

CARD CHECK RECOGNITION IN THE PUBLIC SECTOR

Much attention has been focused on the proposed Employee Free Choice Act which would amend the National Labor Relations Act to mandate certification without an election where a union demonstrates majority support within an appropriate bargaining unit via signed authorization cards. Five states have enacted legislation mandating certification based on establishment of majority status with authorization cards or other means and a sixth state appears ready to join the others.

New York was the first state to provide for certification based on a showing of majority support without an election. The New York PERB rules implementing the statute provide, "If the choice available to the employees in a negotiating unit is limited to the selection or rejection of a single employee organization * * * the employee organization involved will be certified without an election if a majority of the employees within the unit have indicated their choice by the execution of dues deduction authorization cards which are current, or by individual designation cards which have been executed within six months prior to the date of the director's decision recommending certification without an election." NYPERB Rules § 201.9(g). The rules require that a union seeking certification without an election submit a sworn declaration of authenticity attesting on personal knowledge or inquiries that the affiant has made that the cards were signed by the individuals whose names appear on them on the dates specified, that they are in fact current members of the union, and that inquiry was made as to whether they were included in any existing negotiation unit. *Id.* § 201.4(d).

As the book went to press, Illinois became the second state to mandate card check certification. Two agencies administer the Illinois public sector collective bargaining statutes: the Illinois Educational Labor Relations Board (IELRB) has jurisdiction over employers and employees in public education and the Illinois Labor Relations Board (ILRB) has jurisdiction over the rest of the public sector. The IELRB regulations are found at 80 Ill. Adm. Code § 1110.105, and the ILRB regulations are found at 80 Ill. Adm. Code § 1210.100(b). Both provide for the union to file a "majority interest petition," accompanied by its evidence of majority status based on "dues deduction authorizations or other evidence submitted in support of a designation of representative without an election." Both provide for posting a notice and both require the employer to supply to the Board a list of employees in the bargaining unit and handwriting exemplars for those employees. Pursuant to statute, both Boards' regulations provide that a majority interest petition may be defeated by a showing by clear and convincing evidence that the showing of interest was procured by fraud or coercion, in which case a representation election is conducted. Both provide that if issues concerning the appropriateness of the bargaining unit or the inclusion of specific employees would affect the determination of majority status they are resolved by holding a hearing, but if the issues would not affect the outcome, they are resolved through the Boards' unit clarification procedures. The IELRB regulations allow a party to petition to intervene but the ILRB's regulations do not. Instead, the ILRB regulations allow a competing union to file a representation petition supported by a 30% showing of interest. The IELRB regulations provide that a party may allege that dues deduction authorizations or other evidence of majority support were changed, altered, withdrawn or withheld as a result of employer fraud, coercion or unfair labor practice and if the allegations are proven and it is proven

that absent the fraud, coercion or unfair labor practice the union would have had majority support, the Board certifies the union as exclusive representative. The ILRB regulations do not have a comparable provision.

In 2005, New Jersey became the third state to mandate card check certification in the public sector. The New Jersey PERC's regulations allow a union to seek certification based on authorization cards signed by a majority of employees but do not mention dues authorizations, petitions or other evidence of majority support. N.J.Adm.Code 19:11-1.2(a)(10). The regulations provide for the posting of a notice that the union is seeking certification without an election for a period of ten days. *Id.* 19:11-2.4. The Commission's Director of Representation determines whether a majority of employees have signed valid authorization cards, *Id.* 19:11-2-6(b) and has discretion to conduct a hearing where he finds a hearing would resolve substantial and material issues or otherwise serve the interest of administrative convenience and efficiency. *Id.* 19:11-2.6(f). The procedure may only be used if no other organization is seeking to represent the employees.

On July 17, 2007, the Governor of New Hampshire signed into law, effective September 15, 2007, Senate Bill 216 which provides for recognition without an election based on "authorization cards, petitions, or such other written evidence as the public employee labor relations board * * * shall find suitable * * *" The act provides that the union and employer shall agree within ten days on a neutral third party to inspect the showing of interest and verify majority support. If the parties are unable to agree on the neutral third party, the Board is required to perform the inspection and verification. The act is silent on whether employees or a rival union may file petitions seeking elections after a certification petition has been filed.

On July 27, 2007, the Governor of Oregon signed into law House Bill 2891 which took effect upon its enactment. The statute provides that when a representation petition claims majority support, the Oregon Employment Relations Board shall investigate the petition and, if it finds that a majority of employees in an appropriate bargaining unit have signed authorization cards and that no other labor organization represents any employees in the unit, shall certify the petitioning labor organization as exclusive bargaining representative. However, an employee or group of employees may file a petition supported by at least 30% of the employees in the bargaining unit requesting an election. The act further provides for the Board to promulgate rules providing model language for authorization cards, procedures for establishing authenticity of signatures on the cards, procedures for issuing notice to affected employees and for requests for representation elections to be filed within 14 days of the notice.

In Massachusetts, the legislature passed a bill in 2006 requiring card check recognition but then Governor Mitt Romney vetoed it. On September 27, 2007, with a Democrat as governor, the state enacted a card check recognition requirement which took effect December 26, 2007. It provides for certification of a labor organization as exclusive representative based on written authorization as certified by an agreed-on neutral or, if no neutral is agreed on, by the Massachusetts Labor Relations Commission. The bill provides that the MLRC is to promulgate

rules governing the process which safeguard the privacy of employees' free choice and that ensure that the process will be completed within thirty days of appointment of the neutral or assumption of verification duties by the Commission.