

# Background

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## Employee Free Choice Act Effectively Eliminates Secret Ballot Organizing Elections

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Organized labor's highest legislative priority is the deceptively named Employee Free Choice Act (EFCA). EFCA replaces secret ballot elections—the method by which most workers join unions—with publicly signed union cards. While eliminating secret ballots is extremely unpopular, many EFCA supporters argue that the legislation merely gives workers the choice between organizing using secret ballots or publicly signed cards. This argument is false; nothing in the legislation gives workers any control over union organizing tactics. Though EFCA still allows for secret ballot elections under unusual circumstances, standard union organizing tactics ensure that publicly signed union cards will dominate the recognition process. As a result, the misnamed Employee Free Choice Act effectively eliminates secret ballot elections.

### The Current System

Under the National Labor Relations Act (NLRA), workers may be organized in one of two ways: card-check recognition or secret ballot elections. To begin organizing workers, a union must solicit employee signatures on union authorization cards. Once the union has collected signatures from enough employees—a minimum of 30 percent—the union submits the cards to the company and requests the company recognize the union. This process is called card-check recognition. Very few employers accept card-check as the sole means of recognition. Indeed, between 1998 and 2005 only 13 percent of new AFL-CIO members joined through card-check without an election.<sup>1</sup>

### Talking Points

- Unions argue that the Employee Free Choice Act allows workers to choose between card-check and private votes, but it does not. Only union organizers make that decision.
- Private votes could only occur if unions turned in signed cards from a minority of workers, but unions never do so.
- Union presidents openly state they will not seek elections.
- The misnamed Employee Free Choice Act effectively eliminates secret ballot union elections and strips workers of their privacy.

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Employers routinely refuse to recognize unions on a card-check-only basis because publicly signed cards do not reflect employees' preferences. Public card signing exposes workers to pressure, harassment, and threats from the union.<sup>2</sup> Even union organizing guidebooks state that a worker's signature on a union card does not mean that worker supports the union.<sup>3</sup>

If, as in most instances, the employer doubts the cards reflect its workers' preferences, union organizers then submit their cards to the National Labor Relations Board (NLRB) and request an election. The typical election occurs six to seven weeks after the union submits its petition.<sup>4</sup> If a majority of workers—expressing their choice in the privacy of the voting booth—support the union, then the company must begin bargaining with it. If most workers vote against the union, then it does not represent them and must cease its organizing activities. Unions win recognition in over 60 percent of these elections.<sup>5</sup>

### Card-Check

EFCA requires employers to recognize a union—without an election—once organizers collect cards from a majority of employees.<sup>6</sup> Indeed, the act states that once the union submits signatures from

over 50 percent of the employees to the NLRB, it must certify the union without an election. Under EFCA, holding a secret ballot election once unions collect cards from a majority of workers would become illegal.

Additionally, a card-check-only recognition process strips workers of their privacy. Polls show that most Americans strongly oppose denying workers the privacy of the voting booth when deciding whether to join a union.<sup>7</sup> In response to such criticism, unions now argue that EFCA does not end secret ballot elections. Instead, proponents argue that EFCA gives workers the choice between organizing using public card-check or private elections.<sup>8</sup>

Unions make this claim because union organizers can call for an organizing election after cards have been signed by at least 30 percent of employees.<sup>9</sup> Since card-check recognition under EFCA occurs after organizers submit cards signed by a majority of workers, secret ballot elections could—in theory—occur under EFCA if organizers submitted cards signed by 30 to 50 percent of workers.

In practice this scenario will not happen. Nothing in the legislation gives workers any control over what organizing method unions use. That decision is left to union organizers. Organized labor's well-documented preference for card-check recognition

1. Rafel Gely and Timothy Chandler, "Card Check Recognition: New House Rules for Union Organizing?" *Fordham Urban Law Journal*, Vol. 35 (2008), p. 247, Table 2.
2. James Sherk, "How Union Card Checks Block Workers' Free Choice," Heritage Foundation *WebMemo* No. 1366, February 21, 2007, at <http://www.heritage.org/Research/Labor/wm1366.cfm>.
3. James Sherk, "Unions Know that Card Check Does Not Reveal Employees' Free Choice," Heritage Foundation *WebMemo* No. 1386, March 7, 2007, at <http://www.heritage.org/Research/Labor/wm1386.cfm>.
4. Office of the General Counsel, National Labor Relations Board, *Summary of Operations: Fiscal Year 2007*, Memorandum GC 08-01 Revised, December 5, 2007, at [http://www.nlr.gov/shared\\_files/GC%20Memo/2008/GC%2008-01%20Summary%20of%20Operations%20FY%202007.pdf](http://www.nlr.gov/shared_files/GC%20Memo/2008/GC%2008-01%20Summary%20of%20Operations%20FY%202007.pdf) (August 20, 2008). The typical election is defined as the median election, which took place 39 days after the election petition's filing. Some 94 percent of all elections took place within 56 days of the petition's filing.
5. National Labor Relations Board, *Seventy-First Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 2006*, June 18, 2007, at [http://www.nlr.gov/nlr/shared\\_files/brochures/Annual%20Reports/Entire2006Annual.pdf](http://www.nlr.gov/nlr/shared_files/brochures/Annual%20Reports/Entire2006Annual.pdf) (August 19, 2008).
6. Employee Free Choice Act, H. Rep. 800, 100th Cong., 1st Sess., March 1, 2007, Section 2.
7. James Sherk, "Workers Reject Card Checks, Favor Private Ballots in Union Organizing," Heritage Foundation *WebMemo* No. 1363, February 16, 2007, at <http://www.heritage.org/Research/Labor/wm1363.cfm>.
8. American Rights at Work Resource Library, "Lies and Distortions on the Secret Ballot," <http://www.americanrightsatwork.org/employee-free-choice-act/resource-library/lies--distortion-on-the-secret-ballot-20080730-596-84-84.html> (August 19, 2008).
9. National Labor Relations Act (NLRA), 29 U.S. Code § 159 (e).

makes it clear that EFCA effectively eliminates secret ballot elections.

### Unions Do Not Submit Cards from a Minority of Workers

Unions virtually never call for elections with cards signed by a minority of workers. Organizers are generally instructed to collect cards from 60 to 70 percent of workers in a company before going to the polls.<sup>10</sup> Unions openly state that they do not go to an election without a supermajority of cards:

- **International Brotherhood of Teamsters:** “The general policy of the Airline Division is to file for a representation election only after receiving a 65 percent card return from the eligible voters in a group.”<sup>11</sup>
- **New England Nurses Association:** “Have 70–75 percent of members sign cards; if unable to reach this goal, review plan.”<sup>12</sup>
- **Service Employees International Union (SEIU):** “...[T]he rule of thumb in the SEIU is that it’s unwise to file for an election when fewer than 70 percent of the workforce has signed interest cards.”<sup>13</sup>

### Effective End of Elections

As these organizing guidelines demonstrate, unions do not file for an election with cards signed by only 30 to 50 percent of workers. Rather, they only file for an election when they have a superma-

jority of cards because workers who sign in front of an organizer often vote “No” in the privacy of the voting booth.<sup>14</sup> Internal union studies show that the union does not have even odds of winning an election until 75 percent of employees sign cards.<sup>15</sup> Unions will not go to the polls without majority support because they know they are unlikely to win and, if they lose, federal law bars them from calling for another election for a year.<sup>16</sup>

Under EFCA, once cards have been obtained from a majority of workers, unions would not file for an election. In fact, EFCA specifically bars the NLRB from conducting an election if the union turns in cards from a majority of workers. Union organizers’ jobs are to recruit new union members to pay 1 to 2 percent of their wages as dues to the union. They are not paid to give workers a chance to rethink the wisdom of union membership.

Union leaders openly state that they will not call for elections if given the choice. United Food and Commercial Workers President Joe Hansen admits that “We can’t win that way anymore.”<sup>17</sup> UNITE HERE President Bruce Raynor says that he sees “no reason to subject the workers to an election.”<sup>18</sup> SEIU Local 32BJ President Mike Fishman flatly states, “We don’t do elections.”<sup>19</sup>

Under EFCA, organizers would submit all their cards directly to the NLRB and demand immediate recognition. This mandatory check-card process would represent a dramatic departure from the cur-

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10. David L. Cingranelli, “International Election Standards and the NLRB: Representative Elections,” Parts 1–3 in Richard N. Block, et al., eds., *Justice on the Job: Perspectives on the Erosion of Collective Bargaining in the United States* (Kalamazoo, Mich.: W.E. Upjohn Institute, 2006), p. 42.
  11. International Brotherhood of Teamsters Airline Division, “Airline Division Organizing,” at <http://www.teamster.org/divisions/Airline/airlineorganizing.htm> (August 12, 2008).
  12. New England Nurses Association, “Why a Union?” at [http://www.nenurses.org/your\\_rights.htm](http://www.nenurses.org/your_rights.htm) (August 12, 2008).
  13. Steven Henry Lopez, *Reorganizing the Rust Belt: An Inside Study of the American Labor Movement*, (Berkeley, Cal.: University of California Press, 2004), p. 38.
  14. Sherk, “Unions Know.”
  15. AFL-CIO, *AFL-CIO Organizing Survey* (Washington, D.C.: AFL-CIO, 1989).
  16. NLRA, 29 U.S. Code § 159 (c)(3).
  17. BNA Business Report, “UNITE HERE Picks Hilton as Target for ‘Hotel Workers Rising’ Campaign,” March 24, 2006, p. B-1.
  18. Steven Greenhouse, “Labor Turns to a Pivotal Organizing Drive,” *The New York Times*, May 31, 2003, at <http://query.nytimes.com/gst/fullpage.html?res=9E0CE6DC1430F932A05756C0A9659C8B63> (August 20, 2008).
  19. Timothy Aepfel, “Not-So-Big Labor Enlists New Methods For Greater Leverage,” *The Wall Street Journal*, August 29, 2005, at p. A-2.

rent norm of secret ballot elections that give workers an opportunity to privately express their views. Every circumstance that currently leads to a secret ballot organizing election would, under EFCA, lead to card-check recognition without an election.

On paper EFCA leaves secret ballot elections a possibility. In practice EFCA eliminates secret ballot organizing elections for American workers.

### Unions Mislead Workers

Union organizers frequently demonstrate that they have no interest in giving workers the choice of how to join a union, especially when such a choice would interfere with Organized Labor's primary objective—recruiting new members who will pay new dues. Organizers in many campaigns tell workers that the cards they are signing only count toward an election, and then request card-check recognition on the basis of those cards.

For instance, union representatives attempting to organize Trico Marine told workers the cards were only requesting a vote, and then tried to pressure Trico to recognize the union only on the basis of the cards.<sup>20</sup> Culinary Workers organizers in Las Vegas told the same thing to workers at the MGM Grand.<sup>21</sup>

SEIU workers also made the same promise to Kaiser Permanente employee Karen Mayhew. The SEIU then used signed cards to pressure Kaiser into recognizing the union, without the promised election.<sup>22</sup>

Union organizers do not want to give workers a choice about how to join a union; they only want to collect new dues from new union members.

### Workers Have No Choice

Workers have no say in the methods union organizers use. EFCA does not permit workers to sign cards that call for an election without also counting those signatures toward a card-check majority. In fact, under federal law, a worker's signature on a union card counts as a "showing of interest" in union representation.

If workers at a company targeted by union organizers collected signatures to call for a secret ballot election the union could, under EFCA, use those signatures to count towards a card-check majority. For instance, in an attempt to preempt a card-check-only organizing drive, employees might collect cards from 35 percent of fellow employees, turn them in to the NLRB, and request an election.

The 35 percent of employees who signed the cards do not necessarily want a union; they simply want an opportunity to consider the matter before casting a private vote. However, in response to the employees' efforts to prevent card-check recognition, union organizers could submit additional signed cards they had collected from pro-union employees. If the combined total of cards collected—from both pro-union employees and undecided employees seeking to protect their privacy—was greater than 50 percent, the union would be recognized as the workers' exclusive representative—without an election.

Under such circumstances, it is possible that only a paltry 16 percent of employees were in favor of union representation. After all, 49 percent of employees may have been outright hostile to the idea of organizing, while 35 percent—though undecided about representation—wanted to protect their ability to make a decision in a private voting booth. Yet, under EFCA, the NLRB would have to consider the 35 percent employees' signatures not as a decision to reserve a right to consider the matter privately, but as an overt gesture of union solidarity. Subsequently, EFCA provides an opportunity for a small minority of pro-labor employees to impose their agenda on a majority of employees who desire only to make a thoughtful, private decision.

Workers could not insist that they only wanted to vote in privacy and not recognize the union. Under EFCA, employees do not have that choice.

20. Clyde Jacob, testimony before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, April 22, 2004.

21. Bruce Esgar, testimony before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, July 23, 2002.

22. Karen Mayhew, testimony before the Committee on Education and Labor, U.S. House of Representatives, February 8, 2007, at <http://www.nrtw.org/pdfs/Mayhew.pdf> (August 20, 2008).

## EFCA Effectively Ends Worker Privacy

EFCA strips workers of their freedom to choose in privacy. It requires companies to recognize unions without an election once unions collect cards publicly signed by a majority of employees. Unions contend that because the union could file for an election with signatures from 30 to 50 percent of the workers in the company, EFCA does not end secret ballot elections. This is highly misleading. Unions do not file for elections with cards signed by a minority of employees because they know they will probably lose. Their leaders openly state they have no intention of seeking elections if they can avoid them. Once unions have the majority of cards they need for card-check recognition, unions would demand immediate recognition, not request an election.

EFCA gives union representatives—and these representatives alone—the choice of how to organize workers. Union organizers' goal is to recruit new dues-paying members, not give workers an opportunity to privately say “No” to union representation. Unions will tell workers that cards count only toward an election, then demand recognition without a vote. Employees cannot sign cards to request an election without having those cards count toward a card-check majority. Unions have demonstrated that they have no interest in allowing workers to privately reject union representation. The misnamed Employee Free Choice Act effectively ends secret ballot organizing elections for American workers.

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