

# Slate

JURISPRUDENCE

## Card Check 2.0

A better fix for union organizing than the Employee Free Choice Act.

By Benjamin Sachs

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In the opening months of the Obama presidency, the ground rules for union-organizing campaigns have been the focus of a barrage of [TV spots](#) (a [Sopranos](#) mafia boss bullies a doe-eyed employee into signing a union card), [hyperbolic predictions](#) (the Chamber of Commerce warns of Armageddon), and [public flip-flops](#) by politicians (Arlen Specter most notoriously). The fight is over a bill called the Employee Free Choice Act, also known as the "card check" law.

The idea of card check is simple enough: When the majority of employees in a given company sign cards indicating that they want to be represented by a particular union, they get one. This sounds simple. But the stakes of the fight over the bill are enormous, because allowing organizing through card check would make it much easier for workers to unionize. For the last seven decades, organizing campaigns have been governed by a New Deal statute, the National Labor Relations Act. These days, the traditional NLRA rules make it exceedingly difficult for workers to win a union drive, in part because they allow managers to actively discourage workers from unionizing—through tactics both legal and illegal—and to massively delay the organizing process, which kills momentum. If the Employee Free Choice Act were to pass, it could quickly swell union ranks by millions of workers.

It's not surprising, therefore, that enacting the bill is the chief legislative goal of every major labor union in the United States. Burying the legislation, meanwhile, is the chief aim of the country's leading business organizations. As a result, while the Employee Free Choice Act has strong majorities in both the House and Senate and the support of President Obama, it likely will not muster the 60 votes needed to overcome a filibuster.

If we're going to move forward with labor law reform—and bring union organizing rules into the 21<sup>st</sup> century—we're going to need a compromise. I propose a new design that would respond to the demands of both sides. It would be secret, to diminish any concern about undue pressure from organizers and co-workers, and it would also protect against interference from management.

Here's the problem I'm trying to solve. While both sides of the debate agree that organizing rules should ensure that employees can choose *freely* whether they want a union, management and labor are worlds apart on how to get there. The business groups contend that card check is the opposite of secret balloting, because it strips away confidentiality. They argue that if workers feel coerced by union organizers or pressured by co-workers, they may vote for a union they don't want.

The labor movement, for its part, argues that employers currently can exert enormous pressure on employees to "vote no"—by firing union supporters or threatening to close plants and move overseas. With card check, all (or nearly all) of an organizing campaign could move outside the workplace, so employees and unions could conduct organizing drives in a manner that minimizes, or even eliminates,



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management interference.

To address the labor-business impasse, I suggest two alternatives to card check and for changing the Employee Free Choice Act. Both ensure that employees would get to choose confidentially whether they want a union, eliminating the possibility for coercion that worries business groups. At the same time, employees could organize without much of the employer interference that troubles labor.

The first alternative to card check would borrow from the model of early voting in U.S. political elections. Increasingly, in states across the country, voters cast their ballot by mail, or they go to a polling place and cast a ballot in the weeks leading up to election day. In the last presidential election, about one-third of all votes nationally were cast through some kind of early voting.

Early voting is easy to translate to the union election process. Union organizers and supportive employees would be entitled, as they are under the proposed card check law, to visit employees and make the case for unionization. The union would then give the National Labor Relations Board (or some neutral third-party established for this purpose) a list of the relevant employees. The NLRB would set up a polling place, where employees could make their decision at any time during the drive, and it would set up a confidential mail-in procedure. Just as is the case under current NLRA law, the rules would prohibit union organizers from interfering with employees while they're making their choices. The NLRB would keep a running tally, and if the union won the support of 50 percent of the prospective bargaining unit (or perhaps a higher percentage if the union wanted some cushion), the NLRB would inform the union that it was entitled to demand recognition from the employer.

My second approach borrows the successful, but seldom touted, voting technology used in union elections for airlines and railroads. Employees get a confidential voter identification number and then vote in their homes by either phone or the Internet. Union organizers, co-workers, and employer representatives are all prohibited from interfering while votes are being cast. If they don't follow the rules, the election results are overturned.

It would be easy to adapt these technologies to union drives in other industries. The organizing process would be the same as in my first proposal. And again, the NLRB would keep a running tally, and if the union won the support of half the workers, it would be entitled to demand recognition from the employer.

At the end of the process for either of the alternatives I've outlined, employers could raise challenges: They could argue that people voted who shouldn't be included in the bargaining unit, or they could argue that the union interfered. But the challenges would be heard after, rather than before, the votes were tallied, to avoid the unnecessary delays that currently plague organizing drives.

There are undoubtedly objections to my versions of card check 2.0. No decision-making system is perfect. But unlike the current version of the Employee Free Choice Act, both of my alternatives address the biggest fears of business and labor. Workers will be able to choose whether they want a union more freely than they can now, and with more confidentiality than card check allows.

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