

# PUBLICATION

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## NLRB Suing States That Preserve Secret Ballot in Union Elections

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In 2010 the states of Arizona, Utah, South Dakota, and South Carolina passed amendments to their state constitutions guaranteeing employees in their state the right to vote by secret ballot election whenever they are called upon to decide whether they will be represented by a union. Under current federal law there are two ways for a union to obtain certification: (1) by secret ballot election conducted by the NLRB; or (2) through voluntary card check agreements between an employer and a union. A voluntary card check agreement is an agreement between a company and a union where the Company agrees to recognize the union as the collective bargaining representative of the employees in the event that the union collects authorization cards from a majority of employees. Under current law, an employer is not required to recognize a union that has authorization cards from a majority of employees, and the employer can insist on a secret ballot election.

Under the widely debated Employee Free Choice Act, which has been stalled in Congress for quite some time, an employer would be forced to recognize unions who obtained a majority of authorization cards, and employers would not be able to demand a secret ballot election. As a way of getting out in front of the anticipated impact of the Employee Free Choice Act, Arizona, Utah, South Dakota, and South Carolina passed amendments guaranteeing employees the right to vote in a secret ballot election.

On May 6, 2011, the NLRB filed suit against the state of Arizona in federal court seeking a declaration that the Arizona constitutional amendment is invalid because it is preempted by federal law. The states have taken the position that the secret ballot election requirement is consistent with federal law.

It is not often in Labor and Employment law that we see two governmental entities suing each other over issues of federalism. In fact, the states argue that the NLRB does not even have the power to file such suits. Regardless of the outcome of this litigation, the NLRB has firmly ensconced itself in the unpopular position of resorting to a lawsuit with the intention of ending any guarantee of secret ballot in union elections.