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# Labor Union Recognition Procedures: Use of Secret Ballots and Card Checks

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# Labor Union Recognition Procedures: Use of Secret Ballots and Card Checks

## **Abstract**

The National Labor Relations Act of 1935 (NLRA) gives private sector workers the right to join or form a labor union and to bargain collectively over wages, hours, and other working conditions. An issue before Congress is whether to change the procedures under which workers choose to join, or not to join, a union.

Under current law, the National Labor Relations Board (NLRB) conducts a secret ballot election when a petition is filed requesting one. A petition can be filed by any union, worker, or employer. Workers or a union may request an election if at least 30% of workers have signed a petition or authorization cards (i.e., cards authorizing a union to represent them). The NLRA does not require secret ballot elections. An employer may voluntarily recognize a union if a majority of workers have signed authorization cards.

Legislation introduced in the 110th Congress would, if enacted, change current union recognition procedures. The Employee Free Choice Act of 2007, H.R. 800 and S. 1041, would require the NLRB to certify a union if a majority of employees sign authorization cards. The Secret Ballot Protection Act, H.R. 866, would require secret ballot elections for union certification.

Proponents of both measures sometimes use similar language to support their positions. Employers argue that, under card check recognition, workers may be pressured or coerced into signing authorization cards and may only hear the union's point of view. Unions argue that, during an election campaign, employers may pressure or coerce workers into voting against a union. Supporters of secret ballot elections argue that casting a secret ballot is private and confidential. Unions argue that, during an election campaign, employers have greater access to workers. Unions argue that card check recognition is less costly than a secret ballot election. Employers maintain that unionization may be more costly to workers, because union members must pay dues and higher union wages may result in fewer union jobs.

Mandatory card check recognition may increase the level of unionization, while mandatory secret ballot elections may decrease it. Research suggests that the union success rate is greater with automatic card check recognition than with secret ballots, that unions undertake more union drives under automatic card check recognition, and that the union success rate under card check recognition is greater when a card check campaign is combined with a neutrality agreement (i.e., an agreement where the employer agrees to remain neutral during a union organizing campaign).

To the extent that mandatory secret ballot election or mandatory card check recognition would affect the level of unionization, the economic effects may depend on how well labor markets fit the model of perfect competition. Mandatory card check recognition may improve worker benefits and reduce earnings inequality — if more workers are unionized. Mandatory secret ballot elections may increase inequality in compensation — if fewer workers are unionized. This report will be updated as issues warrant.

## **Keywords**

Congressional Research Service, CRS, secret ballots, unions, unionization, card checks

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**Comments**

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# CRS Report for Congress

Received through the CRS Web

## **Labor Union Recognition Procedures: Use of Secret Ballots and Card Checks**

**Updated April 2, 2007**

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Analyst in Public Finance  
Domestic Social Policy Division

# Labor Union Recognition Procedures: Use of Secret Ballots and Card Checks

## Summary

The National Labor Relations Act of 1935 (NLRA) gives private sector workers the right to join or form a labor union and to bargain collectively over wages, hours, and other working conditions. An issue before Congress is whether to change the procedures under which workers choose to join, or not to join, a union.

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Legislation introduced in the 110<sup>th</sup> Congress would, if enacted, change current union recognition procedures. The Employee Free Choice Act of 2007, H.R. 800 and S. 1041, would require the NLRB to certify a union if a majority of employees sign authorization cards. The Secret Ballot Protection Act, H.R. 866, would require secret ballot elections for union certification.

Proponents of both measures sometimes use similar language to support their positions. Employers argue that, under card check recognition, workers may be pressured or coerced into signing authorization cards and may only hear the union's point of view. Unions argue that, during an election campaign, employers may pressure or coerce workers into voting against a union. Supporters of secret ballot elections argue that casting a secret ballot is private and confidential. Unions argue that, during an election campaign, employers have greater access to workers. Unions argue that card check recognition is less costly than a secret ballot election. Employers maintain that unionization may be more costly to workers, because union members must pay dues and higher union wages may result in fewer union jobs.

Mandatory card check recognition may increase the level of unionization, while mandatory secret ballot elections may decrease it. Research suggests that the union success rate is greater with automatic card check recognition than with secret ballots, that unions undertake more union drives under automatic card check recognition, and that the union success rate under card check recognition is greater when a card check campaign is combined with a neutrality agreement (i.e., an agreement where the employer agrees to remain neutral during a union organizing campaign).

To the extent that mandatory secret ballot election or mandatory card check recognition would affect the level of unionization, the economic effects may depend on how well labor markets fit the model of perfect competition. Mandatory card check recognition may improve worker benefits and reduce earnings inequality — if more workers are unionized. Mandatory secret ballot elections may increase inequality in compensation — if fewer workers are unionized. This report will be updated as issues warrant.

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# Labor Union Recognition Procedures: Use of Secret Ballots and Card Checks

The National Labor Relations Act of 1935 (NLRA), as amended, gives private sector workers the right to join or form a labor union and to bargain collectively over wages, hours, and other conditions of employment.<sup>1</sup> An issue before Congress is whether to change the procedures under which workers choose to join, or not to join, a union.

This report begins with a summary of legislation that would, if enacted, change existing union recognition procedures. The report then reviews the rights and responsibilities of workers and employers under the NLRA and the different ways that workers may form or join a union. The report then examines the potential impact of changes in union recognition procedures. Finally, the report considers whether there is an economic rationale for protecting the rights of workers to organize and bargain collectively.

## Legislation

Legislation has been introduced in the 110<sup>th</sup> Congress that would, if enacted, change current union recognition procedures.<sup>2</sup>

H.R. 800, the Employee Free Choice Act of 2007, would require the National Labor Relations Board (NLRB) to certify a union if a majority of employees in a bargaining unit sign authorization cards designating the union as their bargaining representative.<sup>3</sup> The bill would also establish procedures for reaching an initial

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<sup>1</sup> The NLRA is also known as the Wagner Act, after Senator Robert Wagner of New York who sponsored the bill in the Senate. Representative William Connery of Massachusetts sponsored the bill in the House of Representatives.

<sup>2</sup> This section uses terms — e.g., recognition, certification, unfair labor practices, NLRB, and Federal Mediation and Conciliation Service (FMCS) — that are described later in this report.

<sup>3</sup> A bargaining unit is a group of employees represented, or seeking representation, by a union. A bargaining unit is generally determined on the basis of a “community of interest” of the employees involved. Employees who have the same or similar interests with respect to wages, hours, and other working conditions may be grouped together into a bargaining unit. A bargaining unit may include the employees of one employer, one establishment, or one occupation or craft. A bargaining unit may include both professional and nonprofessional employees, provided a majority of professional employees vote to be members of the unit. Guards cannot be included in the same bargaining unit as other

(continued...)

contract agreement. If a union and employer cannot reach an initial agreement within 90 days after bargaining has begun (or a longer period if agreed to by both the union and employer), either party could request mediation by the Federal Mediation and Conciliation Service (FMCS). If an agreement cannot be reached within 30 days through mediation (or a longer period if agreed to by both parties), the dispute would be subject to binding arbitration. The legislation would increase penalties for employer violations of certain unfair labor practices committed during a union organizing campaign or during negotiation of a first contract. H.R. 800 was introduced by Representative George Miller on February 5, 2007, and referred to the House Committee on Education and Labor.<sup>4</sup> A hearing on the measure was held on February 8, 2007, by the House Subcommittee on Health, Employment, Labor, and Pensions.<sup>5</sup> The Committee on Education and Labor approved the bill on February 14, 2007, by a vote of 26 to 19.<sup>6</sup> The full House approved the measure on March 1, 2007, by a vote of 241 to 185.

S. 1041, the Employee Free Choice Act of 2007, was introduced in the Senate on March 29, 2007, by Senator Edward Kennedy. The bill was referred to the

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<sup>3</sup> (...continued)

employees. A union and employer may agree on the appropriate bargaining unit. If not, the issue is settled by the NLRB. National Labor Relations Board, *Basic Guide to the National Labor Relations Act* (Washington: U.S. Govt. Print. Off., 1997), p. 7, available at [<http://www.nlr.gov>]. (Hereafter cited as NLRB, *Basic Guide to the NLRA*.) Bruce S. Feldacker, *Labor Guide to Labor Law*, 3<sup>rd</sup> ed. (Englewood Cliffs, N.J.: Prentice Hall, 1990), pp. 39-44. (Hereafter cited as Feldacker, *Labor Guide to Labor Law*.)

A secret ballot election may be held if less than 50%, but at least 30%, of employees sign authorization cards. See the section on “Secret Ballot Elections” later in this report.

<sup>4</sup> Representative George Miller, “Introduction of H.R. 800, The Employee Free Choice Act,” *Congressional Record*, vol. 153, Feb. 5, 2007, p. E260.

<sup>5</sup> U.S. Congress, House Committee on Education and Labor, Subcommittee on Health, Employment, Labor and Pensions, *Strengthening America’s Middle Class Through the Employee Free Choice Act*, Feb. 8, 2007, available at [<http://edworkforce.house.gov/hearings/help020807.shtml>].

<sup>6</sup> For more information on the “Employee Free Choice Act,” see CRS Report RS21887, *The Employee Free Choice Act*, by Jon O. Shimabukuro.

Legislation that would require card check recognition was introduced in Congress as early as the 95<sup>th</sup> Congress (1977-1978). Early in the 95<sup>th</sup> Congress, Representative Frank Thompson Jr. introduced H.R. 77, the Labor Reform Act of 1977. H.R. 77 would have made card check recognition mandatory if 55% of employees signed authorization cards. No hearings were held and no action was taken on the bill. Later in the 95<sup>th</sup> Congress, President Jimmy Carter sent Congress proposals for amending the NLRA. H.R. 8440/S. 1883, which was also called the Labor Reform Act of 1977, was introduced in the House by Representative Frank Thompson Jr. and in the Senate by Senators Harrison Williams Jr. and Jacob Javits. H.R. 8440/S. 1883 would have created timetables for holding representation elections. The bill passed the House. In the Senate, the Senate Human Resources Committee reported a bill (renumbered as S. 2467). The measure was filibustered on the Senate floor. After six cloture votes, the bill was returned to committee for changes. The committee did not report another bill.



Committee on Health, Education, Labor, and Pensions (HELP). Hearings were held in the Senate on the Employee Free Choice Act on March 27, 2007.<sup>7</sup>

H.R. 866, the Secret Ballot Protection Act, would require a secret ballot election for union certification. The bill would make it an unfair labor practice for an employer to recognize or bargain with a union that has not been selected by a majority of employees in a secret ballot election conducted by the NLRB. It would also be an unfair labor practice for a union to cause or attempt to cause an employer to recognize or bargain with a union that has not been chosen by a majority of employees in a secret ballot election. H.R. 866 was introduced by the late Representative Charlie Norwood on February 7, 2007, and was referred to the House Committee on Education and Labor.<sup>8</sup> On March 1, 2007, during floor debate on H.R. 800, Representative Howard “Buck” McKeon offered an amendment that would have substituted H.R. 866 for H.R. 800. The amendment failed by a vote of 173 to 256.

Senator Jim DeMint said, on March 27, 2007, that he plans to introduce the Secret Ballot Protection Act in the Senate.<sup>9</sup>

## The National Labor Relations Act

The NLRA, as amended, provides the basic framework governing labor-management relations in the private sector.<sup>10</sup> The act begins by stating that the purpose of the law is to improve the bargaining power of workers:

The inequality of bargaining power between employees ... and employers ... substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions by depressing wage rates and the purchasing power of wage earners ... and by preventing the stabilization of competitive wage rates and working conditions within and between industries....

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining....<sup>11</sup>

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<sup>7</sup> U.S. Congress, Senate Committee on Health, Education, Labor, and Pensions, *The Employee Free Choice Act: Restoring Economic Opportunity for Working Families*, hearing on the Employee Free Choice Act, 110<sup>th</sup> Cong., 1<sup>st</sup> sess., Mar. 27, 2007, available at [help.senate.gov].

<sup>8</sup> Representative Charlie Norwood died on Feb. 13, 2007.

<sup>9</sup> Senator Jim DeMint, *DeMint to Introduce Bill to Guarantee Secret Ballot Union Elections*, press release, Mar. 27, 2007, available at [demint.senate.gov].

<sup>10</sup> More specifically, the NLRA applies to employers engaged in interstate commerce. 29 U.S.C. § 152(6).

<sup>11</sup> 29 U.S.C. § 151. Many economists argue that there is not an inequality of bargaining power between employers and employees. For example, see Morgan O. Reynolds, *Power and Privilege: Labor Unions in America*, New York: Universe Books, 1984, pp. 59-62; and (continued...)

The NLRA gives workers the right to join or form a labor union and to bargain collectively over wages, hours, and other conditions of employment through a representative of their choosing. Under the act, workers also have the right not to join a union. To protect the rights of employers and employees, the act defines certain activities as unfair labor practices.<sup>12</sup>

The NLRA does not apply to railroads; airlines; federal, state, and local governments; agricultural laborers; family domestic workers; supervisors; independent contractors; and others.<sup>13</sup>

## Organizing Campaign Rules

Campaign rules differ for employees, union organizers, and employers. Rules also differ for soliciting union support (e.g., expressing support for a union or distributing authorization cards) and for distributing literature. Because of exceptions to the basic rules, the rules that apply to a specific union organizing campaign may differ from the general rules described here.<sup>14</sup>

**Employees.** During work hours, employees can campaign for union support from their coworkers in both work and nonwork areas (e.g., coffee rooms or the company parking lot). But employees can only solicit support on their own time

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<sup>11</sup> (...continued)

Morgan O. Reynolds, "The Myth of Labor's Inequality of Bargaining Power," *Journal of Labor Research*, vol. 12, spring 1991, pp. 168-183. The argument that workers and employers have equal bargaining power is generally based on the premise that labor markets fit the economic model of perfect competition. See the section later in this report on whether there is an economic rationale for protecting the rights of workers to organize and bargain collectively.

<sup>12</sup> NLRB, *Basic Guide to the NLRA*, p. 1.

The Labor Management Relations Act of 1947 (P.L. 80-101, commonly called the Taft-Hartley Act) amended the NLRA to add language that employees have the right to refrain from joining a union, unless a collective bargaining agreement with a union security agreement is in effect. A union security agreement may require bargaining unit employees to join the union after being hired (i.e., a union shop) or, if the employee is not required to join the union, to pay a representation fee to the union (i.e., an agency shop). Under Section 14(b) of the Taft-Hartley Act, states may enact right-to-work laws, which do not allow union security agreements. Michael Ballot, Laurie Lichter-Heath, Thomas Kail, and Ruth Wang, *Labor-Management Relations in a Changing Environment*, New York: John Wiley and Sons, Inc., 1992, pp. 265-268.

<sup>13</sup> NLRB, *Basic Guide to the NLRA*, p. 37.

<sup>14</sup> Unless noted otherwise, this section is based on: Stephen I. Schlossberg and Judith A. Scott, *Organizing and the Law*, 4<sup>th</sup> ed., Washington: Bureau of National Affairs, 1991, pp. 45-55. (Hereafter cited as Schlossberg and Scott, *Organizing and the Law*.) James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, Public Law and Legal Theory Working Paper Series No. 28, Nov. 2004, p. 8, available at [<http://www.law.bepress.com/osulwps>]. (Hereafter cited as Brudney, *Neutrality Agreements and Card Check Recognition*.) Feldacker, *Labor Guide to Labor Law*, pp. 74-79.

(e.g., lunchtime or breaks). If an employer does not allow the distribution of literature in work areas, employees may only distribute union literature in nonwork areas. If an employer allows the distribution of other kinds of literature in work areas, employees may also distribute union literature in those areas.

**Union Organizers.** In general, union organizers cannot conduct an organizing campaign on company property. Organizers may be allowed in the workplace if the site is inaccessible (e.g., a logging camp or remote hotel) or if the employer allows nonemployees to solicit on company property. Organizers may meet with employees on union property. They may also meet with employees and distribute literature in public areas on employer property (e.g., a cafeteria or parking lot) or in public areas (e.g., sidewalks or parking areas). Organizers may also contact employees at home by phone or mail or may visit employees at home.<sup>15</sup> Under a neutrality agreement (described later in this report), an employer may allow organizers onto company property.

**Employers.** Employers may campaign on company property. Employers may require employees to attend meetings during work hours where management can give its position on unionization. These meetings are generally called “captive audience” meetings. Employers cannot hold a captive audience meeting during the 24-hour period before an election. Supervisors can give employees written information (including memos and letters) and hold individual meetings with employees.

## Unfair Labor Practices

To protect the rights of both employees and employers, the NLRA defines certain activities as unfair labor practices.

**Employers.** Employers have the right to campaign against a union. But an employer cannot restrain or coerce employees in their right to form or join a union. An employer cannot threaten employees with the loss of their jobs or benefits if they vote for a union or join a union. An employer cannot threaten to close a plant should employees choose to be represented by a union. An employer cannot raise wages to discourage workers from joining or forming a union. An employer cannot discriminate against employees with respect to the conditions of employment (e.g., fire, demote, or give unfavorable work assignments) because of union activities. An

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<sup>15</sup> Under what is known as the “Excelsior” rule, within seven days after the NLRB has directed that a representation election be held or after a union and employer have agreed to hold an election, an employer must provide the regional director of the NLRB a list of the names and addresses of employees eligible to vote in the election. This list is made available to all parties. National Labor Relations Board, Office of the General Counsel, *An Outline of Law and Procedures in Representation Cases*, Washington: U.S. Govt. Print. Off., Apr. 2002, p. 251. U.S. Departments of Labor and Commerce, *Fact Finding Report: Commission on the Future of Worker-Management Relations*, May 1994, p. 68. The latter report is popularly called the “Dunlop report,” after former Secretary of Labor John T. Dunlop, who chaired the commission.

employer must bargain in good faith with respect to wages, hours, and other working conditions.<sup>16</sup>

**Unions.** Employees have the right to organize and bargain collectively. But a union cannot restrain or coerce employees to join or not join a union. A union cannot threaten employees with the loss of their jobs if they do not support unionization. A union cannot cause an employer to discriminate against employees with respect to the conditions of employment. A union must bargain in good faith with respect to wages, hours, and other working conditions. A union cannot boycott or strike an employer that is a customer of or supplier to an employer that the union is trying to organize.<sup>17</sup>

An unfair labor practice may be filed by an employee, employer, labor union, or any other person. After an unfair labor practice charge is filed, regional staff of the NLRB investigate to determine whether there is reason to believe that the act has been violated. If no violation is found, the charge is dismissed or withdrawn. If a charge has merit, the regional director first seeks a voluntary settlement. If this effort fails, the case is heard by an NLRB administrative law judge. Decisions by administrative law judges can be appealed to the five-member Board.<sup>18</sup>

**Remedies.** The NLRA attempts to prevent and remedy unfair labor practices. The purpose of the act is not to punish employers, unions, or individuals who commit unfair labor practices. The act allows the NLRB to issue cease-and-desist orders to stop unfair labor practices and to order remedies for violations of unfair labor practices. If an employer improperly fires an employee for engaging in union activities, the employer may be required to reinstate the employee (to their prior or equivalent job) with back pay. If a union causes a worker to be fired, the union may be responsible for the worker's back pay.<sup>19</sup> In FY2005, 31,497 employees were

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<sup>16</sup> NLRB, *Basic Guide to the NLRA*, pp. 14-22.

<sup>17</sup> *Ibid.*, pp. 23-32.

<sup>18</sup> National Labor Relations Board, *Annual Report of the National Labor Relations Board, for the Fiscal Year Ended September 30, 2005* (Washington: U.S. Govt. Print. Off., May 1, 2006), p. 5, available at [<http://www.nlr.gov>]. (Hereafter cited as NLRB, *Annual Report, Fiscal Year 2005*.) NLRB, *Basic Guide to the NLRA*, p. 36.

<sup>19</sup> 29 U.S.C. § 160(c). NLRB, *Basic Guide to the NLRA*, p. 38.

The amount of back pay awarded is “net back pay” plus interest. Net back pay is the amount of compensation (i.e., wages plus benefits) that a worker would have received if he or she had not been unlawfully fired less the amount of compensation received (less the expenses from looking for work) from other work during the back pay period. If a discharged employee is able to work but does not look for work, compensation that he or she could have received from work may be deducted from gross back pay. Interest on net back pay is simple interest (i.e., not compounded). National Labor Relations Board, *NLRB Casehandling Manual, Part 3, Compliance Proceedings*, available at [<http://www.nlr.gov/Publications/Manuals>], §§ 10536 and 10566.

awarded \$83.8 million in back pay. Employers paid \$83.4 million to 31,358 employees; unions paid \$0.4 million to 139 employees.<sup>20</sup>

**Figure 1** shows the trend in the number of unfair labor practice charges filed for FY1970 to FY2005. During this period, the number of charges filed peaked at 44,063 in FY1980. The number stood at 24,720 in FY2005.<sup>21</sup> In FY2005, 38.5% of the charges filed were found to have merit.<sup>22</sup> In FY2005, 74.2% of charges were filed against employers (by unions or individuals) and 25.8% were filed against unions (by employers or individuals).<sup>23</sup>

**Figure 1. Unfair Labor Practice Charges, FY1970-FY2005**



Source: NLRB, *Annual Reports*, various years.

<sup>20</sup> NLRB, *Annual Report, Fiscal Year 2005*, Table 4.

<sup>21</sup> NLRB, *Annual Report, Fiscal Year 2005*, p. 5.

<sup>22</sup> NLRB, *Annual Report, Fiscal Year 2005*, p. 11. From FY1970 to FY2005, the percent of unfair labor practice charges found to have merit ranged from about 30% to 40%. NLRB, *Annual Report*, various years.

<sup>23</sup> The percentage calculations do not include charges alleging a “hot cargo” agreement or charges that a union did not give at least a 10-day notice before picketing or striking a health care institution. (A “hot cargo” agreement is where an employer and union agree that the employer will not do business with another employer.) NLRB, *Annual Report, Fiscal Year 2005*, Table 2. NLRB, *Basic Guide to the NLRA*, pp. 21, 32.

## National Labor Relations Board (NLRB)

The NLRA is administered and enforced by the NLRB, which is an independent federal agency that consists of a five-member Board and a General Counsel. The Board resolves objections and challenges to secret ballot elections. It also hears appeals of unfair labor practices and resolves questions about the composition of bargaining units. The General Counsel's office conducts secret ballot elections, investigates complaints of unfair labor practices, and supervises the NLRB's regional and other field offices.<sup>24</sup>

### Union Recognition and Certification

Section 9(a) of NLRA states that a union may be “designated or selected for the purposes of collective bargaining by the *majority* of the employees” (italics added). A union must be recognized before collective bargaining can begin. Currently, there are three ways for employees to join or form a union. First, a majority of employees voting in a secret ballot election may choose to be represented by a union. Second, an employer may voluntarily recognize a union if a majority of employees in a bargaining unit have signed authorization cards. Finally, the NLRB may order an employer to recognize and bargain with a union if a majority of employees have signed authorization cards and the employer has engaged in unfair labor practices that make a fair election unlikely.

### Secret Ballot Elections

The NLRB conducts a secret ballot election when a petition is filed requesting one. A petition can be filed by any union, worker, or employer. Employees or a union may petition the NLRB for an election if at least 30% of employees have signed a petition or authorization cards. An employer may request an election if a union has claimed to represent a majority of its employees and has asked to bargain with the employer (and the union itself has not requested an election). An employer is not required to give a reason for insisting on an election.<sup>25</sup> If a majority of employees voting (i.e., not a majority of employees in the bargaining unit) in an NLRB-conducted election choose to be represented by a union, the union is certified

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<sup>24</sup> NLRB, *Basic Guide to the NLRA*, p. 33. William N. Cooke, *Union Organizing and Public Policy: Failure to Secure First Contracts* (Kalamazoo, MI: W.E. Upjohn Institute, 1985), p. 85.

<sup>25</sup> U.S. Supreme Court, “National Labor Relations Board v. Gissel Packing Co., Inc.,” *United States Reports*, vol. 395 (Washington: U.S. Govt. Print. Off., 1969), pp. 593-594, 609. (Hereafter cited as U.S. Supreme Court, *NLRB v. Gissel Packing*.) In *NLRB v. Gissel Packing*, the U.S. Supreme Court consolidated four NLRB cases. In each case, a majority of employees signed authorization cards. The employer refused to bargain, arguing that authorization cards are inherently unreliable. The NLRB concluded that the employers committed unfair labor practices that made a fair election unlikely and ordered the employers to bargain with the unions. U.S. Supreme Court, *NLRB v. Gissel Packing*, pp. 575-595.

by the NLRB as the employees' bargaining representative.<sup>26</sup> The NLRA does not provide a timetable for holding an election.

After a petition is filed requesting an election, the employer and union may agree on the time and place for the election and on the composition of the bargaining unit. If an agreement is not reached between the employer and union, a hearing may be held in the regional office of the NLRB. The regional director may then direct that an election be held. The regional director's decision may be appealed to the Board.<sup>27</sup>

In a secret ballot election, employees choose whether to be represented by a labor union. If an election has more than one union on the ballot and no choice receives a majority of the vote, the two unions with the most votes face each other in a runoff election.<sup>28</sup>

The right of an individual to vote in an NLRB election may be challenged by either the employer or union. If the number of challenged ballots could affect the outcome of an election, the regional director determines whether the ballots should be counted. Either the employer or union may file objections to an election, claiming that the election or the conduct of one of the parties did not meet NLRB standards. A regional director's decision on challenges or objections may be appealed to the Board.<sup>29</sup>

A union and employer may also agree to a secret ballot election conducted by a third party, such as an arbitrator, clergyman, or mediation board.<sup>30</sup>

The NLRB also conducts elections to decertify unions that have previously been recognized. A decertification petition may be filed by employees or a union acting on behalf of employees. A decertification petition must be signed by at least 30% of

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<sup>26</sup> 29 U.S.C. § 159(c). NLRB, *Annual Report, Fiscal Year 2005*, p. 35. National Labor Relations Board, *The NLRB: What it is, What it Does*, National Labor Relations Board, p. 3, available at [<http://www.nlr.gov>]. U.S. Supreme Court, *NLRB v. Gissel Packing*, pp. 593-594, 609. NLRB, *Basic Guide to the NLRA*, p. 8.

An authorization card may serve more than one purpose. A single-purpose card either designates a union as the bargaining representative or authorizes the union to seek an election. A dual-purpose card authorizes an election and designates the union as the bargaining representative. Commerce Clearing House, *Labor Law Reporter: Labor Relations* (Chicago: CCH Inc., 2005), p. 7279. Howard Lesnick, "Establishment of Bargaining Rights Without an NLRB Election," *Michigan Law Review*, vol. 65, Mar. 1967, p. 855.

<sup>27</sup> NLRB, *Basic Guide to the NLRA*, pp. 8-9. National Labor Relations Board, *NLRB Rules and Regulations*, available at [<http://www.nlr.gov/nlr/>], Sec. 102.67.

<sup>28</sup> NLRB, *Basic Guide to the NLRA*, p. 36.

<sup>29</sup> NLRB, *Annual Report, Fiscal Year 2005*, pp. 5, 88, 91.

<sup>30</sup> Schlossberg and Scott, *Organizing and the Law*, p. 176.

the employees in the bargaining unit represented by the union. A secret ballot election is required for decertification.<sup>31</sup>

**Number of NLRB Elections.** Table 1 shows the number of secret ballot elections conducted by the NLRB from FY1994 to FY2005. In FY2005, the NLRB conducted 2,745 elections.<sup>32</sup> Unions won 54.8% of these elections, which was up from 44.4% in FY1994. Certification of a union by the NLRB does not require that a union and employer reach an initial contract agreement.<sup>33</sup>

**Table 1. Number of Representation Elections Conducted by the NLRB, FY1994-FY2005**

Fiscal Year	Number of Elections Conducted	Number of Elections Won by Unions	Percentage of Elections Won by Unions
2005	2,745	1,504	54.8%
2004	2,826	1,447	51.2%
2003	3,077	1,579	51.3%
2002	3,151	1,606	51.0%
2001	3,975	1,591	40.0%
2000	3,467	1,685	48.6%
1999	3,743	1,811	48.4%
1998	4,001	1,856	46.4%
1997	3,687	1,677	45.5%
1996	3,470	1,469	42.3%
1995	3,632	1,611	44.4%
1994	3,752	1,665	44.4%

**Sources:** National Labor Relations Board, *Annual Report of the National Labor Relations Board, for the Fiscal Year Ended September 30, 2005* (Washington: U.S. Govt. Print. Off., May 1, 2006), p. 20, available at [<http://www.nlr.gov>],. National Labor Relations Board, *Annual Report of the National Labor Relations Board, for the Fiscal Year Ended September 30, 2003* (Washington: U.S. Govt. Print. Off., Apr. 20, 2004), p. 18, available at [<http://www.nlr.gov>].

**Note:** The number of elections conducted includes elections that resulted in a runoff or rerun.

<sup>31</sup> NLRB, *Annual Report, Fiscal Year 2005*, p. 35. National Labor Relations Board, *The National Labor Relations Board and YOU: Representation Cases*, p. 2, available at [<http://www.nlr.gov>], House, Committee on Education and the Workforce, Subcommittee on Employer-Employee Relations, *H.R. 4343, Secret Ballot Protection Act of 2004*, hearings, 108<sup>th</sup> Congress, second session, Serial No. 108-70, Sept. 2004, Washington: U.S. Govt. Print. Off., p. 11. (Hereafter cited as House Education and the Workforce, *H.R. 4343, Secret Ballot Protection Act of 2004*.)

<sup>32</sup> NLRB, *Annual Report, Fiscal Year 2005*, p. 20.

<sup>33</sup> Some evidence indicates that within three years of winning an election, approximately one-fourth of unions have not reached a first contract with the employer. Thomas F. Reed, "Union Attainment of First Contracts: Do Service Unions Possess a Competitive Advantage?" *Journal of Labor Research*, vol. 11, fall 1990, pp., 426, 430. William N. Cooke, "The Failure to Negotiate First Contacts: Determinants and Policy Implications," *Industrial and Labor Relations Review*, vol. 38, January 1985, p. 170.



In most elections conducted by the NLRB, the employer and union agree on the composition of the bargaining unit and on the time and place for an election. In FY2005, of the 2,745 elections conducted, 2,320 (or 84.5%) were based on agreements between the two parties.<sup>34</sup>

Although the NLRA does not provide a specific timetable for holding an election, most elections are held within two months of the filing of a petition. In FY2006, 94.2% of initial representation elections were conducted within 56 days of filing a petition.<sup>35</sup> As of September 30, 2005, representation cases awaiting a Board decision had been pending for a median of 802 days from the date that an election petition was filed.<sup>36</sup>

In FY2005, objections were filed in 237, or 8.6%, of the 2,745 elections conducted. Most (63.7%) of the objections were filed by unions. The remainder were filed by employers (33.3%) or by both parties.<sup>37</sup>

For decisions reached in FY2005, it took a median of 153 days between a regional hearing on a contested election and a decision from the Board.<sup>38</sup>

## Voluntary Card Check Recognition

The NLRA does not require secret ballot elections. An employer may voluntarily recognize a union when presented with authorization cards signed by a majority of employees in a bargaining unit. An employer may also enter into a card check agreement with a union before union organizers begin to collect signatures. A card check agreement between a union and employer may require the union to collect signatures from more than a majority (sometimes called a supermajority) of bargaining unit employees.<sup>39</sup> A neutral third party often checks, or validates, signatures on authorization cards. A collective bargaining contract may include a

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<sup>34</sup> NLRB, *Annual Report, Fiscal Year 2005*, Table 11A.

<sup>35</sup> National Labor Relations Board, General Counsel, *Summary of Operations: Fiscal Year 2006*, Memorandum GC 07-03 Revised, Jan. 3, 2007, p. 1, at [<http://www.nlr.gov>].

<sup>36</sup> NLRB, *Annual Report, Fiscal Year 2005*, Table 23.

<sup>37</sup> *Ibid.*, Table 11C.

<sup>38</sup> *Ibid.*, Table 23.

An analysis by the General Accounting Office (GAO) of cases appealed to the Board found that among cases closed between 1984 and 1989 the median time from the date of regional action on an appeal to a decision by the Board was between 190 and 256 days. U.S. General Accounting Office, *National Labor Relations Board: Action Needed to Improve Case-Processing Time at Headquarters*, Report HRD-91-29, January 1991, pp. 21-22. The General Accounting Office is now called the Government Accountability Office.

<sup>39</sup> One study of card check agreements found that, under some agreements, a union needed signatures from at least 65% of bargaining unit employees. Adrienne E. Eaton and Jill Kriesky, "Union Organizing Under Neutrality and Card Check Agreements," *Industrial and Labor Relations Review*, vol. 55, October 2001, p. 48. (Hereafter cited as Eaton and Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*.)

card check arrangement for unorganized (including new) branches, stores, or divisions of a company.

**Neutrality Agreements.** A card check arrangement may be combined with a neutrality agreement. Not all neutrality agreements are the same. In general, under a neutrality agreement, an employer agrees to remain neutral during a union organizing campaign. The employer may agree not to attack or criticize the union, while the union may agree not to attack or criticize the employer. The agreement may allow managers to answer questions or provide factual information to employees. A neutrality agreement may give a union access to company property to meet with employees and distribute literature. An employer may also agree to give the union a list of employee names and addresses. A neutrality agreement may cover organizing drives at new branches of a company.<sup>40</sup>

**Corporate Campaigns.** To gain an agreement from an employer for a card check campaign — possibly combined with a neutrality agreement — unions sometimes engage in “corporate campaigns.” A corporate campaign may include a call for consumers to boycott the employer; rallies and picketing; a public relations campaign (e.g., press releases, Internet postings, news conferences, or newspaper and television ads); charges that the employer has violated labor or other laws; public support from political, civic, and religious leaders; and other strategies.<sup>41</sup>

**Number of Voluntary Recognitions.** The NLRB does not collect data on voluntary recognitions. The FMCS, however, is involved in voluntary recognitions. The FMCS was created by the Labor Management Relations Act of 1947 (the Taft-Hartley Act). The main purpose of the FMCS is to mediate collective bargaining agreements. FMCS mediators act as a neutral third-party to help settle issues during

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<sup>40</sup> Eaton and Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, pp. 47-48. Charles I. Cohen, “Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?” *The Labor Lawyer*, vol. 16, fall 2000, pp. 203-204. Brudney, *Neutrality Agreements and Card Check Recognition*, pp. 5-6.

It has been argued that, under the NLRA, neutrality and card check agreements, may be unlawful. See Arch Stokes, Robert L. Murphy, Paul E. Wagner, and David S. Sherwyn, “Neutrality Agreements: How Unions Organize New Hotels Without an Employee Ballot,” *Cornell Hotel and Restaurant Administration Quarterly*, vol. 42, Oct.-Nov. 2001, pp. 91-94. A counter argument can be found in Brudney, *Neutrality Agreements and Card Check Recognition*, pp. 28-53.

<sup>41</sup> A union may engage in a corporate campaign to achieve other objectives, e.g., a contract agreement. Charles R. Perry, *Union Corporate Campaigns* (Philadelphia: Industrial Research Unit, Wharton School, University of Pennsylvania, 1987), pp. 1-8, 37-53.

For different views on corporate campaigns, see U.S. Congress, House Committee on Education and the Workforce, Subcommittee on Workforce Protections, *Compulsory Union Dues and Corporate Campaigns*, hearings, 107<sup>th</sup> Cong., 2<sup>nd</sup> sess., July 23, 2002, Serial No. 107-74 (Washington: GPO, 2002). For a discussion of corporate campaigns published by the U.S. Chamber of Commerce, see Jarol B. Manheim, *Trends in Union Corporate Campaigns: A Briefing Book* (Washington: U.S. Chamber of Commerce, 2005), available at [[http://www.uschamber.com/publications/reports/06union\\_campaigns.htm](http://www.uschamber.com/publications/reports/06union_campaigns.htm)].

the bargaining process.<sup>42</sup> Some of the requests received by the FMCS are for mediation where an employer has voluntarily agreed to negotiate with a union. **Table 2** shows the number of voluntary recognitions, for FY1996 to FY2004, where the FMCS helped mediate a first contract. Cases where an employer voluntarily recognized a union and reached a first contract without FMCS assistance are not included in these numbers. Therefore, the actual number of voluntary recognitions is probably greater than the numbers shown in **Table 2**.

**Table 2. Number of Voluntary Recognitions in Which the Federal Mediation and Conciliation Service (FMCS) Provided Assistance for Initial Contracts, FY1996-FY2004**

Fiscal Year	Number of Voluntary Recognitions
2004	258
2003	240
2002	273
2001	420
2000	381
1999	260
1998	227
1997	249
1996	173

**Source:** Federal Mediation and Conciliation Service, *Annual Report, Fiscal Year 2004*, p. 18, available at [<http://www.fmcs.gov>]. Federal Mediation and Conciliation Service, *Annual Report, Fiscal Year 2000*, p. 39, available at [<http://www.fmcs.gov>].

## Bargaining Orders

The final way that a union may be recognized by an employer is through a bargaining order. The NLRB may order an employer to recognize and bargain with a union if a majority of employees have signed authorization cards and the employer has committed unfair labor practices that make it unlikely that a fair election can be held.

According to Feldacker, “[h]ard and fast rules are not possible in determining the situations in which the Board will issue a bargaining order. Each case is based on the specific facts of the employer’s violations.”<sup>43</sup>

Bargaining orders may be appealed.<sup>44</sup>

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<sup>42</sup> Federal Mediation and Conciliation Service, *Annual Report, Fiscal Year 2004*, p. 29, available at [<http://www.fmcs.gov>].

<sup>43</sup> Feldacker, *Labor Guide to Labor Law*, pp. 90-91.

<sup>44</sup> Daniel Quinn Mills, *Labor-Management Relations*, 5<sup>th</sup> ed., New York: McGraw-Hill, Inc., 1994, pp. 213-217.

## Certification

A union that wins a secret ballot election is certified by the NLRB as the bargaining representative of employees in that bargaining unit. Voluntary recognition or a bargaining order do not result in certification by the NLRB. The Taft-Hartley Act of 1947 (P.L. 80-101) eliminated certification through any method other than an election conducted by the NLRB.<sup>45</sup>

Certification gives a union certain advantages. For instance, under what is called a “certification bar,” a union that is certified after winning a secret ballot election is protected for a year from a decertification petition and from an election petition filed by another union. Under a voluntary card check recognition (or bargaining order), a “recognition bar” protects a union from an election petition for “a reasonable period of time.”<sup>46</sup>

The duration of an employer’s duty to bargain also depends on whether a union has been certified by the Board or has been recognized voluntarily by the employer. If a union wins an NLRB election (or under a bargaining order), the employer is required to bargain in good faith for a year. Under a voluntary card check recognition, the employer is required to bargain with the union for “a reasonable period of time.”<sup>47</sup>

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<sup>45</sup> When enacted in 1935, Section 9(c) of the NLRA (P.L. 74-198) stated that whenever a question of employee representation arises the NLRB “may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.” Alternative methods of selection could include authorization cards, petitions, employee testimony, affidavits of union membership, participation in a strike, or acceptance of strike benefits. If employees chose to be represented by a union, the union would be certified by the NLRB. During the five years after the NLRA was enacted, the NLRB issued 897 certifications after an election and 272 certifications (or 23.3% of the total) without an election. (These numbers do not include cases where the union and employer agreed to hold an election.) By 1939, the NLRB only certified unions that had been chosen by a secret ballot election. This approach was written into law by the Taft-Hartley Act. The act amended Section 9(c) to say that the Board “shall direct an election by secret ballot and shall certify the results thereof.” The words “or utilize any other suitable method to ascertain such representatives” were removed. National Labor Relations Board, *Legislative History of the National Labor Relations Act of 1935* (Washington: U.S. Govt. Print. Off., 1949), p. 3274. National Labor Relations Board, *Legislative History of the Labor Management Relations Act, 1947* (Washington: U.S. Govt. Print. Off., 1985), p. 1670. Craig Becker, “Democracy in the Workplace: Union Representation Elections and Federal Labor Law,” *Minnesota Law Review*, vol. 77, 1992, pp. 507-510. Alan Roberts McFarland and Wayne S. Bishop, *Union Authorization Cards and the NLRB: A Study of Congressional Intent, Administrative Policy, and Judicial Review* (Philadelphia: University of Pennsylvania, 1969), pp. 12-14, 50. William B. Gould IV, *A Primer on American Labor Law*, 4<sup>th</sup> ed. (Cambridge, MA: MIT Press, 2004), p. 89.

<sup>46</sup> U.S. Supreme Court, *NLRB v. Gissel Packing*, p. 599fn. Feldacker, *Labor Guide to Labor Law*, p. 57.

<sup>47</sup> Feldacker, *Labor Guide to Labor Law*, pp. 57, 139-140. Once a union and employer enter into a first contract, election petitions are subject to a “contract bar.” A contract of three  
(continued...)

## NLRB Review of Card Check Recognition

The NLRB is currently considering cases that may affect recognition procedures under a card check agreement.

In June 2004, the Board voted 3-2 to review two cases where bargaining unit employees filed a decertification petition within weeks after the employer recognized a union under a card check agreement. In the first case, the United Auto Workers (UAW) and Metaldyne Corporation entered into a card check and neutrality agreement in September 2002. Metaldyne recognized the UAW as the bargaining representative of production and maintenance workers at its St. Marys, Pennsylvania plant in December 2003. In the second case, the UAW and Dana Corporation entered into a card check and neutrality agreement in August 2003. The company recognized the union at its Upper Sandusky, Ohio plant in December 2003.

In both the Dana and Metaldyne cases, the UAW and the employers entered into card check and neutrality agreements before signatures on authorization cards were collected. The signatures were validated by a neutral third party. In both cases, employees filed decertification petitions after the UAW was recognized by the employer, but before an agreement was reached on a contract. Regional NLRB directors dismissed both decertification petitions, saying that a reasonable period of time had not passed since the UAW was recognized as the workers' bargaining representative. Employees at both companies petitioned the NLRB to review the dismissals. The employees are represented by the National Right to Work Legal Defense Foundation. The NLRB granted the request, saying that the issue is whether voluntary recognition should prevent employees from filing a decertification petition within a reasonable time in cases where an employer and union enter into a card check agreement.<sup>48</sup>

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<sup>47</sup> (...continued)

years or less bars an election (called the "contract bar") for the period covered by the contract. NLRB, *Basic Guide to the NLRA*, p. 10.

After one year, if an employer and certified union have not reached a contract agreement, the employer may withdraw recognition of the union, but only if both parties have engaged in good faith bargaining and the employer doubts, based on objective information (e.g., a petition signed by a majority of employees and given to the employer), that a majority of employees no longer support the union. Under a voluntary recognition, if no contract agreement has been reached after a reasonable period of time the employer may withdraw recognition if he has reasonable doubt based on objective information that a majority of employees support the union. Feldacker, *Labor Guide to Labor Law*, p. 140.

<sup>48</sup> National Labor Relations Board, *Order Granting Review*, June 7, 2004, Cases 8-RD-1976, 6-RD-1518, and 6-RD-1519, available at [[http://www.nlr.gov/nlr/shared\\_files/decisions/341/341-150.pdf](http://www.nlr.gov/nlr/shared_files/decisions/341/341-150.pdf)].

In July 2004, Arthur Rosenberg, at the time General Counsel of the NLRB, proposed that employees be allowed to file a decertification petition signed within 21 days after a voluntary card check recognition. The petition must be signed by at least 50% of bargaining unit employees and filed with the NLRB within 30 days of recognition. National Labor  
(continued...)

In another case involving voluntary card check recognition, the NLRB agreed to review a case where a union claimed that an employer had agreed to voluntary card check recognition at newly acquired stores. In December 2004, the Board by a vote of 2-1 agreed to review a case involving Shaw's Supermarkets and the United Food and Commercial Workers (UFCW).<sup>49</sup> In August 2003, Shaw's opened a new store in Mansfield, Massachusetts. A majority of workers at the new store signed authorization cards. The UFCW claimed that, under a clause in an existing bargaining contract, Shaw's had agreed to voluntary card check recognition at newly acquired stores.<sup>50</sup> Shaw's filed a petition requesting a secret ballot election. In May 2004, an acting regional director of the NLRB dismissed Shaw's petition without a hearing. The Board agreed to review the case and returned the case to the regional office for a hearing. In its decision, the Board said:

The issues in this case include (1) Whether the Employer clearly and unmistakably waived the right to a Board election; (2) if so, whether public policy reasons outweigh the Employer's private agreement not to have an election.

The Board went on to say: "We do not resolve these issues at this stage. We merely hold that they are worthy of review."<sup>51</sup> After the hearing ordered by the Board, a regional director, in March 2005, again dismissed Shaw's petition for an election.<sup>52</sup> In March 2006, the Board again agreed to review the case.<sup>53</sup>

## Impact of Changes in Recognition Procedures

Changes in union recognition procedures may affect the level of unionization in the United States.<sup>54</sup> This section summarizes the most common arguments made in favor of requiring secret ballot elections and the most common arguments made in support of card check recognition if a majority of workers sign authorization cards.

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<sup>48</sup> (...continued)

Relations Board, *Amicus Brief of the General Counsel*, July 14, 2004, p. 2, available at [<http://www.nlr.gov/nlr/about/foia/DanaMetaldyne/NLRBGC.pdf>].

<sup>49</sup> The NLRA (Section 3(b)) allows the Board to delegate decisions to a group of three or more members.

<sup>50</sup> These clauses have been called "after-acquired stores" clauses, "additional stores" clauses, and "Kroger" clauses (after NLRB and court decisions involving the Kroger Company).

<sup>51</sup> National Labor Relations Board, *Shaw's Supermarkets and United Food and Commercial Workers Union Local 791, AFL-CIO*, Case 1-RM-1267, Dec. 8, 2004, pp. 1-3, available at [[http://www.nlr.gov/nlr/shared\\_files/decisions/343/343-105.pdf](http://www.nlr.gov/nlr/shared_files/decisions/343/343-105.pdf)].

<sup>52</sup> National Labor Relations Board, "Shaw's Supermarkets and Local 791, United Food and Commercial Workers Union, AFL-CIO, Case 1-RM-1267, [[http://www.nlr.gov/nlr/shared\\_files/decisions/dde/2005/1-RM-1267\(3-22-05\).pdf](http://www.nlr.gov/nlr/shared_files/decisions/dde/2005/1-RM-1267(3-22-05).pdf)].

<sup>53</sup> Bureau of National Affairs, "NLRB 2-1 Grants Shaw's Request for Review in Case Involving After-Acquired Store Clause," *Daily Labor Report*, no. 55, Mar. 22, 2006, p. A-1.

<sup>54</sup> For a discussion of union membership trends in the United States, see CRS Report RL32553, *Union Membership Trends in the United States*, by Gerald Mayer.

The section also reviews research on the effect of different union recognition procedures on union success rates.

The most common arguments made by the proponents of mandatory card check recognition and the proponents of mandatory secret ballot elections are summarized in **Table 3**.<sup>55</sup>

**Table 3. Common Arguments Made by Proponents of Mandatory Card Check Recognition and Mandatory Secret Ballots**

<b>Proponents of Mandatory Card Check Recognition</b>	<b>Proponents of Mandatory Secret Ballot Elections</b>
Card check recognition requires signatures from more than 50% of bargaining unit employees. A secret ballot election is decided by a majority of workers voting.	Casting a secret ballot is private and confidential. A secret ballot election is conducted by the NLRB. Under card check recognition, authorization cards are controlled by the union.
During a secret ballot campaign, the employer has greater access to employees.	Under card check recognition, employees may only hear the union's point of view.
Because of potential employer pressure or intimidation during a secret ballot election, some workers may feel coerced into voting against a union.	Because of potential union pressure or intimidation, some workers may feel coerced into signing authorization cards.
Employer objections can delay a secret ballot election.	Most secret ballot elections are held soon after a petition is filed.
Allegations against a union for unfair labor practices can be addressed under existing law. Existing remedies do not deter employer violations of unfair labor practices.	Allegations against an employer for unfair labor practices can be addressed under existing law. Existing remedies do not deter union violations of unfair labor practices.
Card check recognition is less costly for both the union and employer. If secret ballot elections were required, the NLRB would have to devote more resources to conducting elections.	Union members must pay union dues. Unionization may result in fewer union jobs.
Card check and neutrality agreements may lead to more cooperative labor-management relations.	An employer may be pressured by a corporate campaign into accepting a card check or neutrality agreement. If an employer accepts a neutrality agreement, employees who do not want a union may hesitate to speak out.

**Source:** Table compiled by CRS.

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<sup>55</sup> The arguments for and against mandatory card check recognition and secret ballot elections are considered in House, Committee on Education and the Workforce, Subcommittee on Employer-Employee Relations *H.R. 4343, Secret Ballot Protection Act of 2004*.

Proponents of each view sometimes use similar language in support of their positions. Employers argue that, under card check recognition, employees may be pressured or coerced into signing authorization cards and that employees may only hear the union's point of view. On the other hand, unions argue that, during an election campaign, employers may pressure or coerce employees into voting against a union. Proponents of secret ballot elections argue that, unlike signing an authorization card, casting a secret ballot is private and confidential. Unions argue that, during an election campaign, employers have greater access to employees (e.g., captive audience meetings and access to employees on company property). Unions argue that card check recognition is less costly than a secret ballot election. But employers maintain that unionization may be more costly to employees, because union members must pay dues and higher union wages may result in fewer union jobs.

## Research Findings

Little research has been done comparing the effects of requiring card check recognition versus the effects of requiring secret ballot elections. The research that exists, however, suggests that changes in union recognition procedures could affect the level of unionization in the United States. Research suggests that the union success rate is greater with card check recognition than with secret ballots. Unions also undertake more unionization drives under card check recognition. The union success rate under card check recognition is greater when a card check campaign is combined with a neutrality agreement.

Evidence from Canada suggests that the union success rate is higher under card check recognition than under secret ballots. In Canada, each of the 10 provinces has laws governing union recognition.<sup>56</sup> In 1976, all 10 provinces allowed card check recognition. Beginning with Nova Scotia in 1977, five provinces adopted mandatory voting.<sup>57</sup> Under mandatory voting a union must receive a majority of votes in a secret ballot election to be recognized as the bargaining agent. Under card check recognition, a union is automatically recognized if the number of employees who sign authorization cards meets a minimum threshold. In general, a union is automatically recognized if more than 50% to 55% of employees, depending on the province, sign authorization cards.<sup>58</sup>

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<sup>56</sup> Gary N. Chaison and Joseph B. Rose, "The Canadian Perspective on Workers' Rights to Form a Union and Bargain Collectively," Edited by Sheldon Friedman, Richard W. Hurd, Rudolph A. Oswald, and Ronald L. Seeber, in *Restoring the Promise of American Labor Law* (Ithaca, NY: ILR Press, 1994), p. 244.

<sup>57</sup> The five Canadian provinces that currently require secret ballots are: Nova Scotia, Alberta, Newfoundland, Ontario, and Manitoba. British Columbia adopted mandatory voting in 1983 and reversed itself in 1993. Susan Johnson, "The Impact of Mandatory Votes on the Canada-U.S. Union Density Gap: A Note," *Industrial Relations*, vol. 43, Apr. 2004, p. 357. (Hereafter cited as Johnson, *The Impact of Mandatory Votes*.) Chris Riddell, "Union Suppression and Certification Success," *Canadian Journal of Economics*, vol. 34, May 2001, p. 397. (Hereafter cited as Riddell, *Union Suppression and Certification Process*.)

<sup>58</sup> Johnson, *The Impact of Mandatory Votes*, pp. 356-357.



A study of the union success rate under mandatory voting and automatic card check recognition concluded that the union success rate in Canada is nine percentage points higher under card check recognition than under secret ballots. The study examined 171 union organizing campaigns between 1978 and 1996 in nine provinces.<sup>59</sup>

In the province of British Columbia, union recognition based on card checks was allowed until 1984. From 1984 through 1992, union certification required a secret ballot election. Card checks were again allowed after 1992. During an 11-year period when card checks were allowed, the union success rate was 91%. During the period when voting was mandatory, the union success rate was 73%. In addition, during the period when card checks were allowed, there were more attempts to organize workers: an average of 531 organizing drives per year when card checks were in effect versus an average of 242 a year when mandatory voting was in effect.<sup>60</sup>

Evidence also suggests that card check recognition may be more successful under a neutrality agreement. A study of union organizing drives in the United States concluded that union success rates are higher when a card check agreement is combined with a neutrality agreement. The study examined 57 card check agreements involving 294 organizing drives. Unions had a success rate of 78.2% in drives where card check recognition was combined with a neutrality agreement and a 62.5% success rate in cases where there was only a card check agreement.<sup>61</sup>

The union success rate may be higher under card check recognition because, in part, employers have less of an opportunity to campaign against unionization. Unions may initiate more organizing drives under card check recognition because a card check campaign costs less than a secret ballot election. A secret ballot election may take longer than a card check campaign and employer opposition may be greater (requiring a union to expend more resources).<sup>62</sup> Unions may have a higher success rate when card check recognition is combined with a neutrality agreement because there may be less employer opposition to unionization under a neutrality agreement.

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<sup>59</sup> Susan Johnson, "Card Check or Mandatory Representation Vote? How the Type of Union Recognition Procedure Affects Union Certification Success," *Economic Journal*, vol. 112, pp. 355-359.

<sup>60</sup> The data are for union drives in the private sector. The calculation of the union success rate under card checks is for the five years before and the six years after voting was mandatory. The calculations of the union success rate and the average annual number of unionizing drives exclude 1984, when card checks were allowed for part of the year. Because of incomplete data, the calculation of the average annual number of unionizing drives also excludes 1998. Riddell, *Union Suppression and Certification Success*, p. 400.

<sup>61</sup> The success rate was measured as the percentage of organizing campaigns that resulted in union recognition. The results include some agreements in the public sector. Some of the agreements were with employers where a union represented other workers. Some of the agreements were with employers with whom the union had no existing bargaining relationship. Eaton and Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, pp. 45-48, 51-52.

<sup>62</sup> Robert J. Flanagan, "Has Management Strangled U.S. Unions?," *Journal of Labor Research*, vol. 26, winter 2005, p. 51.

(Some research has concluded that management opposition is a key factor affecting union success rates in NLRB conducted elections.)<sup>63</sup>

Finally, two surveys provide added information about secret ballot elections and card check recognition.<sup>64</sup> According to a March 2006 survey conducted for the Center for Union Facts (a business group), 75% of 1,000 persons surveyed said that they believe that a secret ballot election is the most fair and democratic way for employees to decide whether or not to join a union. By contrast, 12% of respondents said that card check recognition is the most fair and democratic way to form a union.<sup>65</sup> According to a 2005 survey conducted by American Rights at Work (a labor group), 22% of 430 workers who had gone through a union organizing campaign said that they experienced a “great deal” of pressure from management. By contrast, 6% of workers said that they experienced a great deal of union pressure. Among workers who signed authorization cards in the presence of a union organizer, 5% said that the presence of the organizer made them feel pressure to sign the cards.<sup>66</sup>

Requiring card check recognition if a majority of employees sign authorization cards may increase the union success rate. Whether or not mandatory card check recognition would reverse the decline in private sector unionization in the United States is not certain. Shrinking employment in unionized firms and decertifications may offset any increase in union membership due to mandatory card check recognition. In addition, mandatory card check recognition may increase employer opposition during the collection of authorization cards.

## **Is There an Economic Rationale for Protecting the Rights of Workers to Organize and Bargain Collectively?**

The NLRA gives private sector workers the right to organize and bargain collectively over wages, hours, and other working conditions. The act says that the purpose of the law is to improve the bargaining power of workers. This section considers whether there is an economic rationale for protecting the rights of workers to organize and bargain collectively.

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<sup>63</sup> Richard B. Freeman and Morris M. Kleiner, “Employer Behavior in the Face of Union Organizing Drives,” *Industrial and Labor Relations Review*, vol. 43, April 1990, p. 351.

<sup>64</sup> For information on the two surveys, see Bureau of National Affairs, *Two Surveys Reach Different Conclusions on Benefits of Card Checks, NLRB Elections*, no. 55, Mar. 22, 2006, p. A-5.

<sup>65</sup> The survey was conducted by the Opinion Research Corporation (a social and marketing research firm). Center for Union Facts, *Nationwide Poll: Americans Overwhelmingly Prefer Secret Ballot Elections to Card Checks*, Mar. 21, 2006, available at [<http://www.unionfacts.com/news.cfm?id=13>].

<sup>66</sup> The survey was prepared by two university professors and conducted by the Eagleton Research Center at Rutgers University. American Rights at Work, *Fact Over Fiction: Opposition to Card Check Doesn't Add Up*, March 2006, available at [<http://www.americanrightsatwork.org>].

## Government Intervention in Labor Markets

Governments may intervene in labor markets for a number of reasons. One of these reasons is to improve competition.<sup>67</sup> According to standard economic theory, competitive markets generally result in the most efficient allocation of resources, where resources consist of individuals with different skills, capital goods (i.e., buildings and equipment and associated technology), and natural resources. In turn, an efficient allocation of resources generally results in greater total output and consumer satisfaction.

In competitive labor markets workers are paid according to the value of their contribution to output. Under perfect competition, wages include compensation for unfavorable working conditions. The latter theory, called the “theory of compensating wage differentials,” recognizes that individuals differ in their preferences or tolerance for different working conditions — such as health and safety conditions, hours worked, holidays and annual leave, and job security.<sup>68</sup>

If labor markets do *not* fit the model of perfect competition, increasing the bargaining power of workers may raise wages, improve benefits (e.g., for health care and retirement), and improve working conditions to levels that would exist under competitive conditions. In labor markets where a firm is the only employer (called a monopsony) unionization could, within limits, increase both wages and employment.<sup>69</sup>

On the other hand, increasing the bargaining power of employees in competitive labor markets may result in a misallocation of resources — and reduce total economic output and consumer satisfaction. In competitive labor markets, higher union wages may reduce employment for union workers below the levels that would

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<sup>67</sup> The following conditions are the general characteristics of a competitive labor market: (1) There are many employers and many workers. Each employer is small relative to the size of the market. (2) Employers and workers are free to enter or leave a labor market and can move freely from one market to another. (3) Employers do not organize to lower wages and workers do not organize to raise wages. Governments do not intervene in labor markets to regulate wages. (4) Employers and workers have equal access to labor market information. (5) Employers do not prefer one worker over another equally qualified worker. Workers do not prefer one employer over another employer who pays the same wage for the same kind of work. (6) Employers seek to maximize profits; workers seek to maximize satisfaction. Lloyd G. Reynolds, Stanley H. Masters, and Colletta H. Moser, *Labor Economics and Labor Relations*, 11<sup>th</sup> ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1998), pp. 16-21.

<sup>68</sup> Randall K. Filer, Daniel S. Hamermesh, and Albert E. Rees, *The Economics of Work and Pay*, 6<sup>th</sup> ed., New York: Harper Collins, 1996, pp. 376-390. Ronald G. Ehrenberg and Robert S. Smith, *Modern Labor Economics: Theory and Public Policy*, 7<sup>th</sup> ed. (Reading, MA: Addison-Wesley, 2000), pp. 251-259. (Hereafter cited as Ehrenberg and Smith, *Modern Labor Economics*.)

<sup>69</sup> Bruce E. Kaufman, *The Economics of Labor Markets*, 4<sup>th</sup> ed. (Fort Worth: Dryden Press, 1994), pp. 277-280. (Hereafter cited as Kaufman, *The Economics of Labor Markets*.)

exist in the absence of unionization.<sup>70</sup> If unions lower employment in the unionized sector, they may increase the supply of workers to employers in the nonunion sector, lowering the relative wages of nonunion workers.<sup>71</sup>

It is difficult, however, to determine the competitiveness of labor markets. First, identifying the appropriate geographic labor market may be difficult. Labor markets can be local (e.g., for unskilled labor), regional, national, or international (e.g., for managerial and professional workers). Second, measuring the competitiveness of labor markets is difficult. Finally, labor markets may change over time because of demographic, economic, technological, or other changes.<sup>72</sup>

## Distribution of Earnings

A second reason governments may intervene in labor markets is to reduce earnings inequality.<sup>73</sup> Competitive labor markets may allocate resources efficiently, but they may result in a distribution of earnings that some policymakers find unacceptable. Unionization may be a means of reducing earnings inequality. Some economists argue that, during a recession, greater earnings equality may increase aggregate demand and, therefore, reduce unemployment.

## Collective Voice

Finally, some economists maintain that unions give workers a “voice” in the workplace. According to this argument, unions provide workers an additional way to communicate with management. For instance, instead of expressing their

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<sup>70</sup> In competitive labor markets, unions can offset the employment effect of higher wages by trying to persuade consumers to buy union-made goods (e.g., campaigns to “look for the union label”), limiting competition from foreign made goods (e.g., through tariffs or import quotas), or negotiating contracts that require more workers than would otherwise be needed. Kaufman, *The Economics of Labor Markets*, pp. 276-277. Ehrenberg and Smith, *Modern Labor Economics*, p. 493. Toke Aidt and Zafiris Tzannatos, *Unions and Collective Bargaining: Economic Effects in a Global Environment* (Washington: The World Bank, 2002), p. 27.

<sup>71</sup> If unions raise the wages of union workers and lower employment in the union sector, the supply of workers available to nonunion employers may increase, resulting in greater competition for jobs and lower wages for nonunion workers (the “spillover” effect). On the other hand, nonunion employers, in order to discourage workers from unionizing, may pay higher wages (the “threat” effect). Ehrenberg and Smith, *Modern Labor Economics*, pp. 504-508.

<sup>72</sup> Kaufman argues that labor markets in the United States have become more competitive since World War II. Bruce E. Kaufman, “Labor’s Inequality of Bargaining Power: Changes over Time and Implications for Public Policy,” *Journal of Labor Research*, vol. 10, summer 1989, pp. 292-293.

<sup>73</sup> Governments may also intervene in private markets to produce “public” goods (e.g., national defense) or correct instances where the market price of a good does not fully reflect its social costs or benefits — called, respectively, negative and positive “externalities.” Air and water pollution are frequently cited as examples of negative externalities; home maintenance and improvements are often cited as examples of positive externalities.

dissatisfaction with an employer by quitting, workers can use dispute resolution or formal grievance procedures to resolve issues relating to pay, working conditions, or other matters.<sup>74</sup>

## Conclusion

The economic impact of mandatory card recognition or mandatory secret ballot elections may rest on the desired objectives of policymakers.

By bargaining collectively, unionized workers may obtain higher wages, improved benefits, and better working conditions than if each worker bargained individually.<sup>75</sup> But, depending on how well labor markets fit the model of perfect competition, collective bargaining may improve or harm the allocation of resources (i.e., economic efficiency). If labor markets are competitive, increasing the bargaining power of workers may reduce economic output and consumer satisfaction, but may increase equality. On the other hand, if labor markets are not competitive, increasing the bargaining power of workers may improve the allocation of resources as well as increase equality.<sup>76</sup>

Mandatory card check recognition may increase the number of organizing campaigns and increase union success rates. Conversely, mandatory secret ballot elections may reduce the number of organizing drives and reduce union success rates. Thus, compared with existing recognition procedures, mandatory secret ballot elections may lower the level of unionization, whereas mandatory card check recognition may raise it. Accordingly, depending on the competitiveness of labor markets, mandatory card check recognition may either improve or harm economic efficiency. Similarly, mandatory secret ballots may either improve or harm efficiency. If either change were enacted, it may be difficult, however, to predict or measure the size of the effects.

Regardless of the competitiveness of labor markets, mandatory secret ballot elections may increase earnings inequality — if fewer workers are unionized. Mandatory card check recognition may reduce inequality — if more workers are unionized. Again, the size of the effects may be difficult to predict or measure.

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<sup>74</sup> Richard B. Freeman and James L. Medoff, “The Two Faces of Unionism,” *Public Interest*, no. 57, fall 1979, pp. 70-73. Richard B. Freeman, “The Exit-Voice Tradeoff in the Labor Market: Unionism, Job Tenure, Quits, and Separations,” *Quarterly Journal of Economics*, vol. 94, June 1980, pp. 644-645.

<sup>75</sup> Bargaining between employers and workers includes the right of workers to strike (in the private sector) and the right of employers to lock out employees.

<sup>76</sup> The results of research on the wage differential between union and nonunion workers vary. But, in general, most studies find that, after controlling for individual, job, and labor market characteristics, the wages of union workers are in the range of 10% to 30% higher than the wages of nonunion workers. Although the evidence is not conclusive, some studies have concluded that unions reduce earnings inequality in the overall economy. CRS Report RL32553, *Union Membership Trends in the United States*, by Gerald Mayer.

In sum, if the policy objective of Congress is to increase total economic output and consumer satisfaction, mandatory secret ballots or mandatory card check recognition may either improve or harm economic efficiency, depending on the competitiveness of labor markets. Mandatory card check recognition may reduce earnings inequality; mandatory secret ballot elections may increase it.