ISSUE BRIEF

NLRB and OSHA Attorneys' Fees

The Fair Access to Indemnity and Reimbursement (FAIR) Act would require the National Labor Relations Board (NLRB) and the Occupational Safety and Health Administration (OSHA) to pay attorneys' fees and expenses to "small businesses" that prevail in NLRB and OSHA enforcement actions. The FAIR Act thus would undermine enforcement of core workers' rights—the right of workers to form unions free from employer interference and the right to a safe and healthy workplace. Congress must oppose the FAIR Act and strengthen—rather than weaken—enforcement of these core workers' rights.

Proponents of the FAIR Act claim it provides a remedy against prosecutorial overreaching by the government, but the Equal Access to Justice Act (EAJA) of 1980 already provides such a remedy. The EAJA provides for awards of attorneys' fees and expenses to small businesses that prevail against any of several government agencies when the government position is not "substantially justified," or when the government's demand is "substantially in excess of the judgment finally obtained and is unreasonable when compared to the judgment." The FAIR Act, by contrast, would impose a strict, no-fault "loser pays" rule on the NLRB and OSHA, forcing them to pay attorneys' fees and expenses whenever any small business prevails against them.

The FAIR Act would discourage "substantially justified" enforcement actions. Unlike the EAJA, the FAIR Act would force the government to pay fees and expenses to a prevailing small business even when the government position is "substantially justified." If the NLRB or OSHA had *any* doubts about its chances of prevailing, it would be less likely to pursue even "substantially justified" actions.

NLRB and OSHA enforcement always involves uncertainty. When the NLRB and OSHA decide whether to bring enforcement actions, they can never be absolutely certain of prevailing. They cannot predict how credible witnesses will be or whether the law will be reinterpreted during the course of litigation. And sometimes they have a legitimate need to bring test cases to clarify new areas of the law.

The FAIR Act would encourage violation of the law. If the NLRB and OSHA failed to pursue actions that are "substantially justified," many more violations of the NLRA and the Occupational Safety and Health (OSH) Act would go unpunished. And if NLRA and OSH Act enforcement were further weakened, employers would have fewer disincentives to violate the law.

The FAIR Act is a radical departure from the "American Rule." Under the traditional American Rule, which applies in virtually every other judicial forum in the country, each party to litigation bears its own expenses. FAIR Act proponents offer no justification for singling out the NLRB and OSHA for such a radical departure from the American Rule.

The FAIR Act would promote litigation, not cooperation. Proponents of the FAIR Act claim it would promote cooperation between employers and the NLRB and OSHA. On the contrary, the FAIR Act would encourage defendants who have violated the law to litigate rather than settle—on the chance that the government might be unable to prove its case, in which case they would be reimbursed for their attorneys' fees and expenses. Fewer settlements and lengthier litigation would delay compliance with the NLRA and the OSHAct by violators.

The FAIR Act would drain OSHA and NLRB enforcement resources. Unless accompanied by a substantial increase in appropriations to pay for awards of attorneys' fees and expenses to prevailing parties, the FAIR Act would force the NLRB and OSHA to divert resources away from enforcement of the NLRA and the OSH Act.

There is no evidence that the EAJA does not work. The EAJA is most commonly used in Social Security cases, in which the government almost always loses. The EAJA also has been applied successfully against both the Labor Department's OSHA and the NLRB. In fact, according to a 1998 General Accounting Office report (GAO/HEHS-98-58R), in fiscal year 1994 the NLRB and the Labor Department ranked fourth and fifth out of 15 agencies in the number of judicial decisions issued with respect to EAJA applications.

The FAIR Act definition of "small business" is unusually broad. The FAIR Act defines "small business" as having fewer than 100 employees, a broader definition than in other employment-related statutes. The Age Discrimination in Employment Act (ADEA), for example, excludes businesses with fewer than 20 employees. Title VII of the Civil Rights Act exempts businesses with fewer than 15. According to the Small Business Administration, 98 percent of all private non–farm employers have fewer than 100 employees.

The FAIR Act would not benefit union members. The FAIR Act provides for awards of fees and expenses to unions that prevail against the NLRB, but only about 7 percent of charges brought by the NLRB are against unions. OSHA brings enforcement actions only against employers.

Congress should strengthen OSH Act and NLRA enforcement. Rather than tie the hands of OSHA and the NLRB, Congress should significantly strengthen enforcement of the NLRA (see "National Labor Relations Act") and the OSH Act (see "Occupational Safety and Health").