March 17, 2009

The Honorable Edward M. Kennedy
The Honorable Michael B. Enzi
Committee on Health, Education, Labor, and Pensions
United States Senate
Washington, DC 20510

The Honorable George Miller
The Honorable Howard "Buck" McKeon
Committee on Education and Labor
United States House of Representatives
Washington, DC 20515

Dear Chairmen Kennedy and Miller and Ranking Members Enzi and McKeon:

The United States Council for International Business ("USCIB") and the United States Chamber of Commerce ("U.S. Chamber") are writing to bring to your attention how provisions of the *Employee Free Choice Act*, H.R. 1409, S. 560 ("EFCA") contradict principles of international labor law, as they have been defined by the International Labor Organization ("ILO").

The U.S. Chamber of Commerce is the world's largest business federation representing 3 million businesses and organizations of every size, sector, and region.

USCIB serves as the U.S. affiliate of the International Organisation of Employers (IOE), which itself is part of the tripartite ILO. USCIB provides business representation on the President's Committee on the ILO, the Tripartite Advisory Panel on International Labor Standards ("TAPILS"), and the National Advisory Committee for Labor Provisions of U.S. Free Trade Agreements.

Both the U.S. Chamber and USCIB oppose enactment of the *Employee Free Choice Act*. While there are many reasons for our opposition to this bill, we are particularly concerned with its provisions that seek to modify the National Labor Relations Act to effectively replace the secret ballot union election with card check recognition, and to force parties that have not reached an initial collective bargaining agreement to have an arbitrator set the contract's terms. We believe these provisions are inconsistent with principles of international labor law, namely the principles of freedom of association and effective

recognition of the right to collective bargaining as set forth in the 1998 ILO Declaration on Fundamental Principles and Rights at Work ("1998 Declaration").

As you know, although the U.S. has not ratified ILO Conventions 87 and 98 on these subjects, the U.S. Government is bound by the 1998 Declaration, and its principles are cited in numerous pieces of U.S. legislation and key provisions of trade agreements.

Through case examinations by its Committee on Freedom of Association, the ILO has consistently upheld the secret ballot election to be the preferred means for workers to select a union. The ILO prefers the secret ballot election because the risk of reprisal is significantly diminished where workers can express their sentiments in the secrecy of the voting booth. Under EFCA, however, the authorization cards used to determine a union's representative status necessarily reveal the identity of the signer. That revelation creates a risk of reprisal, even if the reprisal comes from those who might support the union rather than those who oppose it or the employer.

The ILO also favors the secret ballot election within legal frameworks where only one union may be the exclusive representative of a group of employees. The NLRA creates such a legal framework. Again, EFCA's effective elimination of the secret ballot election in favor of card check runs contrary to this principle.

Finally, where government authorities have the capacity to conduct secret ballot representation elections, the ILO prefers them. Certainly, in the United States the government has such capacity, as it has been conducting secret ballot union elections through the National Labor Relations Board for well over half a century.

EFCA's proposal to impose compulsory arbitration similarly contradicts principles of freedom of association and collective bargaining as the ILO has defined them. The ILO does not encourage compulsory arbitration mechanisms to settle labor contracts because they interfere with voluntary collective bargaining. Under EFCA, if a party becomes dissatisfied with negotiations for a first contract, without doubt the most difficult of all contracts, it can unilaterally disengage from the table and have the contract terms set by an arbitrator. Such a procedure is antithetical to the voluntary nature of collective bargaining because it creates an incentive not to reach agreement. Moreover, the structure of EFCA also limits the right of workers to strike for a first contract. While strikes are hardly to be encouraged, economic leverage in the form of the strike is a cornerstone of American labor law and the international principles of freedom of association.

In addition to the general concern that compulsory arbitration to set terms of a contract does not encourage voluntary collective bargaining, the ILO is also critical of such procedures if their application is not limited solely to employees in the public sector or those in the private sector who perform essential services which, if interrupted, would endanger the life, personal safety or health of the public. EFCA makes this procedure applicable to all employers subject to the jurisdiction of the National Labor Relations Act without regard to the nature of the work performed.

These arguments are elaborated in more detail in a forthcoming article by Stefan Jan Marculewicz that we have attached for your review.[1]

In sum, we believe that if enacted in its current form, the provisions of EFCA that effectively eliminate the secret ballot union election and impose a compulsory arbitration scheme to set the terms of initial collective bargaining agreements are inconsistent with the principles of freedom of association and effective recognition of the right to collectively bargain. We ask that you seriously consider the ramifications of such legislation and that you preserve the cornerstones of American industrial democracy, which include the secret ballot election and the right to voluntary collective bargaining.

We look forward to working with you on this matter.

Sincerely,

The United States Council for International Business

Ronnie L. Goldberg
Executive Vice President, Policy and Program
U.S. Employer Representative to the Governing Body of the ILO

The United States Chamber of Commerce

Randel K. Johnson
Vice President, Labor, Immigration, and Employee Benefits

[1] Marculewicz, Stefan Jan, *Elimination of the Secret Ballot Union Election and Compulsory Arbitration Under the Employee Free Choice Act – A Violation of Fundamental Principals of International Labor Law*, 2009 INTERNATIONAL ORGANISATION OF EMPLOYERS INTERNATIONAL LABOR AND SOCIAL POLICY REVIEW (Geneva, Switzerland, forthcoming, June 2009).