

Mistitled “Employee Free Choice Act” Would Strip Workers of Secret Ballot in Union Representation Decisions

Kennedy/Miller Bill Would Force Workers to Choose Under Direct Pressure from Union Organizers

The continuing slide in organized labor’s market share of the private sector workforce has generated a strong push for the so-called “Employee Free Choice Act” (S. 1925/H.R. 3619), sponsored by Sen. Ted Kennedy (D-MA) and Rep. George Miller (D-CA). The centerpiece of the legislation is a requirement that an employer recognize a union when a majority of the employees have signed union authorization cards in the presence of union organizers. In the interests of boosting organized labor’s share of the workforce, the legislation would eliminate the long-standing system of secret ballot elections that ensures that workers express their preference in a confidential, uncoerced manner.

Current Procedures for Choosing Unions Under existing National Labor Relations Board procedures, in place since the 1930s, a union representation election typically takes place after the union has demonstrated to the NLRB that at least 30 percent of those it is seeking to represent wish to have an election. This interest is usually demonstrated by signed union authorization cards that indicate a desire by the employee to be represented by the union or to have an election to determine that issue. When the election is held—usually within 60 days—it is supervised by the NLRB, which ensures that employees cast their ballot in a confidential manner with no coercion by either management or the union. Under current law, when presented with union authorization cards signed by more than 50 percent of the employees, the employer may voluntarily recognize the union (a “card check”). The Kennedy/Miller bill would require recognition by the employer in such instances.

Absence of Procedural Safeguards Unlike a secret ballot election, union authorization cards are signed in the presence of an interested party—a pro-union co-worker or an outside union organizer—with no governmental supervision. [See Procedural Safeguards: Election v. Card Check.] This absence of oversight has resulted in deceptions, coercion, and other abuses over the years, as documented in cases where courageous employees have brought coercive activity to the attention of the NLRB or the courts. [See NLRB Cases Involving Union Deception and/or Coercion in Obtaining Authorization Card Signatures.] For example, in *HCF, Inc. d/b/a Shawnee Manor*, 321 N.L.R.B. 1320 (1996), an employee testified that a co-employee soliciting signatures on union authorization cards threatened that, if she refused to sign, “the union would come and get her children and it would also slash her tires.” Yet, even where there is no coercion, as Chief Justice Earl Warren acknowledged, “[t]he unreliability of the cards is . . . inherent, as we have noted, in the absence of secrecy and the natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees.” *NLRB v. Gissel*, 395 U.S. 575, 602 n.20 (1969), quoting *NLRB v. Logan Packing Co.*, 386 F.2d 562, 566 (4th Cir. 1967).

Organized Labor’s Selective Support for Secret Ballots The superiority of secret ballot elections in manifesting employee choice is so clear-cut that even organized labor and its

supporters have sung its virtues when it serves their purposes. For example, where the issue is whether secret ballot elections should be required to determine whether employees are *no longer* to be represented by a union (*i.e.*, a decertification), the AFL-CIO has argued to the NLRB that “other means of decision-making are ‘not comparable to the privacy and independence of the voting booth,’ and [the secret ballot] election system provides the surest means of avoiding decisions which are ‘the result of group pressures and not individual decision[s].’” Joint brief of the AFL-CIO *et al.* in *Chelsea Industries & Levitz Furniture Co. of the Pacific, Inc.*, Nos. 7-CA-36846, *et al.* at 13 (May 18, 1998). Similarly, responding to AFL-CIO complaints that certain Mexican unions are not legitimate, Rep. Miller and 15 of his colleagues sent a letter in February 2001 to the Mexican labor board asserting: “[W]e feel the secret ballot election is absolutely necessary in order to ensure that workers are not intimidated into voting for a union they might not otherwise choose.”

A Better Approach: Mandate Secret Ballot Elections Contrary to its title, the Kennedy/Miller bill moves the law in the exact opposite direction needed to protect employee choice. Instead, card check recognition should be prohibited. In recent years, increasing numbers of employers have been pressured into card check recognition by vicious “corporate campaigns,” which use a variety of tactics described by AFL-CIO Secretary-Treasurer Rich Trumka as “swarm[ing] the target employer from every angle, great and small, with an eye toward inflicting upon the employer the *death of a thousand cuts* rather than a single blow into agreeing to card check recognition.”

MGM Grand Example In just one of many examples of corporate campaigns, the Hotel Employees & Restaurant Employees International Union (HERE) pressured the MGM Grand in Las Vegas into a card check agreement by using its political clout in Detroit to threaten to deny the MGM Grand a license necessary to open a major new casino in that city. After the union was recognized, a *majority* of the employees—concerned about the tactics used to obtain signatures—petitioned the NLRB three times to hold an election. They were told by the Board that it would not hold an election while the parties were negotiating a contract. Once the contract was signed, further petitions were barred by the NLRB “contract bar” doctrine. *MGM Grand Hotel, Inc.*, 329 NLRB No. 50 (Sept. 30, 1999).

The Law Should Guarantee Employee Free Choice, Not Union Victories A 1999 study undertaken for the AFL-CIO’s George Meany Center for Labor Studies shows why card checks are so important to organized labor. Using a traditional NLRB secret ballot election, unions only win about half the time (56.5 percent in 2002). The study examined union organizing experiences under 114 card check agreements and found that unions scored victories in 78 percent of the campaigns. Clearly, the law should not be crafted simply to ensure union victories. While not without flaws, the best way for resolving the question of representation continues to be by employees expressing their opinion in a secret ballot election conducted by the NLRB. The secret ballot election process, which in the vast majority of situations occurs within 60 days after it commences, guarantees confidentiality and protection against coercion, threats, peer pressure, and improper solicitations and inducements by either the employer or the union.

Procedural Safeguards: Election v. Card Check

The following side-by-side comparison explains some of the procedural safeguards found in the NLRB election process along with any counterpart card check protections:

Election: An NLRB-approved notice that explains the workers' rights must be posted by the employer at least three days prior to the election.

Card Check: *Workers are informed of their rights only to the extent articulated by the union organizer.*

Election: "Captive audience" speeches within 24 hours of the election are prohibited.

Card Check: *Employees are subject to un rebuttable, pro-union speeches up until the time they sign an authorization card.*

Election: The election is conducted by an agent of the NLRB in conjunction with an equal number of observers selected by the union and employer.

Card Check: *Union authorization cards are solicited in the presence of union organizers.*

Election: The names of prospective voters are compared against a previously established eligibility list before they may cast their ballots.

Card Check: *Anyone may sign union authorization cards. Although forgery of authorization cards is prohibited, there is no safeguard that prevents forgeries before the fact.*

Election: The election ballot box is physically inspected and sealed by the NLRB agent immediately prior to voting.

Card Check: *The union maintains control over signed authorization cards.*

Election: The NLRB agent retains positive control over the ballots at all times.

Card Check: *The union retains control over authorization cards at all times.*

Election: The ballots are secret: no name or other identifying information appears on the ballot to indicate how an employee voted.

Card Check: *Both the employer and the union know which employees signed authorization cards.*

Election: Employees may not be assisted in casting their votes by agents of the union or employer.

Card check: *Union organizers may fill out and sign authorization cards on behalf of the workers with their express or implied permission, regardless of whether they have read the cards.*

Election: Electioneering near the polls is prohibited.

Card Check: *Solicitation of authorization cards may be accompanied by any pro-union propaganda that does not rise to a material misrepresentation regarding the consequences of signing the card.*

Election: Neither the employer nor the union may engage in coercive or threatening conduct prior to the election.

Card Check: *The union may not use threats or coercion in order to obtain signed cards nor may the employer use threats or coercion to prevent cards from being signed.*

Election: Neither the employer nor the union may grant or promise benefits prior to the election.

Card Check: *The union may not promise or grant benefits in order to obtain signed cards nor may the employer make promises or grant benefits to prevent cards from being signed.*

Election: The ballot box is opened, and the votes are counted, by the NLRB agent in the presence of the employer and union observers.

Card Check: *The employer may, but is not required to, request that a neutral party compare the names on authorization cards to the employer's payroll list.*

NLRB Cases Involving Union Deception and/or Coercion in Obtaining Authorization Card Signatures

Case Name	Issues Involved
<i>American Beauty Baking Co.</i> , 198 N.L.R.B. 327 (1972)	pressure
<i>American Can Co.</i> , 157 N.L.R.B. 167 (1966)	forgery
<i>American Metal Climax, Inc. v. NLRB</i> , 413 F.2d 191 (6th Cir. 1969)	misrepresentation
<i>Area Disposal, Inc.</i> , 200 N.L.R.B. 354 (1972)	misleading statements
<i>Bauer Welding & Metal Fabricators, Inc. v. NLRB</i> , 358 F.2d 766 (8th Cir. 1966)	misrepresentation
<i>Ben Duthler, Inc. v. NLRB</i> , 395 F.2d 28 (6th Cir. 1968)	pressure, misleading statements
<i>Bookland, Inc.</i> , 221 N.L.R.B. 35 (1975)	misrepresentation
<i>Boyer Bros., Inc.</i> , 181 N.L.R.B. 401 (1970)	peer pressure
<i>Briggs IGA Foodliner</i> , 146 N.L.R.B. 443 (1964)	coercion, misrepresentation
<i>Burlington Indus., Inc. v. NLRB</i> , 680 F.2d 974 (4th Cir. 1982)	misrepresentation
<i>Calplant Constr.</i> , 279 N.L.R.B. 854 (1986)	promised benefits
<i>Camvac Int'l, Inc.</i> , 288 N.L.R.B. 816 (1988)	misleading statements
<i>Case, Inc.</i> , 237 N.L.R.B. 798 (1978)	misrepresentation
<i>City Welding & Mfg. Co.</i> , 191 N.L.R.B. 124 (1971)	pressure
<i>Claremont Polychem. Corp.</i> , 196 N.L.R.B. 613 (1972)	promised benefits
<i>Columbia Broad. Sys., Inc.</i> , 125 N.L.R.B. 1161 (1959)	forgery, fraud
<i>Cooper-Hewitt Elec. Co.</i> , 162 N.L.R.B. 1148 (1967)	pressure
<i>D.H. Overmyer Co.</i> , 170 N.L.R.B. 658 (1968)	promised benefits
<i>Dan Howard Mfg. Co. v. NLRB</i> , 390 F.2d 304 (7th Cir. 1969)	misrepresentation, peer pressure
<i>Dayco Corp. v. NLRB</i> , 382 F.2d 577 (6th Cir. 1967)	misrepresentation
<i>Dayton Hudson Dep't Store Co.</i> , 314 N.L.R.B. 795 (1994)	forgery
<i>Dexter IGA Foodliner</i> , 209 N.L.R.B. 369 (1974)	pressure
<i>Dresser Indus., Inc.</i> , 248 N.L.R.B. 33 (1980)	misrepresentation, misleading statements
<i>DTR Indus., Inc.</i> , 311 N.L.R.B. 833 (1993)	misleading statements
<i>Eagle-Picher Indus., Inc.</i> , 171 N.L.R.B. 293 (1968)	misrepresentation
<i>Eckerd's Mkt., Inc.</i> , 183 N.L.R.B. 337 (1970)	misrepresentation
<i>Ed's Foodland of Springfield, Inc.</i> , 159 N.L.R.B. 1256 (1966)	misleading statements
<i>Engineers & Fabricators, Inc. v. NLRB</i> , 376 F.2d 482 (5th Cir. 1967)	misrepresentation
<i>Englewood Lumber Co.</i> , 130 N.L.R.B. 394 (1961)	misrepresentation
<i>Evergreen Healthcare, Inc. v. NLRB</i> , 104 F.3d 867 (6th Cir. 1997)	pressure

Case Name

Findlay Indus., Inc., 323 N.L.R.B. No. 139 (May 22, 1997)
Fort Smith Outerwear, Inc. v. NLRB, 499 F.2d 223 (8th Cir. 1974)
Freeport Marble & Tile Co. v. NLRB, 367 F.2d 371 (1st Cir. 1966)
G & A Truck Line, Inc. v. NLRB, 407 F.3d 120 (6th Cir. 1969)
Gaylord Bag Co., 313 N.L.R.B. 306 (1993)
General Steel Prods. Inc., 157 N.L.R.B. 636 (1966)
Golub Corp., 159 N.L.R.B. 503 (1966)
HCF, Inc., 321 N.L.R.B. 1320 (1996)
Heck's Inc. v. NLRB, 386 F.2d 317 (4th Cir. 1967)
Hedstrom Co., 223 N.L.R.B. 1409 (1976)
Hicks Oils & Hicksgas, 293 N.L.R.B. 84 (1989), enf'd, 942 F.2d 1140 (7th Cir. 1991)
Holiday Inn of Perrysburg, 243 N.L.R.B. 280 (1979)
I. Posner, Inc., 133 N.L.R.B. 1573 (1961)
Imco Container Corp., 148 N.L.R.B. 312 (1964)
Insuler Chem. Corp., 128 N.L.R.B. 93 (1960)
ITT Semi-Conductors Inc., 165 N.L.R.B. 716 (1967)

J.M. Machinery Corp. v. NLRB, 70 L.R.R.M. 3355 (5th Cir. 1969)
J.P. Stevens & Co., 244 N.L.R.B. 407 (1979)

John Kinkel & Son, 157 N.L.R.B. 744 (1966)
L'Eggs Prods., Inc., 236 N.L.R.B. 354 (1978)
Lake Butler Apparel Co. v. NLRB, 392 F.2d 76 (5th Cir. 1968)
Lenz Co. v. NLRB, 396 F.2d 905 (6th Cir. 1968)
Lerner Shops of Ala., Inc., 91 N.L.R.B. 151 (1950)
Levi Strauss & Co., 172 N.L.R.B. 732 (1968)
Medline Indus., Inc. v. NLRB, 593 F.2d 788 (7th Cir. 1979)
Merrill Axle & Wheel Serv., 158 N.L.R.B. 1113 (1966)
Mid-East Consol. Warehouse, A Div. of Ethan Allen, Inc., 247 N.L.R.B. 552 (1980)
Montgomery Ward & Co., 253 N.L.R.B. 196 (1980)
Montgomery Ward & Co., 288 N.L.R.B. 126 (1988)
Morris & Assoc., Inc., 138 N.L.R.B. 1160 (1962)
Mutual Indus., Inc., 159 N.L.R.B. 885 (1966)
Nashville Lumber Co., 162 N.L.R.B. 1027 (1967)

Issues Involved

forgery
 misrepresentation, promised benefits
 misrepresentation
 misleading statements
 promised benefits
 misleading statements
 misrepresentation
 coercion
 pressure
 misleading statements
 misleading statements
 misleading statements
 coercion
 forgery
 pressure
 misrepresentation, misleading statements
 misrepresentation
 misrepresentation, pressure, misleading statements
 pressure, misleading statements
 misrepresentation
 misrepresentation
 misrepresentation
 coercion
 misleading statements
 pressure, misrepresentation
 peer pressure
 peer pressure
 misleading statements
 misleading statements
 misrepresentation
 misleading statements
 coercion, misrepresentation

Case Name

Nichols-Dover, Inc. v. NLRB, 380 F.2d 438 (2d Cir. 1967)
Nissan Research & Dev. Inc., 296 N.L.R.B. 598 (1989)
NLRB v. Cumberland Shoe Corp., 351 F.2d 917 (6th Cir. 1965)
NLRB v. Gorbea, Perez & Morrell, 328 F.2d 679 (1st Cir. 1964)
NLRB v. Horizon Air Servs., Inc., 761 F.2d 22 (1st Cir. 1985)
NLRB v. James Thompson & Co., 208 F.2d 743 (2d Cir. 1953)
NLRB v. Koehler, 328 F.2d 770 (7th Cir. 1964)
NLRB v. Rohtstein & Co., 266 F.2d 407 (1st Cir. 1959)
NLRB v. Roney Plaza Apartments, 597 F.2d 1046 (5th Cir. 1979)
NLRB v. Sanford Home for Adults, 669 F.2d 35 (2d Cir. 1981)
NLRB v. Savair Mfg. Co., 414 U.S. 270 (1973)
NLRB v. The Catalyst, 99 L.R.R.M. 3022 (9th Cir. 1978)
Olin Conductors, Olin Mathieson Chem. Corp., 185 N.L.R.B. 467 (1970)
Olympic Villas, 241 N.L.R.B. 358 (1979)
Ottenheimer & Co., 144 N.L.R.B. 38 (1963)
Paul Distributing Co., 264 N.L.R.B. 1378 (1982)
Pembrook Management Inc., 296 N.L.R.B. 1226 (1989)
Peoples Serv. Drug Stores, Inc., 154 N.L.R.B. 1516 (1965)

Pizza Prods. Corp., 153 N.L.R.B. 1265 (1965)
Polyclinic Medical Ctr. of Harrisburg, 315 N.L.R.B. 1257 (1995)
Potomac Elec. Power Co., 111 N.L.R.B. 553 (1955)
Puerto Rico Food Prods. Corp., 111 N.L.R.B. 293 (1955)
Pulley v. NLRB, 395 F.2d 870 (6th Cir. 1968)
Republic Corp., Advanced Mining Group, 260 N.L.R.B. 486 (1982)
Rowand Co., Inc., 210 N.L.R.B. 95 (1974)
Salvation Army Williams Memorial Residence, 293 N.L.R.B. 944 (1989)
Sandy's Stores, Inc., 163 N.L.R.B. 728 (1967)
Schwarzenbach-Huber Co. v. NLRB, 408 F.3d 236 (2d Cir. 1969)
Scotts IGA Foodliner, 223 N.L.R.B. 394 (1976)
Sea Life, Inc., 175 N.L.R.B. 982 (1969)
Serv-U-Stores, Inc., 234 N.L.R.B. 1143 (1978)
Shapiro Packing Co., 155 N.L.R.B. 777 (1965)
Silver Fleet, Inc., 174 N.L.R.B. 873 (1969)

Issues Involved

misrepresentation
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 misleading statements
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 pressure, misrepresentation
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 forgery, pressure
 promised benefits
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 misleading statements
 peer pressure, promised benefits, misrepresentation
 peer pressure, misrepresentation
 misrepresentation
 promised benefits
 coercion
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 coercion
 misrepresentation
 misrepresentation
 promised benefits
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 misrepresentation
 peer pressure, coercion
 misrepresentation

Case Name

Somerset Welding & Steel Inc., 304 N.L.R.B. 32 (1991)
Southbridge Sheet Metal Works, Inc. v. NLRB, 380 F.2d 851 (1st Cir. 1967)
Southern Cal. Associated Newspapers, Inc. v. NLRB, 415 F.2d 360 (9th Cir. 1969)
Southland Paint Co. v. NLRB, 394 F.2d 717 (5th Cir. 1968)
Stanley M. Feil, Inc., 250 N.L.R.B. 1154 (1980)
Stride Rite Corp., 228 N.L.R.B. 224 (1977)
Suburban Drugs, Inc., 138 N.L.R.B. 787 (1962)
Swan Super Cleaners, Inc. v. NLRB, 384 F.2d 609 (6th Cir. 1967)
Taylor's IGA Foodliner v. NLRB, 407 F.3d 644 (7th Cir. 1969)
The Holding Co., 231 N.L.R.B. 383 (1977)

Tipton Elec. Co. v. NLRB, 621 F.2d 890 (8th Cir. 1980)
Top Mode Mfg. Co., 97 N.L.R.B. 1273 (1952)
Trend Mills, Inc., 154 N.L.R.B. 145 (1965)
Twin County Trucking, Inc., 259 N.L.R.B. 576 (1981)
W&W Tool & Die Mfg. Co., 225 N.L.R.B. 1000 (1976)
Walgreen Co., 221 N.L.R.B. 1096 (1975)
Wylie Mfg. Co., 170 N.L.R.B. 122 (1968)
Zellerbach Paper Co., 4 N.L.R.B. 348 (1938)

Issues Involved

misleading statements
 pressure
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