



## Employee Representation

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### Background

Many U.S. employees choose to join a labor organization in order to improve their standing in negotiations with their employer over wages, hours, and working conditions. Following decades of gradual decline, union membership rates have slightly risen in recent months. The Bureau of Labor Statistics revealed that in 2008 union members accounted for 12.4 percent (16.1 million total employees) of the public and private workforce, up from 12.1 percent a year earlier and 12.0 percent in 2006.

Despite these modest increases, labor advocates have been pushing legislation in Congress to change the process by which unions can organize employees. Under the National Labor Relations Act, private employees can choose to join a union in one of two ways:

1. **Election**—After a substantial number of employees signs a petition in support of a union (defined as at least 30 percent of employees in a bargaining jurisdiction), the National Labor Relations Board (NLRB) administers a private ballot election to the employees. If the union wins a majority of votes in the election, it becomes the exclusive bargaining representative for the employees.
2. **Authorization cards**—During this process, better known as “card checks,” union proponents circulate official authorization cards among employees and ask for signatures in support of a union. If a majority of employees in a bargaining unit signs the cards, and the NLRB certifies the cards as valid, the union immediately becomes the exclusive bargaining representative for the employees.

The most common method of officially gauging union support among workers has been the secret ballot election. From 1998-2005, there were 2,896 elections compared to 730 card checks.<sup>1</sup> Unions view card checks as an easier, more direct way to secure the approval of a majority of workers in a bargaining unit. Some employers currently agree to allow card checks, in lieu of an election, to determine if a union will be certified as the bargaining representative.

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<sup>1</sup> Gely, R., & Chandler, T.D. (2008). Card Check Recognition: New House Rules for Union Organizing? 35 Fordham Urban Law Journal. 247-276.

## Issue

Labor organizations continue to push legislation, called the Employee Free Choice Act (EFCA). This proposal would amend the organizing rules provided by the National Labor Relations Act by allowing unions to bypass private ballot elections in favor of the card check process. If enacted, the EFCA would effectively replace election with the card check process in the vast majority of cases. This is because unions would invariably choose the card check method over the election to organize workplaces.

The Employee Free Choice Act would:

- Require the NLRB to certify a union without directing an election if a majority of the bargaining unit employees have signed authorization cards in support of the union,
- Require binding arbitration on first contracts after 90 days of collective bargaining and 30 days of mediation, and
- Increase penalties, including back pay plus liquidated damages, on employers that commit unfair labor practices against employees during organizing drives.

## Status

The Employee Free Choice Act (H.R. 560/S. 1409) was introduced by Representative George Miller (D-CA) and Senator Edward Kennedy (D-MA) on March 10, 2009.

In the previous Congress, Representative Miller and Senator Kennedy also sponsored the EFCA. The House passed EFCA by a vote of 241 – 185 on March 1, 2007. On June 26, 2007, the Senate failed to invoke cloture (60 votes needed to defeat a filibuster and proceed with consideration of the bill) on EFCA by a vote of 51 – 48.

## SHRM Position

SHRM strongly opposes the Employee Free Choice Act.

SHRM believes an employee's decision to join or refrain from joining a union should be based on relevant information and free choice. SHRM supports and encourages secret ballot elections as the most effective process for validating majority representation, as such elections minimize inappropriate outside influences and are consistent with underlying and fundamental principles of democracy. However, SHRM also recognizes that alternative processes may be available under the NLRA that legitimately validate the will of the majority in the workplace. There is strong concern about whether card check agreements are voluntary, and if card checks allow employees to choose union representation free from interference or coercion by union or employer stakeholders.

Specifically, SHRM is opposed to the following provisions of the EFCA:

- **Circumvention of private ballot election**—Since unions would rarely, if ever, select the election process over card checks, the EFCA would effectively eliminate the secret ballot election during the union certification process. Accordingly, the bill would force employees to make their important decision on

whether to support a union in public—potentially in front of their co-workers, union organizers and others who have a stake in the organizing process. SHRM strongly believes the secret ballot election process is the best way to protect a worker’s privacy and ascertain a worker’s true view on union representation.

- **Binding arbitration on first contracts**—SHRM opposes mandatory binding arbitration. The EFCA would end bargaining negotiations after only 120 days—90 days of negotiations and 30 days of mediation—and force a two-year contract on both the employer and employees. SHRM believes that mandatory binding arbitration encourages either a union or employer to engage in bad faith bargaining during the negotiating period. Finally, the EFCA would lead to an arbitrator imposing unwanted employment conditions on both employees and management.
- **Employer penalties**—The bill would increase penalties, including back pay plus liquidated damages, on employers that discriminate against employees during organizing drives. While SHRM believes that any illegal or unethical behavior by any party during an organizing campaign should not be tolerated, the EFCA creates no new penalties for labor organizations that engage in coercive conduct.

## Talking Points

- Federal government-supervised private ballot elections best protect the privacy rights of individual employees in choosing whether to join a union.
- By effectively eliminating the private ballot, the Employee Free Choice Act would actually take away an employee’s private and “free choice,” expose employees to coercion and encourage a threatening workplace for employees.
- Americans overwhelmingly support the right to a private vote for workers, according to a poll of 1,000 likely voters in the U.S. conducted from January 7-11, 2009. This survey revealed that four out of five voters (82%) favor a federally supervised election over card checks as a means to “protect the individual rights of workers.”<sup>2</sup>
- Mandatory binding arbitration would impose unwanted employment conditions on both employees and employers.
- Under EFCA, employees would simultaneously lose their rights to vote on union representation and to approve workplace contracts.

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<sup>2</sup> McLaughlin & Associates (2009).