

## Proposed “Card Check” Union Election Bills – Historical Context for an Old Proposal

By Mark Broth and Anna Cole

During the current legislative session, two bills have been proposed (one in the House – HB 1399 - and one in the Senate – SB 448) that would amend the Public Employee Labor Relations Act to bypass the union election process and allow for certification of a bargaining unit's exclusive representative (i.e., union) upon receipt of written authorization from a majority of the employees' in the bargaining unit. Such a process is often referred to as a “card check” process. Currently, certification of an exclusive representative is performed through a secret ballot election. RSA 273-A:10.

While the proposed change in the process may sound novel, those who have long worked in the public sector may remember that a similar, but short-lived, change was made to the PELRA during the Obama Era. In 2007, the federal Employee Free Choice Act sought, among other things, to permit private sector union recognition based on authorization cards. As a result, a number of states saw similar proposed changes to their public employee labor relations laws. While the Employee Free Choice Act failed, the proposed change to New Hampshire law went into effective in September 2007. The modification was short-lived, however, and was repealed in August of 2011.

Returning to the present, it may appear that history is repeating itself. At



the federal level, we have seen the Protect the Right to Organize (PRO) bill pass the House. PRO includes a variety of measures that private sector unions have long sought and includes a provision that would place the burden of proof on the employer to demonstrate that the employer did not undermine the union election. If the employer fails to meet that burden, the NLRB could then rely on authorization cards to recognize the union. More expansively than the PRO bill being discussed at the federal level for private employers but just like their 2007 New Hampshire predecessors, the New Hampshire bills seek to adopt the broader card check method. As may often be the case in such circum-

stances, the criticisms of the proposed New Hampshire amendment have primarily remained the same.

For example, many have raised concerns that the card check is an anti-democratic process, because it does not allow all members of the bargaining unit the opportunity to weigh in on the selection of the exclusive representative – once a majority is reached, the prospective union could simply stop approaching additional members of the bargaining unit. Additionally, critics have raised concerns regarding potential coercion, because it is almost impossible to determine whether employees were pressured, misled, or otherwise improperly influenced to sign an authoriza-

tion card. Finally, there are concerns that the card check process deprives employees of the ability to learn the employer's perspective on unionization because it can take place before the employer is even aware that a union-organizing drive has begun. The existing secret ballot process, which has operated successfully for over 40 years with few claims of improper election interference, essentially eliminates these coercion and undue influence concerns. In that sense, the proposed amendment to the current secret ballot process appears to be a solution in search of a problem.

Even if adopted, it is somewhat unlikely that proposed change in the law will have a significant effect on the public sector union landscape. Currently there are relatively few employees who could unionize (by being part of a bargaining unit consisting of 10 or more employees that share a community of interest) who have not already done so. Therefore, where the proposed amendment does not seek to alter the current 10-employee minimum, it is unlikely that many public employees would have the opportunity to take advantage of the card check process.

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