for bad faith bargaining. In addition, the Act enables a workforce to strike as a means to compel a company not to behave in a manner inconsistent with judicious execution of a good faith contract. As pointed out by Eugene Scalia[27],

> "it was one of the Supreme Court's first observations about the NLRA - in the decision upholding it from constitutional challenge –that 'the act does not compel agreements between employers and employees. It does not compel any agreement whatever'. *NLRB v. JONES & LAUGHLIN Steel Corp.,* 301 U.S. 1, 45 (1937). Later, in a decision written by Franklin Roosevelt appointee Hugo Black, the court explained the wisdom of this policy. The approach of our labor laws, Justice Black said, has never been "to allow governmental regulation of the terms and conditions of employment." *H.K. Porter Co. v. NLRB* 397 U.S. 99,103, (1970). Instead, its goal has been "to ensure that employers and their employees could work together to establish mutually satisfactory conditions." *Id.* Again, as Justice Black summarized it, our labor laws '"fundamental premise" is "private bargaining under governmental supervision of the procedure alone without any official compulsion over the actual terms of the contract."' *Id.* at 108.

Perhaps the most disturbing aspects of the compulsory interest arbitration provision of the proposed EFCA legislation is the notion that FMCS mediators would be in a position to make decisions affecting business operations and profitability. Managing restaurant operations is a very difficult and perilous occupation. Indeed, the failure rate for restaurant businesses, due to their difficulty of operation, is among the highest among all SIC codes as previously pointed out. Therefore, it would be highly inappropriate to place a FMCS arbitrator, who ostensibly has no experience in managing a company, in a position of determining the labor contract for a restaurant company and its employees. These contracts govern aspects of operations including compensation, scheduling, shift and work rules, benefits, holiday and sick pay, overtime rules as well as hiring and firing practices. It seems to be the antithesis of the nature of the highly competitive restaurant industry to have a government bureaucrat presiding over a contract which inures to the benefit of a unionized workforce.

---

[27] Mr. Scalia is a partner at the Law firm of Gibson, Dunn & Crutcher LLP, Washington, D.C., and former Solicitor, U.S. Department of Labor.

Increased Penalties For Labor Violations Only For Employers

EFCA seeks to increase penalties for NLRA violations for the employers, but not for unions or employees. According to the United States Chamber of Commerce, "the NLRA was designed to be a remedial statute, as opposed to a punitive one. The NLRA expressly provides for two different types of relief, the first designed to prohibit ongoing unfair labor practices and the second to require employers, employees, or unions to take affirmative steps, including reinstatement and backpay, as will effectuate the purposes of the NLRA. The Supreme Court has interpreted these provisions broadly." Unilaterally increasing the NLRA violation penalties for employers, but not the union, seems to be asymmetrical. In addition, it ignores the significant body of evidence of unions in both recruiting potential members as well as coercing companies to accede to union demands which should be subject to increased penalties as well.

EFCA proponents do not disclose the existing remedial power under the current NLRA. For instance, the current Act provides for the return of relocated operations to their original work site, the reinstatement of lost wages during the relocation, mandated bargaining periods, and penalties and reimbursement of expenses for bad faith negotiations. These provisions are also buttressed by the union's ability to seek injunctive relief, petition the NLRB and of course, strike. There are no offsetting rules or relief for an employer who is victimized by predatory union tactics.

Conclusion

Labor unions have provided great benefits to workers in the United States over the course of the last century. Many employers have significantly improved wages, benefits, safety, working conditions and work schedules as a result of pressures from organized labor. It is also important to note that many of the federal agencies such as the Occupational Safety & Health Administration ("OSHA"), US Department of Labor ("DOL") and many other governmental agencies have passed laws protecting the worker and even have their origins as result of labor union activity. These and many other government agencies have been very beneficial to the US labor force and in some respects this has rendered labor unions less critical in industries where there is adequate protection under existing state and federal laws.

It is also important to note that some labor unions have caused severe economic damage to some US industries by imposing uncompetitive wage and benefit structures. This has resulted in the demise a couple of key US industries. As clearly demonstrated in this paper, the restaurant industry is not well-suited for rigid regulatory labor constraints. If a restaurant's labor cost cannot be significantly managed, the restaurant will ultimately fail.

Consequently, externally imposed labor constraints will generally present an insurmountable risk to restaurant operators leading to many restaurant closures.

An often overlooked issue in the card check debate is that many workers do not seek or request certain benefits such as health care or other benefits due to their short-term outlook or part-time employment status. The restaurant industry has a significant number of short-term and part-time employees who do not consider their job to be permanent employment or a career path. Accordingly, they do not expect the level of benefits that you may expect from long-term employment. In fact, many of these employees would much rather trade those benefits for wages if they had the option.

There are critical aspects of EFCA that do not fit the restaurant industry well. The unique short-term outlook and part-time employment characteristics of the restaurant industry's labor force present key obstacles to managing labor issues for a work force that experiences rapid turnover. If a quick service restaurant is unionized, there would be a constant flurry of employees both joining and quitting the union each month since restaurant employment turnover averages over 190% nationwide. This would create a chaotic and costly bureaucratic mess of keeping track of all the regulatory issues associated with these employees. Moreover, as strenuously pointed out in this paper, most of the restaurant operators do not have the financial means or the sophistication to properly understand and execute the legal and regulatory aspects of unionized workforce. This would be disastrous for many small proprietors that would fall into unintended consequences for regulatory misunderstandings.

Most of the labor unions today are very sophisticated and have become adept at negotiating and winning significant concessions from employers. As pointed out in this paper, a significant number of the restaurants in United States have very meager profits and cannot underwrite the expense of wage concessions. For example, the minimum-wage increases legislated during the past two years pushed hundreds of restaurants into the zone of unprofitability as a result of higher labor costs. Hundreds of restaurants were closed as a result of significantly higher labor costs. This raises the age-old question of market-based wages versus externally imposed wages. But the market determines the cost of ingredients, rents, and the prices you can charge customers and therefore the financial model breaks down with externally imposed wages.

It is important to note that it’s not just the employee’s wage that increases when a labor concession is granted to a union. All of the other expenses associated with employment including unemployment compensation, payroll tax, workers compensation, Medicare, local tax and Social Security increase as well. This puts enormous pressure on businesses that have traditionally survived on unskilled labor wages. If these wages are meaningfully increased, a significant number of restaurants would close for lack of profitability. This is plain mathematics.

Finally, there are serious flaws in EFCA's concept of labor union organization as presented in HR 1409. For instance, mandatory binding arbitration led by a FMCS representative can lead to serious flaws in negotiation because FMCS representatives do not typically have, nor can they be expected to have the requisite skills to understand market-based business management. The ability to organize a union without notification of the employer is also a seriously flawed aspect of EFCA. Employers can often make concessions to labor force that may well satisfy them and obviate the need for an organized labor union and all of the associated bureaucracy, cost and union dues.

BIBLIOGRAPHY

Chamberlin, Edward H., Philip D. Bradley, Gerard D. Reilly, Roscoe Pound. Labor Unions and Public Policy. Washington, D.C. American Enterprise Association. 1958

Craypo, Charles. The Economics of Collective Bargaining. Washington, D.C. The Bureau of National Affairs, Inc. 1986

Epstein, Richard. The Case Against the Employee Free Choice Act. The Hoover Institution of Stanford University.

Goldstein, Hope. Critical Issues for Employers – Union Organizing and What Employers Need to Know About the Changing Rules. Bryan Cave LLP. 2008.

Mitchell, John. Organized Labor, Its Problems, Purposes and Ideals and the Present and Future of American Wage Earners. Philadelphia, PA. American Book and Bible House. 1903

Rees, Albert. The Economics of Trade Unions Second Edition Revised. Chicago and London. The University of Chicago Press. 1962, 1977

Taft, Philip. Organized Labor in American History. New York, Evanston, and London. Harper & Row. 1964

U.S. Chamber of Commerce. The Employee Free Choice Act: Piercing the Rhetoric. Labor, Immigration & Employee Benefit Division. 2009.