

The Employee Free Choice Act: Wal-Mart's Last Stand Against Unionization?

Wal-Mart has a long history of opposing unionization. Sam Walton was notorious for trying to keep unions out of his stores. In fact, Walton hired union-busting lawyer John E. Tate to quash some of the earliest efforts to organize stores in Missouri. Despite a successful unionization effort in China, Wal-Mart will not budge from its position in the United States and Canada. However, with the election of Barack Obama and the potential passage of the Employee Free Choice Act, Wal-Mart is clearly afraid that its anti-worker practices of the last half century might be coming to a close. Wal-Mart says its associates do not need a union. Wal-Mart Watch, however, believes that after years of low wages, expensive health care benefits, and poor working conditions, Wal-Mart workers can finally see a light at the end of the tunnel.

WAL-MART'S ANTI-UNION REPUTATION

"We like driving the car and we're not going to give the steering wheel to anybody but us." - Lee Scott's response to a question about card check¹

Human Rights Watch releases report on Wal-Mart and union busting. In 2007, the respected human rights watchdog group, Human Rights Watch, released a report lambasting Wal-Mart's union-busting policies and practices in the United States. According to the report, "while many American companies use weak U.S. laws to stop workers from organizing, the retail giant stands out for the sheer magnitude and aggressiveness of its anti-union apparatus." [Human Rights Watch "Discounting Rights," May 2007]

Wal-Mart warns of Democratic Presidential win. More recently, it was revealed that Wal-Mart has been warning its hourly supervisors of the likelihood of unionization if Democrats won the November election. One supervisor said: "I am not a stupid person. They were telling me how to vote." Workers say they used intimidation by emphasizing all the negative effects of unionization and warning them if the Employee Free Choice Act passed, it would speed up the union process. [Wall Street Journal, 8/1/08]

Butchers cut out of Wal-Mart stores. In February 2000, ten employees of the Wal-Mart meat department in a Jacksonville, Texas store elected United Food and Commercial Workers (UFCW) as their union. Wal-Mart immediately ended their entire network of in-store butcher departments. The company refused to recognize and negotiate with the meat cutters union, and instead traded the work of experienced employees for the convenience of pre-cut and pre-packaged meats. [Occupational Health & Safety, 3/16/08]

No relief in court. After taking the case to the US Court of Appeals for the District of Columbia, UFCW was faced with a test they simply could not pass. The court ruled that UFCW failed the legal standard 'community-of-interest test' and a unanimous three-judge appellate panel upheld Wal-Mart's right to eliminate butcher departments ruling they had no particularly special skills. The court placed the incident as analogous to a typical closing, effectively cutting butchers out of the picture for good. [Occupational Health & Safety, 3/16/08]

Nine months later in Canada. After the creation of a certified UFCW Local 503 chapter at a Wal-Mart store in Jonquière, Quebec, Wal-Mart employees there would soon find themselves out of a job. In August 2004, the union gained certification and attempted to bargain with Wal-Mart but was unable to reach a settlement. On February 1, 2005, the same day that the Minister of Labour granted the union's request for contract arbitration,

¹ "It's time to give voters the liberalism they want," Wall Street Journal, 11/19/08



Wal-Mart announced that it would close the Jonquière store. The store was closed on April 29, 2005. [Human Rights Watch “Discounting Rights,” May 2007]

Wal-Mart forced to change its anti-union ways. Three years later, another Canadian shop became at risk for trying to unionize. According to UFCW officials, due to union efforts at a Wal-Mart Tire & Lube Express in Gatineau, the company shut it down. The garage has been unionized since 2005, and the workers recently turned in their first collective bargaining agreement. “The contract will be a first in North America and is expected to have an impact on Wal-Mart unionization efforts across Canada,” said the president of the local union. As of August 2008, a Quebec arbitrator decided to impose a collective bargaining agreement on Wal-Mart, which is the first of its kind in the history of the company’s history. A UFCW Canada representative said that the deal would give workers raises of 35 to 50 percent and more vacation. [Canadian Broadcasting Company, 8/15/08 and 10/17/08; *The Gazette*, 8/6/08]

A DIFFERENT TUNE IN CHINA

Catering to China. In late July, Chinese media outlets announced that Wal-Mart planned to sign collective bargaining contracts with all of its employees in China. This was right after the company signed its first agreement in Shenyang which resulted in an 8% pay increase for all of the workers. [*China Labor Bulletin*, 8/4/08]

ACFTU- Yes; UFCW- No. In China, Wal-Mart operates more than 100 stores and employs 48,589 people. The company also sources millions of dollars worth of goods from the country, and hence is keen to play by their rules. According to Dave Orlins, president of the National Committee of U.S. China Relations, it is important to negotiate with ACFTU for any foreign company to prosper. "To expand in China, one needs government support," he says. "This is what you should be doing in China." [*Forbes*, 7/25/08]

WHY THE EMPLOYEE FREE CHOICE ACT IS IMPORTANT²

The Employee Free Choice Act is a *bipartisan* bill designed to provide workers with a fair opportunity to bargain with employers for better wages, benefits and working conditions.

Median incomes fall. “From 2000 to 2007, the income of the median working-age household fell by \$2,000 – an unprecedented decline. In that time, virtually all of the nation’s economic growth went to a small number of wealthy Americans. An important reason for the shift from broadly-shared prosperity to growing inequality is the erosion of workers’ ability to form unions and bargain collectively.”

In recent years, despite a growing economy, the middle class has been squeezed. Corporate profits and executive compensation have skyrocketed, but the middle class has seen their wages stagnate, while the costs for basic needs like healthcare, education, food, energy and housing continue to increase.

Workers who belong to unions earn 30 percent more than nonunion counterparts. In addition, they are 62 percent more likely to have employer-provided health coverage and four times more likely to have pensions.

² U.S. House of Representatives – Committee on Education and Labor News Release. “Education and Labor Committee Approves Employee Free Choice Act.” February 14, 2007. Online at: http://www.house.gov/apps/list/speech/edlabor_dem/EFCAFeb14.html. Also see American Rights at Work, online at: <http://www.americanrightsatwork.org/employee-free-choice-act/home-102/>; http://www.epi.org/issues/category/labor_policy



The current process for forming unions is tilted in favor of those who oppose them. Employees who are active union supporters have a one-in-five chance of being fired for legal union activities. Many employers resort to spying, threats, intimidation, harassment and other illegal activity in their campaigns to oppose unions.

The penalty for illegal activity, including firing workers for engaging in protected activity, is weak and does little to deter law breakers. For example, an employer found guilty of illegally firing an employee for union activity must only give back pay to that employee—minus whatever he or she earned in the interim. Many employers find the punishment for breaking the law a bargain if firing a pro-union employee scares others from supporting the union.

Even when employers don't break the law, the deck is stacked against union supporters. The employer has all the power; they control the information workers can receive, can force workers to attend anti-union meetings during work hours, can force workers to meet with supervisors who deliver anti-union messages, and can even imply that the business will close if the union wins. Union supporters' access to employees, on the other hand, is heavily restricted.

WHY WAL-MART EMPLOYEES NEED THE EMPLOYEE FREE CHOICE ACT

Wal-Mart on Wages and Scheduling:

Wal-Mart offers poverty level wages. Using Wal-Mart's figures, a “full-time” employee at 34 hours per week, making the Wal-Mart average wage of \$10.86 per hour, will earn \$19,200.48 per year. The federal government's definition of poverty for a family of four in the contiguous United States is \$21,200. [2008 Wal-Mart Employee Handbook; 2008 HHS Poverty Guidelines]

Most Wal-Mart retail jobs pay far below the national average wage. Of Wal-Mart's top retail jobs (Sales Associate, Cashier, Team Leaders, Overnight Stocker) Wal-Mart typically pays 26-37% less than the national average for the same jobs in the retail industry. [Brennan Center for Justice, Economic Policy Brief, No. 2, August 2005, http://walmartwatch.com/img/documents/brennan_center.pdf]

Wal-Mart faces a fine in Minnesota suit involving work breaks. A state judge in Minnesota has ruled that Wal-Mart Stores violated state laws on rest breaks and other wage matters more than 2 million times between 1998 and 2004 and as a result could face more than \$2 billion in fines. [*New York Times*, 7/2/08]

U.S. Labor Department orders Wal-Mart to pay back overtime wages. In January, the U.S. Labor Department announced that Wal-Mart must pay nearly \$34 million in back wages and interest to employees who were not paid overtime hours. The company said that because of errors in calculation, it underpaid 87,000 employees nationwide. At least 57 other wage-and-hours cases have been filed across the U.S. against the world's largest retailer, and many of them are awaiting class-action certification, according to company filings. [*Washington Post*, 1/26/07]

Wal-Mart managers use extreme measures to hold down labor costs. Some of the methods cited in the lawsuits used by managers to hold down labor costs include forcing employees to work off the clock, requiring workers to skip lunch and rest breaks and manipulating time and wage records. An internal audit performed by Wal-Mart in July 2000 indicated these types of violations were and had been a massive problem companywide for years. [Wal-Mart Watch: Wal-Mart's Wage and Hour Violations Fact Sheet; http://walmartwatch.com/img/blog/wage_and_hour.pdf]



WAL*MARTWATCH

Wal-Mart has not learned from its past. Wal-Mart is currently facing more than 80 lawsuits at various stages of the legal process. Four class action lawsuits have either been certified or affirmed since May of this year, and trial in a fifth recently commenced. [Wal-Mart Watch: Wal-Mart's Wage and Hour Violations Fact Sheet; http://walmartwatch.com/img/blog/wage_and_hour.pdf]

Wal-Mart threatens workers who allege unpaid wages. In 2006, cashiers at Wal-Mart Stores in Texas asked a U.S. judge to order the company to stop threatening to fire workers who join a lawsuit alleging unpaid wages. The workers claim that Wal-Mart has required or permitted hourly employees to work off the clock without compensation, in violation of U.S. labor laws. The lawsuit is one of more than 70 filed against Wal-Mart in the United States claiming violations of wage-and-hour laws. [*International Herald Tribune*, 8/22/06]

Wal-Mart and Workplace Discrimination:

Women join class action lawsuit against Wal-Mart. Wal-Mart faces the nation's largest workplace gender-bias lawsuit. In June 2004, U.S. District Court Judge Martin Jenkins granted class-action status to 1.6 million current and former female Wal-Mart employees who charge the company with paying women less and offering them fewer opportunities for promotion. [*Dukes v. Wal-Mart Stores, Inc.*]

Wal-Mart paying women less than men. In 2001, a suit against Wal-Mart was filed alleging that Wal-Mart discriminates against female employees by paying less-qualified men higher wages than women and promoting less-qualified men to management positions ahead of women. Among the plaintiffs arguments are that in 2001, 67 percent of hourly workers and 78 percent of department managers were women, but only 36 percent were assistant managers, 14 percent store managers and 10 percent district managers. A federal judge certified the case as a class-action lawsuit in June 2004. [*Arkansas Democrat-Gazette*, 1/28/07]

Wal-Mart pays out for violating the Americans with Disabilities Act. In 2005, a U.S. District court jury in Long Island ordered Wal-Mart to pay \$7.5 million for violating the Americans with Disabilities Act (ADA). The jury awarded Patrick Brady, a 21-year-old man with cerebral palsy, \$5 million in punitive damages and another \$2.5 to compensate him for emotional pain and suffering. Brady's lawyer, Douglas Wigdor, said he believed the jury was influenced by the fact that Wal-Mart is subject to a 2001 court-ordered agreement related to previous violations of the ADA. [*Newsday (New York)*, 2/25/05]

Wal-Mart settles truck driver lawsuit. Nationally, 15% of truck drivers are African-American. However, Wal-Mart's trucking fleet lacks the same diversity. Recently it was determined that African-Americans comprised only 4-6% of Wal-Mart's fleet, which employs 10,000 truck drivers. A discrimination class action was filed, and in May of 2007, a district court judge ruled that Wal-Mart's hiring policies created a common group of potential plaintiffs (African -American truckers who either were not hired or were deterred from applying for Wal-Mart positions). According to the complaint, "the application and hiring practices employed by the nation's largest retailer had the effect of preventing many black drivers from getting those jobs, or in many cases even knowing that the jobs were available." On February 20, 2009, Wal-Mart announced that it would pay \$17.5 million to settle this class-action lawsuit. [*Arkansas Democrat Gazette*, 02/26/09; <http://walmartdriverclass.com/>]

Wal-Mart and Labor Abuse:

Child labor not just an issue in supplier factories. A Wal-Mart internal audit of one week's time-clock records for roughly 25,000 employees found 1,371 instances in which minors apparently worked too late at night, worked during school hours or worked too many hours in a day. It also found 60,767 apparent instances



WAL*MARTWATCH

of workers not taking breaks, and 156,705 apparent instances of employees working through meal times. [*New York Times*, 1/13/04]

Wal-Mart under investigation. In 2005, Connecticut Governor M. Jodi Rell ordered the state Labor Department to launch an intensive review of Wal-Mart's labor practices in Connecticut. The federal Labor Department had previously cited Wal-Mart for nearly 90 child labor violations - most of them in Connecticut - for having children under 18 operate dangerous machinery such as chainsaws, paper balers and forklifts. Wal-Mart paid a \$135,540 fine, but denied any wrongdoing. [*Hartford Courant*, 2/19/05]

Wal-Mart strikes a deal with Department of Labor. In January 2005, Wal-Mart reached a settlement with Department of Labor for violations pertaining to the Fair Labor Standards Act. Wal-Mart paid a \$135,540 fine after an investigation found that the company allowed 85 workers, aged 16 and 17, to participate in activities "including loading and occasionally operating or unloading scrap paper balers, and operating fork lifts." While Wal-Mart denied any wrongdoing, they signed an agreement with the department's Wage and Hours Division to make sure they would not have any problems in the future.

[http://walmartwatch.com/research/documents/wal_marts_sweetheart_deal_with_the_department_of_labor/]

FEATURES OF THE EMPLOYEE FREE CHOICE ACT

The National Labor Relations Act states: "Employees shall have to the right to self organization to form, join, or assist labor organizations...." However, employers have turned the NLRB election process into a management-controlled election process—the employer has all the power, controls the information workers can receive and routinely undercuts the process by intimidating, harassing, coercing and even firing people who try to organize unions. According to the study "Free and Fair? How Labor Law Fails U.S. Democratic Election Standards,"³ American workers face an uphill battle when trying to form a union, despite what corporations say. Under current rules, employees are restricted from openly disseminating information and from expressing their opinions, employers have greater access to voters, employees are not protected against economic coercion, workers face open ended delays, there is virtually no regulation of election spending.

By the time employees vote in an NLRB election, if they can get to that point, a free and fair choice isn't an option.⁴ EFCA seeks to rectify these realities through the following:⁵

- **Majority Sign-Up:** If a majority of workers in a proposed bargaining unit sign cards indicating they want representation, the National Labor Relations Board would require the employer to recognize the union, ending the pattern of employer threats, harassment and firings that commonly precede union elections.
- **First Contract Mediation and Arbitration:** A remedy to employers' stalling tactics, this provision would allow either the union or employer to seek federal mediation if a contract hasn't been reached after 90 days of bargaining. If mediation is unsuccessful after 30 days, the parties would be subject to binding arbitration.

³ "Free and Fair? How Labor Law Fails U.S. Democratic Election Standards," American Rights at Work, June 2005; <http://www.americanrightsatwork.org/dmdocuments/ARAWReports/FreeandFair%20FINAL.pdf>

⁴ Communications Workers of America. Online at: <http://www.cwa-union.org/efca/>.

⁵ Employee Free Choice Act – legislative history of H.R. 800, available online from [The Library of Congress](http://www.thelibraryofcongress.org).



WAL*MARTWATCH

- **Stronger Penalties for Violations:** Employers who willfully and repeatedly violate workers' rights during organizing and bargaining would face civil fines up to \$20,000 per violation, plus triple back pay for workers who have been illegally fired or discriminated against during union campaigns.

EMPLOYEE FREE CHOICE ACT - LEGISLATIVE HISTORY⁶

- H.R. 800 was introduced into the United States House of Representatives on February 5, 2007, by its primary sponsor, Rep. George Miller, a Democrat from California's 7th District. The bill was referred to the House Committee on Education and Labor.
- Debate on the bill took place on March 1, 2007. After three proposed amendments were voted down, H.R. 800 was passed by a vote of 241-185. Afterwards, H.R. 800 was sent to the United States Senate, and placed on the Senate Legislative Calendar under General Orders on March 2, 2007.
- The Senate version, S. 7877, was considered on June 19, 2007. Democrats attempted to enforce cloture on the bill, placing a time limit on consideration of the bill, thereby avoiding a possible Republican filibuster. The cloture motion received a majority of votes, 51-48, but failed to attract the needed three-fifths majority of the full Senate in order to pass. When cloture failed, the bill languished and no more action was taken.
- On March 10, 2009, Representative George Miller (D-CA) and Senator Tom Harkin (D-IA) introduced the Employee Free Choice Act.

EMPLOYEES SPEAK OUT AGAINST...

Wal-Mart's Wage and Hour Practices:

Wal-Mart plays games with a worker's paycheck. "They increased my pay, then slashed my hours so that my check is a fraction of what it used to be. The full-time sales associates in my department, other than the department manager, have been cut to 25-35 hours a week instead of 40."

40 Hours a week is part-time? "I have worked for about 8 months now at Wal Mart, and have not received promised benefits although I work full-time hours. I was told it was because I am classified as a part time employee. Uh, hello? 40 hours a week is part time??"

Anonymous on burning overtime: "They make us "burn our overtime," which associates call "buying back our overtime." If you have overtime they make us burn it on our lunches. Example: say you have one hour overtime. We get an hour unpaid lunch, but they have us take a *two hour* lunch instead, prior to our Friday [payday]. It is against Federal Law according to the Federal Wage Commission for them to make us do this."

Wal-Mart's Discriminatory Practices:

Wal-Mart's quest for a younger, cheaper workforce "I have noticed that my store seems to schedule all the

⁶ Employee Free Choice Act – legislative history of H.R. 800, available online from [The Library of Congress](http://harkin.senate.gov/pr/p.cfm?i=309344); <http://harkin.senate.gov/pr/p.cfm?i=309344>



WAL*MARTWATCH

older people for late night duty...specifically the 2-11 shift. Some have successfully battled for early hours, but now we are being told that if we change our availability, we will be knocked back to part-time."

Discrimination at a Nevada deli. "I know for a fact that my male co-workers are getting higher wages than I do with no experience, and I have 8 years experience."

Anonymous on age-based terminations. "Wal Mart is systematically targeting anyone over 40 years of age for firings through systematically assigning the heaviest, most back breaking jobs to that class of people in the facility. Managers are encouraged to pressure senior employees into quitting and firing to ensure that young strong backs are maintained in the facility."

L.R. in Florida discusses the move towards more part-time employees. "They are cutting the hours of the full time people and still hiring new people. When an associate asks if they were going to have to do the same work in 6 hours they were doing in 8 management replied: 'Yes and if the older people can't keep up they will have to leave.'"

Wal-Mart ignores deaf employee's request. "I tried to apply for a promotion and they required me to do an interview over the phone, which was difficult considering there was no accommodation made for my disability."

S.P. and the leave of absence trick. "I had a back injury, which was caused by the conditions of my job at Wal-Mart. They pulled the leave of absence trick on me. They said that I had been off work for too long, and that they could fill my position with a new associate."

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WAL*MARTWATCH