



## New Jersey Mini-Card Check Law is Unconstitutional

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### **For Discussion Only**

Acting Governor Codey has signed the so-called “card check” union recognition law, which is effective immediately within the state. Among other things, the law amends the New Jersey Employer-Employee Relations Act by expanding the authority of the NJ State Board of Mediation to determine when a labor union represents a majority of employees on the basis of simply counting the number of signed authorization cards. This “card check” recognition circumvents an employer’s right to have an election and to campaign against union recognition.

On its face, the Card Check law represents a significant legislative victory for organized labor and a substantial legal burden for employers who desire to remain union-free. In reality, the law creates complex legal issues and may be unenforceable in many cases. Further in the cases where the law could be enforced, it creates unsettled procedural questions.

While it is clear that the law applies to public employers, including authorities and commissions, it excludes religious institutions and private nonprofit organizations. It also excludes “private employers regulated by the National Labor Relations Board pursuant to the National Labor Relations Act.” This “private sector” exclusion is necessary because the national (federal) labor law preempts entirely state law. However, even though the national labor law trumps state labor law in nearly every case in the private sector, the National Labor Relations Board (NLRB) typically does not regulate smaller employers. Generally speaking, the NLRB will decline to regulate an employer unless the following jurisdictional standards are satisfied:

*Nonretail business:* Direct sales of goods to consumers in other States, or indirect sales through others (called outflow), of at least \$50,000 a year; or direct purchases of goods from suppliers in other States, or indirect purchases through others (called inflow), of at least \$50,000 a year.

*Retail enterprises:* At least \$500,000 total annual volume of business.

*Public utilities:* At least \$250,000 total annual volume of business, or \$50,000 direct or in direct outflow or inflow.

*Newspapers:* At least \$200,000 total annual volume of business.

*Hotels, motels, and residential apartment houses:* At least \$500,000 total annual volume of business.

*Privately operated health care institutions:* At least \$250,000 total annual volume of business for hospitals; at least \$100,000 for nursing homes, visiting nurses associations, and related facilities; at least \$250,000 for all other types of private health care institutions. Such institutions include "any hospital, convalescent hospital, health maintenance organizations, health clinic, nursing home, extended care facility or other institution devoted to the care of the sick, infirm, or aged person."

Due to the ambiguity of the Card Check law's coverage, resources permitting, unions will certainly use the law to organize smaller firms. However, due to the far reach of the federal labor law, it is doubtful that the state law will apply to even smaller employers in the private sector, but this is sure to be a point of contention that will be most likely decided by a court.

Additionally, since the Card Check law circumvents an open campaign and fair election for union recognition, employers are denied the right to make a good faith refusal to recognize a union and to fairly make their case against union recognition to their employees during an election campaign. The NJ State AFL-CIO justifies this denial, stating that the law "allows workers to exercise their right to union representation without being subjected to the lengthy, often contentious, union election drives which allow employers to threaten, intimidate and harass workers into voting 'no.'" However, the employer's right to freely and fairly campaign against union recognition is constitutionally guaranteed. Therefore, "card check" recognition of a labor union is dubious as a matter of constitutional law, particularly if the employer refuses in good faith to recognize the union's majority status based on authorization cards alone and insists instead on exercising its First Amendment right to an open and fair election. In short, it is highly uncertain whether the Card Check law will apply to any employer in the private sector.

However, the law does apply to "public" employers, which includes all governmental employers and any branch or agency of the public service. It empowers the State Board of Mediation to determine whether union recognition can be based on "authorization cards indicating [employee] preference." The only restriction on the Board's determination is that "an authorization card indicating preference shall not be valid unless it is printed in a language understood by the employee who signs it." There is no provision in the law that permits an employer to contest the authenticity of authorization cards or to present evidence of union fraud or intimidation. Moreover, the law does not direct the State Board of Mediation to issue due process regulations. Further, public employers too have First Amendment rights that would be abridged by "card check" union recognition, making the law of uncertain validity even in the public sector.

Clearly, the Card Check law is an impressive testament to the political and legislative skill of the State AFL-CIO. Its enactment represents a potent symbol of labor power. However, it is certain that if the law is actually used by organized labor its applicability in both the private and public sectors will be seriously challenged in court. It is not uncommon for legal skill and analysis to ultimately trump legislative skill and political action.