

Governor Schwarzenegger Preserves Secret Ballot Elections in Agriculture

By

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In the 34 years of the California's Agricultural Labor Relations Act, supervised secret ballot elections have proven to be the crown jewel of California's labor relations law. These elections vest employees with the decision for or against union representation. During the election campaign, labor unions and employers both have their say, but neither has a vote. Rather, on the day of the election, unions and employers step back and the employees decide on union representation in the privacy of the voting booth. Agricultural employers and employees alike can thank Governor Schwarzenegger for protecting these elections with his veto of SB 789.

Under current law, both nationally and in California agriculture, unions can obtain a secret ballot election by gathering employee signatures in sufficient numbers to make a "showing of interest." In California agriculture, the required showing of interest is a majority of employees in the bargaining unit. Under the National Labor Relations Act, the required showing of interest is 30% of eligible employees. Unions submit the showing of interest together with a representation petition seeking certification as the exclusive bargaining agent of the bargaining unit. Before setting an election, the National Labor Relations Board (NLRB) checks the cards to see if the union has made a sufficient showing of interest. The California Agricultural Labor Relations Board (ALRB) does the same for agricultural employers in California. If sufficient cards have been submitted, the NLRB attempts to set an election within 30 days. Because farm workers work seasonally, the ALRB must set a secret ballot election within 7 days of the representation petition.

The NLRB and the ALRB have similar procedures for conducting elections. The employer submits a list of the employees in the bargaining unit in the period immediately before the petition, and the union reviews the list to challenge names on the employer's list, or to add names not on the list. In most cases, names that are not agreed to must vote "challenged". On the day of the election, employees go to the polling place, present their identification, and cast their ballot behind drawn curtains, so that neither side can know how they voted. Even if they vote challenged, all of the challenged ballots are placed in a box before they are opened, so that no one can know how any particular voter voted.

Both the so-called Employee Free Choice Act and SB 789 in California would take away the right to a secret ballot election and replace it with a count of union authorization cards. By these

proposals, if a majority of employees sign cards, there would be no secret ballot election, no campaign, and no opportunity for employees to hear both sides of the question. The Employee Free Choice Act would in fact deprive employees of the free choice it promises.

Employees may sign authorization cards under various circumstances for various reasons. In many cases, the employer is unaware that the union is gathering authorization cards, and has no opportunity to persuade employees not to sign them. Some employees sign the cards because they want union representation. Other employees may not have decided in favor of union representation, but they sign the cards in order to have an election on representation. Other employees may sign the card just to get the union agent to leave them alone. In a few reported cases of fraud, employees have believed that they are signing up for some raffle or benefit.

Senator Arlen Specter, now a Democrat since switching parties last fall, has expressed strong concerns about certain organizing techniques. In particular, he has advocated legislation to prohibit organizers from visiting employees uninvited in their homes. The intrusion may be unwelcome and may even seem threatening. Cornered where they live, employees have no sanctuary to escape from the pressure of home visits. Organizers know that employees will often sign the card just to make them leave.

Unions nationwide have made the Employee Free Choice Act their top priority, probably because of their continuing inability to win secret ballot elections. The union portion of the private sector workforce has fallen to 7.4 % , the lowest since records have been kept. For labor unions, this is both a political and a financial crisis.

There are many causes for the decline in union membership. For many years, we have seen a shift in economic activity from manufacturing, a bastion of unions, to the service industry. On top of that, the current recession has reduced jobs both in manufacturing and in construction, another bastion of trade unions. A related cause has been the globalization of the economy and the rise of foreign competition, also concentrated in the manufacturing sector.

The legal and political environments have also changed to emphasize individual employee rights rather than the collective rights of unions. The first signs of this trend were with Title VII of the Federal Civil Rights Act and the California Fair Employment and Housing Act, which authorized individual discrimination and harassment lawsuits. Then in California, we have seen the growth of individual wrongful termination actions, including actions based on implied employment contracts and actions for the violation of public policy. In recent years, we have also seen the explosion of wage and hour lawsuits, both individual and class actions. As usual in employment law, California leads the nation in these trends. The California Private Attorney General Act has provided a remedy for every provision in the California Labor Code, and some of these provisions, such as the requirement of meal and break periods, have created a feeding frenzy among plaintiffs' counsel.

Union organizers understand these developments in the law and often sponsor employment litigation to serve their current and potential memberships. Employees also proceed without the benefit of union support. An employee who feels shortchanged by his employer does not need to go to the union hall for assistance. Rather, he can go to the Labor Commissioner, or find a private lawyer who may see the profit opportunity in litigation. Neither of these remedies requires a monthly deduction of union membership dues, and none subjects the employee to the requirement that he maintain his union membership in good standing.

Union organizing is weaker than it has ever been. Seeing no prospect of expanding union membership by secret ballot elections, organized labor is attempting to circumvent elections with the Employee Free Choice Act and comparable state proposals. We can all thank Governor Schwarzenegger for being resolute in vetoing the legislation for California agriculture. We can only hope that his successor will take a similar view.

Employers can take heart in these developments, but must always be aware that unions remain available as a last resort for employees exasperated by employer malfeasance. Human resources professionals and experienced labor counsel can help employers comply with the bewildering array of labor laws and regulations and avoid the type of malfeasance that may result in union organizing.