

The Employee Free Choice Act: *Understanding the Act and Protecting your Business*

by Jonathan A. Keselenko



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Introduction

The Employee Free Choice Act is proposed federal legislation that would greatly improve union chances of winning certification elections and would increase union membership throughout the country. Businesses have identified the EFCA as a serious threat and one that has a good chance of becoming law.

At this point, no one can predict whether the EFCA will pass as proposed, whether it will pass in an amended form, or whether it will pass at all. But, regardless, union organizing activity will likely increase in coming years due to the changed political environment, and employers need to be prepared.

I hope that you find the information in this booklet helpful, and please feel free to contact me if you have any questions.

Sincerely,

Jonathan A. Keselenko

Partner, Labor and Employment Department

What Would The Employee Free Choice Act Change?

- Procedures for union certifications
- Negotiations of first contract
- Penalties against employers

Employee Free Choice Act:

Eliminating the need for secret ballot elections

The Current Law

- An employer can generally demand a secret ballot election.
- A union must demonstrate to the NLRB that 30% of the employees in a bargaining unit have expressed an interest in that union. At that point, the NLRB will conduct a secret ballot election.
- A union cannot usually show that it has majority support only through authorization cards.

The EFCA

- A union can demonstrate majority support through a majority of employees signing authorization cards.
- An employer cannot demand a secret ballot election if the union demonstrates majority support through signed authorization cards.
- The union can still, alternatively, demonstrate majority support through the traditional process: showing 30% support followed by an NLRB secret ballot election.

[House Bill](#)

[Senate Bill](#)

Employee Free Choice Act: *First contract negotiations*

The Current Law

- The employer and union must bargain in good faith in their attempts to negotiate a collective bargaining agreement.
- Neither party is obligated to agree to a proposed agreement or to make a concession.
- Parties bargain either to impasse or to agreement.
- At impasse, the employer can impose terms.

The EFCA

- The employer and union must bargain in good faith in their attempts to negotiate a collective bargaining agreement.
- If the parties do not sign a collective bargaining agreement within 90 days, either party may submit the dispute to mediation.
- If no collective bargaining agreement is reached after 30 days of mediation, the mediator submits the dispute to arbitration.
- The arbitrator will decide the terms for the parties' first collective bargaining agreement, to last for two years.

Employee Free Choice Act: *Fines and penalties*

The Current Law

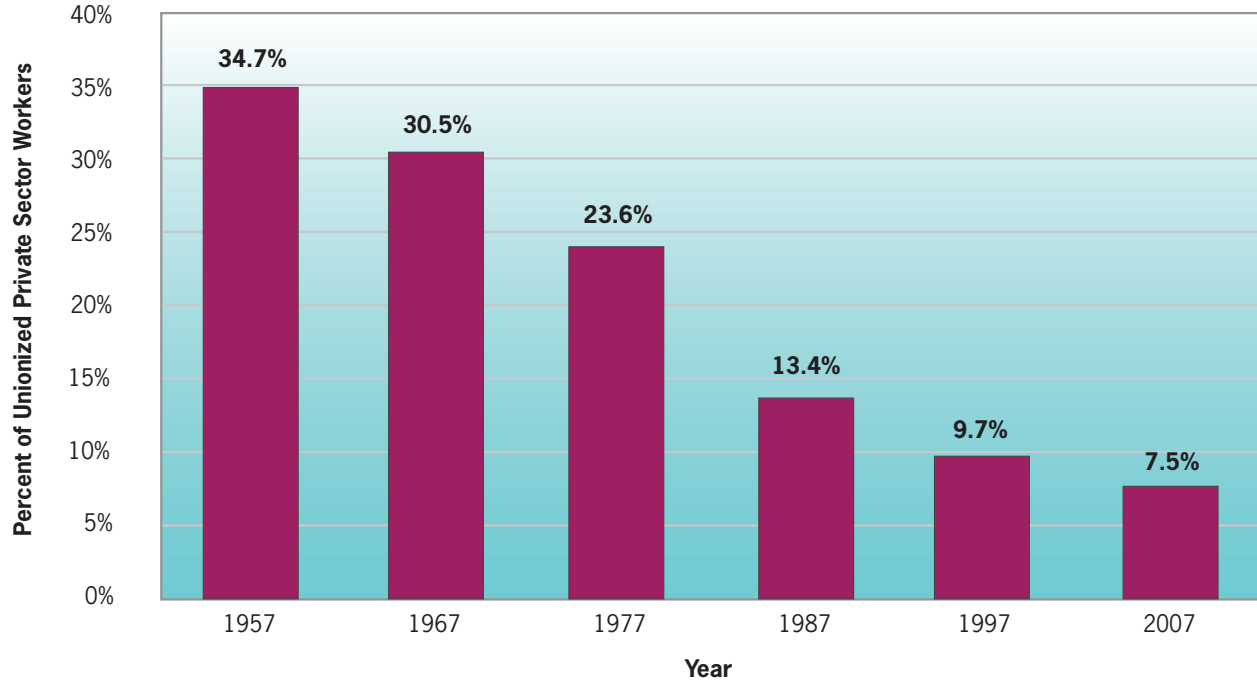
- The law provides remedial relief.
- An employee can recover back pay damages.
- The employer is not subject to civil penalties for willful or repeated unfair labor practices.
- The NLRB is not required to seek injunctive relief to prevent employer violations of unfair labor practices in connection with organizing activity.

The EFCA

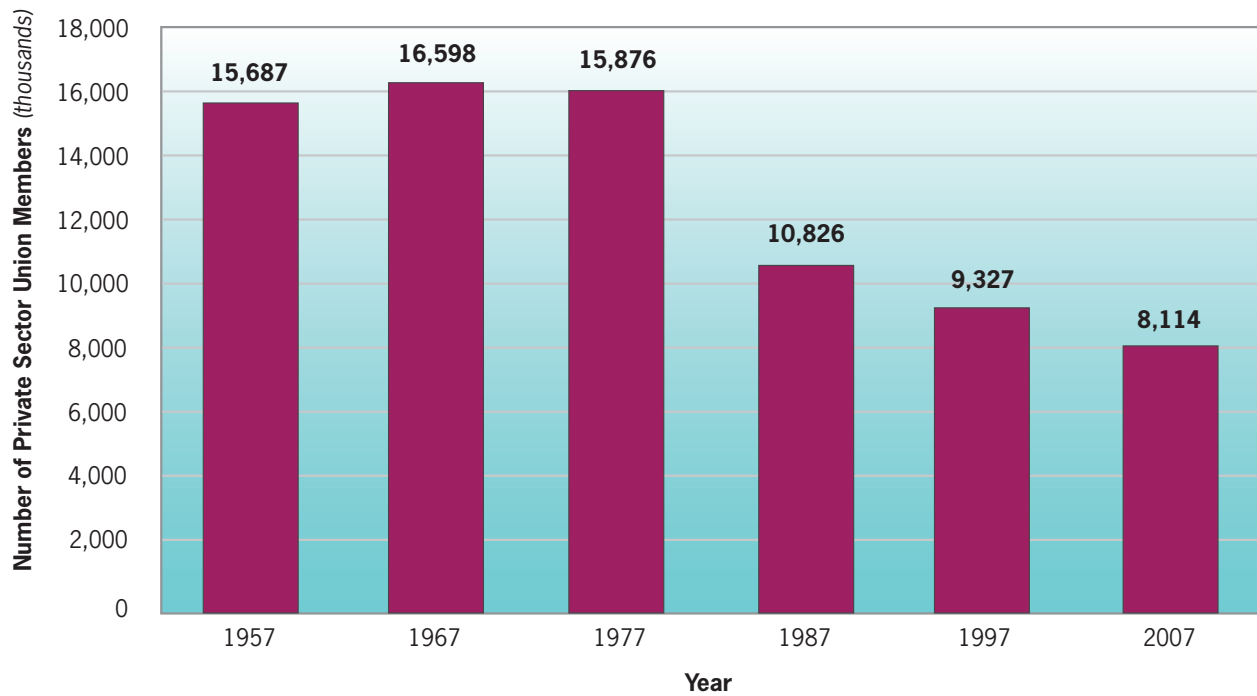
- The law provides remedial and punitive relief.
- An employee can recover three times back pay damages.
- The employer is subject to up to \$20,000 per violation for willful or repeated unfair labor practices.
- The NLRB is required to seek injunctive relief to prevent employer violations of unfair labor practices in connection with organizing activity.

Why Unions Want the EFCA

Union Membership Has Declined Over Time



Private Sector Union Membership Over Time

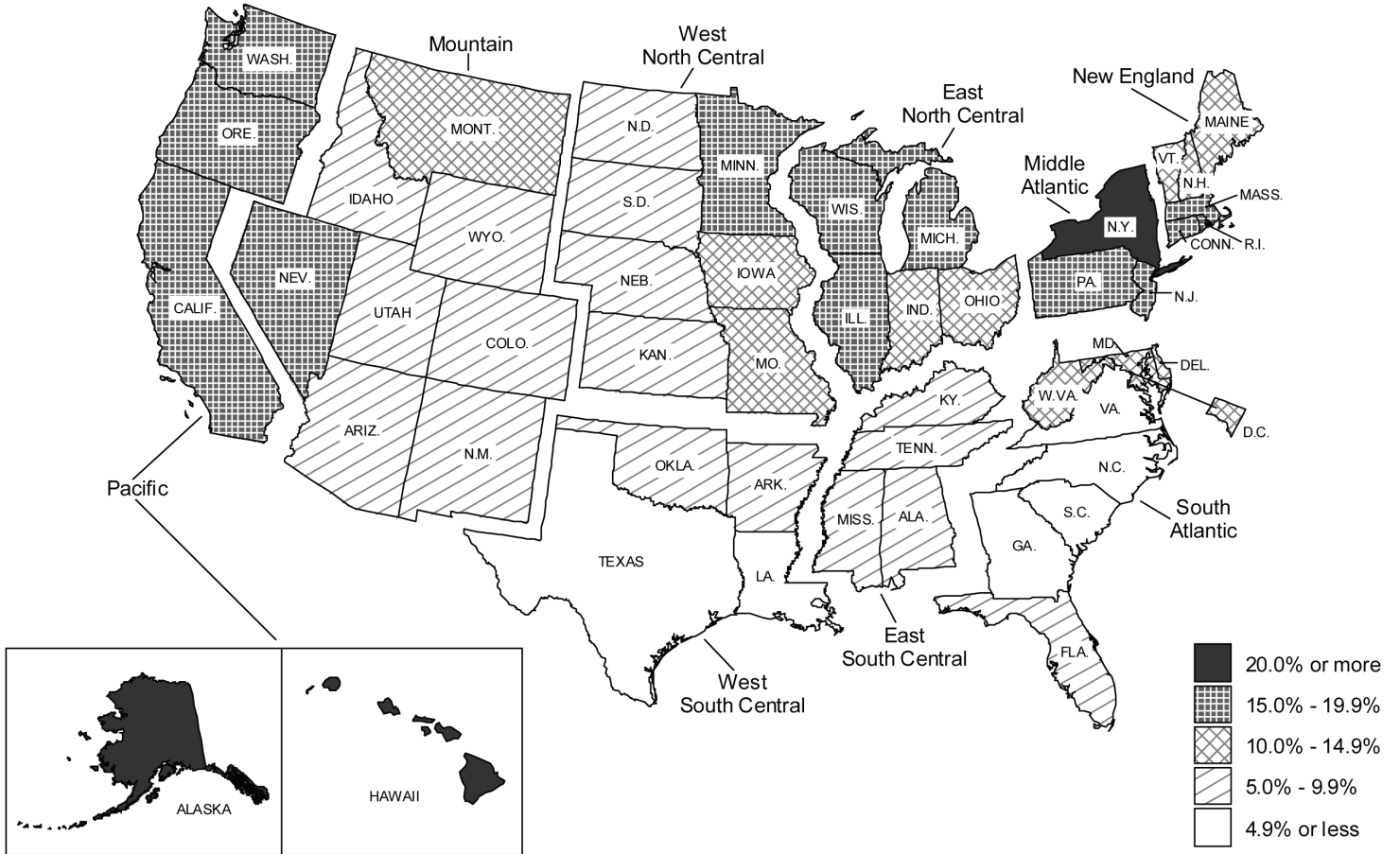


Source: U.S. Bureau of Labor Statistics.

Unionization By State

Union membership rates by state, 2008 annual averages

(U.S. rate = 12.4 percent)

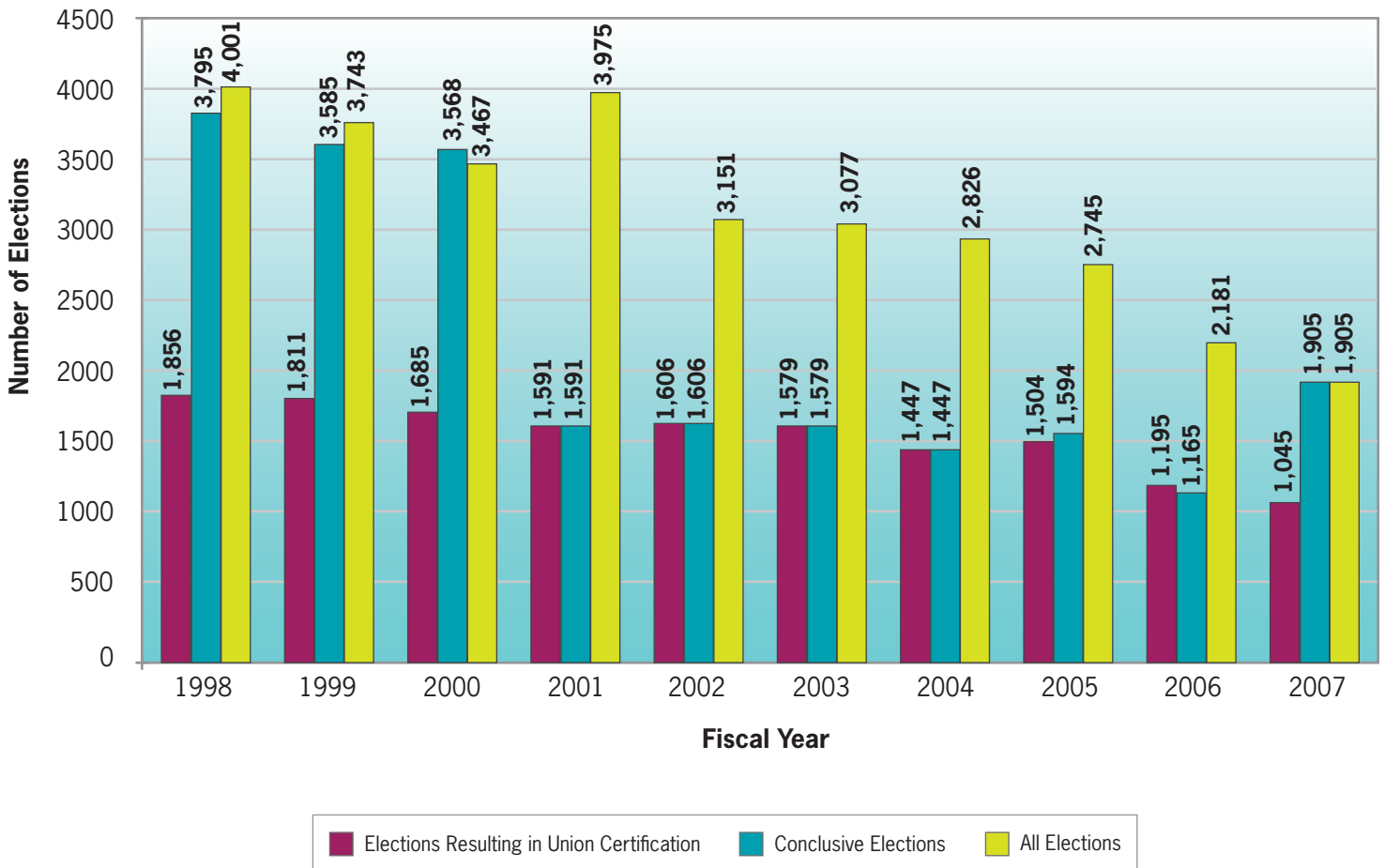


Source: U.S. Bureau of Labor Statistics.

Year by Year Results in Representation Elections

Representation Elections Conducted

(Based on Cases Closed During Year)

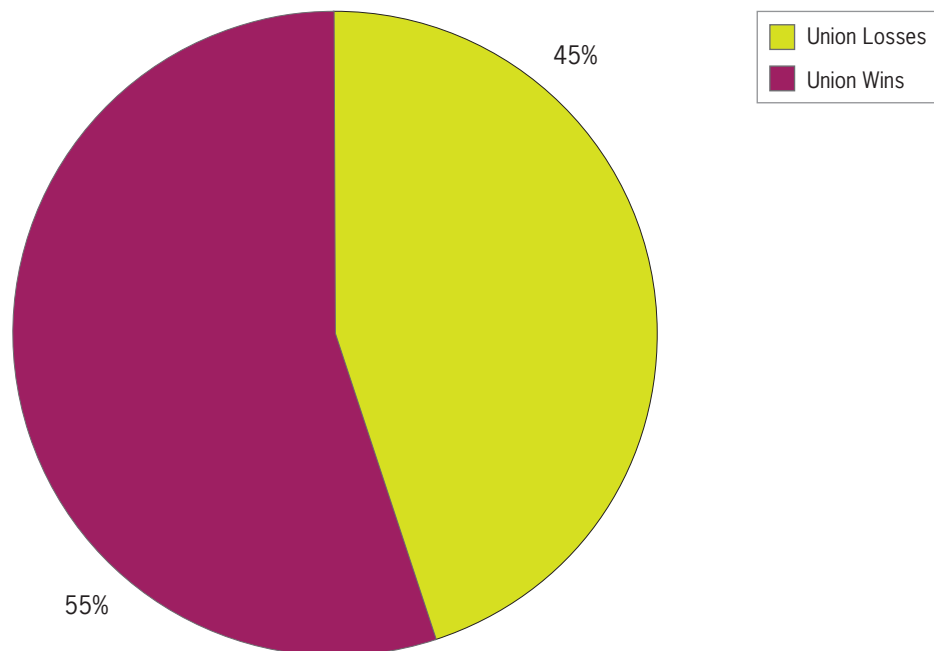


Source: 2007 Annual Report, National Labor Relations Board.

Neutrality Agreements Lead to Higher Union Success Rates

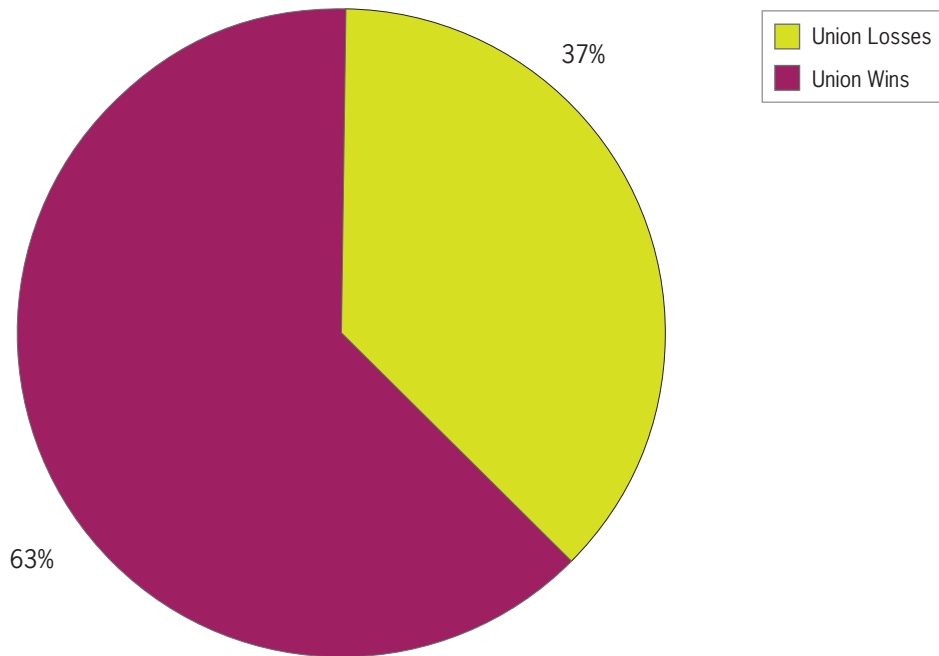
- A neutrality agreement is an agreement between the union and company in which the employer agrees not to oppose a union's efforts to unionize.
- A 'card check' recognition is an agreement between the union and company stating that a union can be chosen by a card check rather than by a secret ballot election.
- Unions are more successful with a card check than with a secret ballot election.
- Unions are more successful with a card check and neutrality agreement than with a card check alone.

When There Is A Secret Ballot Election With No Neutrality Agreement

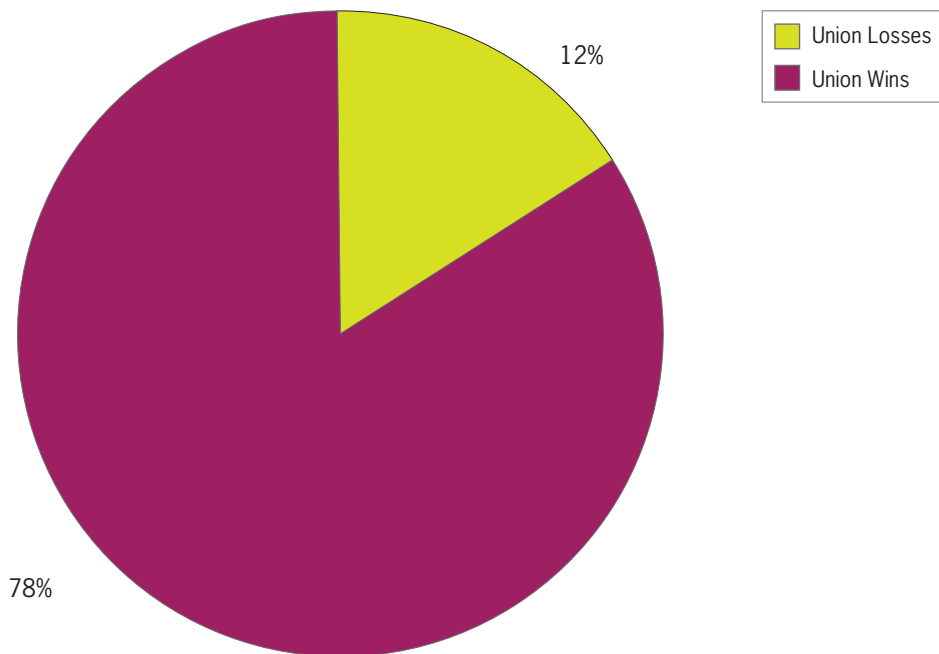


Source: Congressional Research Service, Labor Union Recognition Procedures: Use of Secret Ballots and Card Checks (April 2, 2007) [2007 Annual Report, National Labor Relations Board.](#)

When There Is Only Card Check Recognition



When Card Check Recognition Is Combined With A Neutrality Agreement



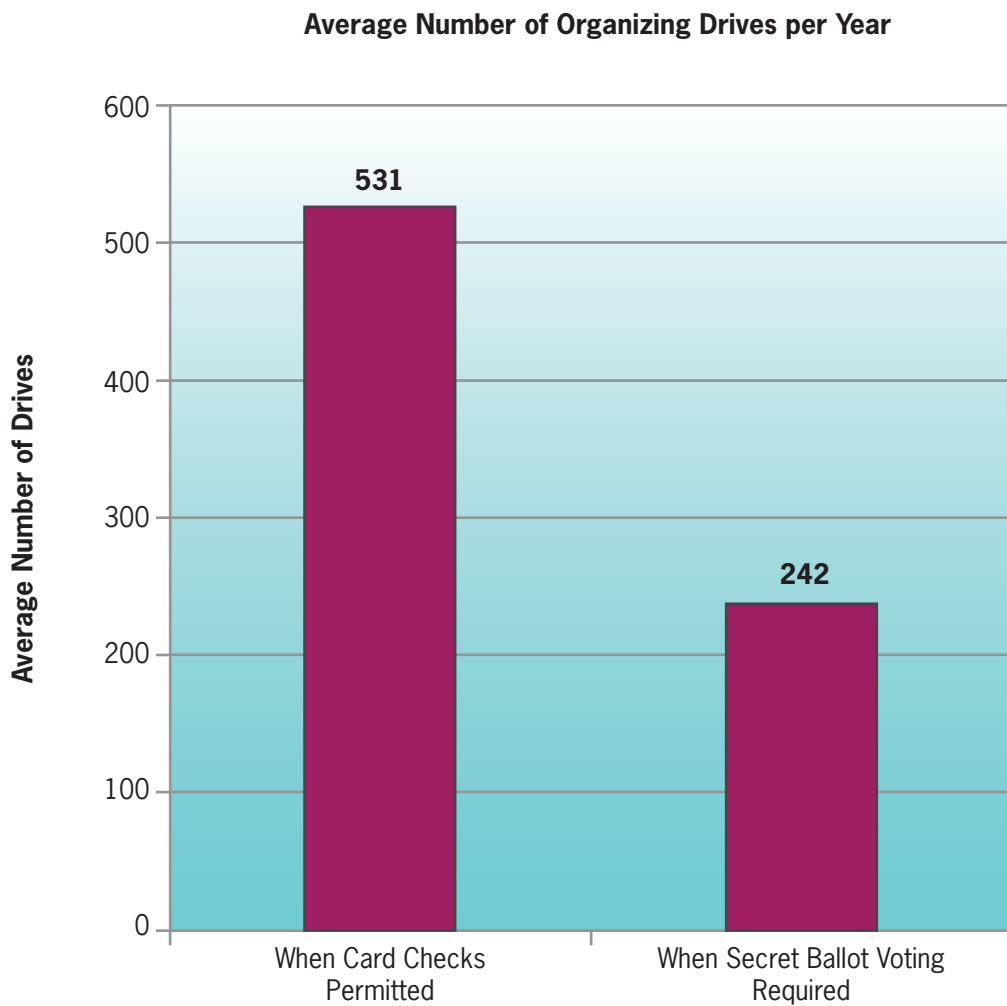
Source: Congressional Research Service, [Labor Union Recognition Procedures: Use of Secret Ballots and Card Checks \(April 2, 2007\)](#) and 2007 Annual Report, National Labor Relations Board.

Unions Elsewhere More Successful With Card Checks

In Canada, union certification is governed by the law of each province. From 1984-1992, British Columbia required secret ballot elections. After 1992, British Columbia permitted signed authorization cards instead.

Data from British Columbia indicates that permitting card checks leads to...

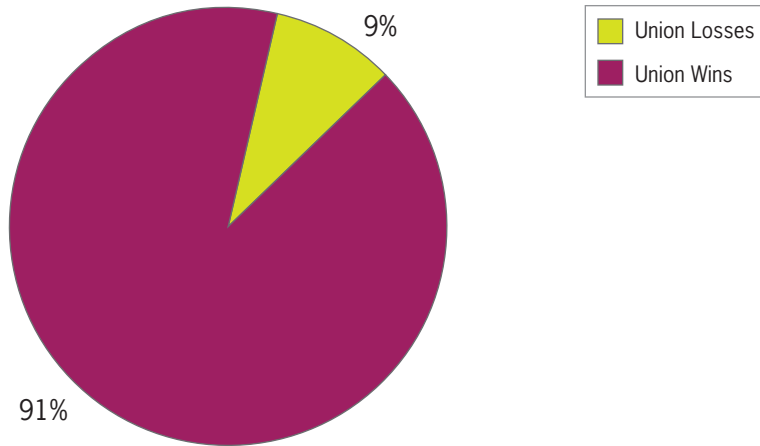
More Organizing Drives



Data from British Columbia indicates that permitting card checks leads to...

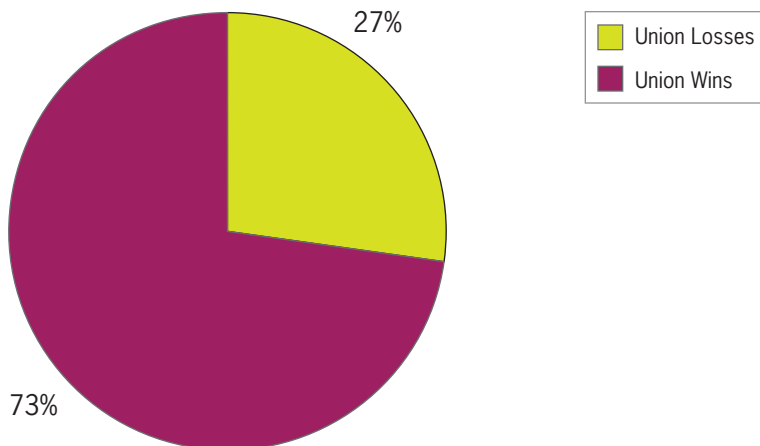
More Union Wins

When Card Checks Permitted



Union success rate when card checks permitted: 91%

When Secret Ballot Voting Required



Union success rate when secret ballot voting required: 73%

Source: Congressional Research Service, Labor Union Recognition Procedures: Use of Secret Ballots and Card Checks (April 2, 2007).

Nipping Unionization in the Bud:

Address issues earlier rather than later, before a union is on the scene.

Human Resources Issues

- **Fairness:** Deal fairly and even-handedly with employees.
- **Promptness:** Address issues, handle complaints, and conduct performance reviews in a timely manner.
- **Underperformers:** Treat underperformers with fairness but do not allow underperformers to linger.
- **Compassion:** Show compassion to an employee personal needs and issues.

Supervisor Training

- **Increase Awareness:** Train managers to identify and respond to union activities, whether budding or full-blown.
- **Determine Who Are Supervisors:** Your definition may vary from the NLRB's. Make sure you know who are supervisors under the law.
- **Campaigning and Voting:** Supervisors can campaign for the company in a union campaign, but cannot vote.

Handbooks & Personnel Policies

- **Current:** Have your handbooks and personnel policies been updated.
- **Consistent Enforcement:** Apply the policies fairly and consistently. Inconsistent enforcement before a union is on the scene may prohibit enforcement later.
- **No-Solicitation/Distribution Policy:** Implement (and consistently enforce) such a policy, including regarding email.

Wages and Benefits

- **Comparables:** Determine whether the wages and benefits on par with comparable companies.
- **Fairness:** Is the compensation fair? Do employees perceive it to be fair? Is there an explanation for pay differences?

Address issues earlier rather than later, before a union is on the scene.

Keep A Pulse on Employee Needs and Problems

- **Supervisor Communication:** Make sure supervisors are communicating with employees.
- **Surveys:** Consider use of employee surveys.
- **Resolve Problems:** Consider resolving concerns learned about through this process. Once a union is on the scene, resolution becomes legally problematic.

Loss of Employment

- **Treatment:** Make sure to fairly and respectfully treat affected employees.

Communication

- **Keep Employees Informed:** When kept informed, employees are less likely to feel stress.
- **Appropriate Sources of Information:** Tell them important decisions through appropriate channels.

Respect

- Respected employees are less likely to seek outside representation.

Jonathan A. Keselenko

Jonathan Keselenko has an extensive traditional labor law practice, which includes representing employers before the National Labor Relations Board. He has defended employers against unfair labor practice charges and “R” (representation) petitions in numerous NLRB regional offices throughout the United States and in face-to-face meetings with the NLRB General Counsel. Jonathan also represents employers in grievances challenging employment practices, and he has arbitrated labor law disputes under collective bargaining agreements.

Jonathan also approaches employment issues proactively by conducting training sessions that help employers and their management comply with the law and deal with everyday employment issues. He advises employers concerning personnel decisions, including terminations and layoffs.

Click the image below for a full biography.



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