



LABOR, IMMIGRATION &
EMPLOYEE BENEFITS DIVISION
U.S. CHAMBER OF COMMERCE

The Truth Behind Union Rhetoric Supporting the Employee Free Choice Act

Union Rhetoric: Secret ballot elections take too long and delays of months or years are common.

Facts: One of the best things the National Labor Relations Board (“NLRB”) does correctly, from an employee’s perspective, is conduct elections. The median time for a secret ballot election to be held is just 38 days, while 95 percent of all elections are held within 56 days.¹ A very small percentage of elections may take longer, but these are outliers and hardly justify abandoning the secret ballot election process.

Union Rhetoric: A card check procedure is the most effective way to determine the wishes of a majority of employees.

Facts: Federal courts have repeatedly ruled that secret ballot elections are the preferred method of ascertaining whether a union has the support of a majority of employees.² As a federal appellate court noted, workers sometimes sign cards not because they intend to vote for the union in an election, but to avoid offending the person who asks them to sign, often a co-worker, or simply to get the person off their back.³ As the Fourth Circuit stated, it would be difficult to imagine a more unreliable method of determining the real wishes of employees than card check.⁴

Union Rhetoric Employers illegally fire employees in 25-30 % of all organizing drives.

¹ Office of the Gen. Couns., National Labor Relations Board, *Summary of Operations Fiscal Year 2008* 6 (Oct. 29, 2008), available at http://www.nlr.gov/research/memos/general_counsel_memos.aspx.

² See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969); *NLRB v. Flomatic Corp.*, 347 F.2d 74, 78 (2d Cir. 1965); *United Services for the Handicapped v. NLRB*, 678 F.2d 661, 664 (6th Cir. 1982); *Avecor, Inc. v. NLRB*, 931 F.2d 924, 934 (D.C. Cir. 1991).

³ See *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1371 (7th Cir. 1983).

⁴ *Gissel Packing Co.*, 395 U.S. at 602.

Facts: Unions and their allies claiming that employers illegally fire a large number of employees during organizing drives, generally cite two studies— one by labor professor Kate Bronfenbrenner and another commissioned by the pro-union group, American Rights at Work. The statistics these studies rely on, however, are simply taken from uncorroborated reports of union organizers—hardly an unbiased source. A more reliable and unbiased source, the NLRB, shows that, at most, employees are illegally fired in 2.7% of organizing drives. If the NLRB finds that an employer illegally fired workers during an organizing drive it has the power to order the employer to recognize and bargain with the union, even if the union lost the election.⁵

Union Rhetoric: The secret ballot election process enables employers to wage bitter anti-union campaigns.

Facts: While union organizing can become contentious, in 85% of all cases the employer and union reach an agreement on the most central issues surrounding union elections: the size and scope of the bargaining unit (who is eligible to vote), and the date and time of the election. The fact that the parties agree to these stipulations in the vast majority of cases illustrates once again that in most cases, the secret ballot election process works fairly and smoothly.

Union Rhetoric: During an organizing drive, management has total and continuous access to the list of employees, while union supporters may have access very late in the process to a list that is often inaccurate.

Facts: The NLRB requires employers submit complete and accurate lists of employees within one week of the Board's determination that it will hold an election.⁶ The list is then provided to the union. If the employer fails to provide the list or the list is inaccurate, the Board can set aside the election and order another, especially if errors involve a determinative number of voters.

Union Rhetoric: Under the Employee Free Choice Act, employees remain free to choose a secret ballot process. The Act simply gives employees the option of using a card-check system; it does not replace the secret ballot election.

Facts: While the statutory language providing for secret ballot elections would remain on the books, it would cease to be relevant. Union organizers would no longer take a chance calling for an election which they could lose, when they know that if they gathered a few more authorization cards, they would automatically be recognized. Furthermore, the language of EFCA mandates that if a union presents cards representing a majority of the employees in the bargaining unit, the NLRB is prohibited from

⁵ See *Gissel Packing Co.*, 395 U.S. at 614; 29 U.S.C. § 158(a)(5).

⁶ See *Excelsior Underwear Inc.*, 156 N.L.R.B. 1236 (1966); 29 U.S.C. § 159.

conducting an election, regardless of whether the employees want one (“the Board *shall not direct an election but shall certify the individual or labor organization as the representative*”). The card check process will only capture the preference of those who want a union (or at least those who sign the cards). Those who do not want a union will not have an opportunity to express their preference.

Union Rhetoric: Mandatory arbitration for a first contract benefits everyone, because it is an incentive for management and labor to bargain productively. Under EFCA, mandatory arbitration for first contracts creates a fair process for resolving disputes.

Facts: Mandatory arbitration denies workers the right to participate in the bargaining process, and eliminates their right to vote for a contract for two years. Congress specifically rejected the idea of mandatory arbitration under the original National Labor Relations Act and its subsequent amendments, because it was incompatible with the concept of collective bargaining and free enterprise. The importance of the topics being bargained for in first contracts should not be left up to government bureaucrats who do not have the industry and market expertise that employers and their employees have. Mandatory arbitration removes the parties’ power to negotiate the terms and working conditions of employment, and instead creates incentives for one side to stall negotiations in hopes of arbitration.