

# Card Check and Ag Employers, One Year Later

What Does It Mean for You? What Have We Learned From the  
First Year of Card Check?

*Presented by:*

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# Legal Disclaimer

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# What are we calling this thing?

- Card Check
  - AB 2183
  - AB 113
  - Majority Support Petition
  - Labor Code section 1156.37
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- What about “labor peace compact”?
  - What about “mail balloting”?

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Are FLCs exempt from card check?

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A bit of background...

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## Terms that are helpful to know...

- “**Card check**” means “majority support petition” or “MSP.”
- “**CBA**” means “collective bargaining agreement” between an employer and a union.
- “**Majority support**” means more than 50% of the eligible voters.
- “**MMC**” means “Mandatory Mediation and Conciliation.”
- “**Proof of support**” means authorization cards, petitions, or other documents signed by an employee.
- “**ULP**” means “unfair labor practice” charge, which is an allegation that a party violated the Act.
- “**Union**” means a “labor organization” that has filed LM-2 forms for the preceding two years and has a CBA covering Ag workers as of May 15, 2023.

## Background information that is helpful to know...

- National Labor Relations Act (NLRA)
  - Federal law excludes Ag workers
- Elections under the NLRA
  - Showing of interest requirements (30%)
  - Secret ballot vs. Voluntary recognition
- Agricultural Labor Relations Act (ALRA)
  - California law covers Ag workers
- Elections under the ALRA
  - Showing of interest requirements (50%)
  - Secret ballot only...until now...

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Labor Code section 1156.37

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# What does the “card check” law do?

Subdivision (a) says:

- A union may become the exclusive representative for the agricultural employees of an appropriate bargaining unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment **by filing a Majority Support Petition with the Board** alleging that a majority of the employees in the bargaining unit wish to be represented by that union.
- The petition **shall be accompanied by proof of majority support**, which can be signed authorization cards or petitions.
- Only unions that have filed LM-2 forms for the preceding two years and have a CBA covering agricultural employees as of May 15, 2023, may file an MSP.

# How does a card check election begin?

Subdivision (b) says:

- A union that wishes to represent a particular bargaining unit, files an MSP with the Board. The MSP **shall allege** all of the following:
  - The employer named in the MSP is at **no less than 50% peak agricultural employment** for the current year;
  - That no valid election has been conducted among the agricultural employees of that employer within the 12 months immediately preceding the filing of the MSP; and
  - That the MSP is not barred by an existing CBA.

# What does “no less than 50% peak agricultural employment” mean?

- Assume Grower X will have 1,000 employees at peak agricultural employment during the 2024 calendar year.
- Grower X is at no less than 50% peak Ag employment when there are at least 500 Ag employees “**currently employed**” by Grower X.
- An employee is considered “currently employed” if they were employed by Grower X during the payroll period immediately preceding the filing of the MSP.
- *Think this through for a moment...when are you susceptible to a card check election? **How many signatures would be needed to achieve majority support?***

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  - That the MSP is not barred by an existing CBA.
- *Think this through...to initiate this process does a union have to have a good faith belief that it has a majority support?*

# What happens in the first five days?

Subdivision (d) says:

- The union is shall **personally serve** the [MSP] on the employer on the same day that the MSP is filed with the Board.
- **Within 48 hours** after the MSP is served, the employer shall file with the Board, **and personally serve upon the union** that filed the MSP, its response to the MSP, which includes a complete and accurate list of:
  - The full names
  - Current street addresses
  - Telephone numbers
  - Job classifications, and
  - Crew or department
- Of all “currently employed” employees in the bargaining unit.

**State of California  
Agricultural Labor Relations Board  
Majority Support Petition**

**Instructions:** Submit an original and two (2) copies of this petition to the ALRB regional office in the region in which the employer concerned is located. If more space is required for any one item, attach additional sheets as necessary.

Do not write in this space

Case No. \_\_\_\_\_

Date Filed: \_\_\_\_\_

The Petitioner requests that the Agricultural Labor Relations Board proceed under its authority pursuant to Section 1156.37 of the Agricultural Labor Relations Act of 1975.

**1. Name, address and phone number of petitioner and its affiliation, if any:**

**Petitioner**

Name \_\_\_\_\_

Addr \_\_\_\_\_

City \_\_\_\_\_

Email \_\_\_\_\_

State \_\_\_\_\_

Zip \_\_\_\_\_

Phone \_\_\_\_\_

Fax \_\_\_\_\_

**Affiliation**

Name \_\_\_\_\_

Addr \_\_\_\_\_

City \_\_\_\_\_

Email \_\_\_\_\_

Phone \_\_\_\_\_

Fax \_\_\_\_\_

State \_\_\_\_\_

Zip \_\_\_\_\_

\_\_\_\_\_ of representative of petitioner authorized to make agreements with the

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  - The full names
  - Current street addresses
  - Telephone numbers
  - Job classifications, and
  - Crew or department
- Of all “currently employed” employees in the bargaining unit.

# What happens in the first five days?

Subdivision (e) says:

- Upon receipt of an MSP, the Board “shall immediately” commence an investigation regarding the validity of the MSP **and the proof of support** submitted.
  - *Think this through...before receiving the employer’s eligibility list, what can the Board actually investigate?*
- **Within five days** of receipt of the MSP, the Board shall make an “administrative determination” as to whether the union has provided proof of majority support.
- In making this determination, the Board shall compare the names on the proof of support submitted by the union to the names on the employer’s eligibility list.



# What if the names on the authorization cards do NOT match the names on the eligibility list?

Subdivision (e) says:

- The Board “**shall ignore discrepancies** between the employee’s name listed on the proof of support and the employee’s name on the employer’s list **if the preponderance of the evidence**, such as the employee’s address, the name of the employee’s foreman or forewoman, or evidence submitted by the labor organization or employee shows that the employee who signed the proof of support is the same person as the employee on the employer’s list.”

# What if the Board determines certain of the authorization cards are invalid?

Subdivision (e) says:

- The Board shall return proof of majority support that it finds invalid to the union that filed the MSP, **with an explanation as to why each proof of support was found to be invalid.**
- *Think this through...if the union knows exactly which employees have signed and not signed authorization cards, and if the union is provided with an explanation as to why each proof of support was found to be invalid, does that also mean that the employer gets to see the authorization cards?*

# Does the employer get to see the signed authorization cards?

Subdivision (e) says:

- To protect the confidentiality of the employees whose names are on authorization cards or a petition, the **Board's determination of whether a particular proof of support is valid shall be final and not subject to appeal or review.**

# What if the Board determines the union has NOT provided proof of majority support?

Subdivision (e) says:

- If the Board determines that the union has **not** submitted the requisite proof of majority support, the Board **shall notify** the union of the deficiency **and** grant the union 30 days from the date it is notified to submit additional support.
- *Think this through...the union gets 30 days to utilize the employer's eligibility list to engage in targeted campaigning.*

# What if the Board determines the union has provided proof of majority support?

Subdivision (e) says:

- If the Board determines that the union has submitted proof of majority support, then it **shall immediately certify the union** as the exclusive bargaining representative of the employees in the bargaining unit.
- An employer's duty to bargain with the union **commences immediately** after the union is certified.
- *Understand the significance of what this means...CBA, MMC, ULPs, etc.*

# Can an employer object to this process?

Subdivision (f) says:

- **Within five days** after the Board certifies a union through an MSP election, any person may file with the Board a petition objecting to the certification on one or more of the following grounds:
  - Allegations in the MSP were false.
  - The Board improperly determined the geographical scope of the bargaining unit.
  - The MSP election was conducted improperly.
  - Improper conduct affected the results of the MSP election.
- Upon receipt of a petition objecting to certification, the Board **may administratively rule** on the petitioner's objections or may choose to conduct a hearing to rule on the petitioner's objections.

# What happens if the Board decides to conduct an objections hearing?

Subdivision (f) says:

- If the Board decides to conduct an objections hearing, then the Board “shall conduct” the hearing **within 14 days of the filing of an objection**, **unless** an extension is agreed to by the union.
- If the Board finds at the hearing that any of the allegations in the petition of the grounds are true, the Board shall revoke the certification.

Note that subdivision (f) also says:

- The filing of a petition objecting to an MSP election certification shall **not** diminish the duty to bargain or delay the running of the 90-day period for MMC.

# What happens if an employer interferes with an MSP election?

Subdivision (f) says:

- If an employer commits a **ULP or misconduct**, including vote suppression, during an MSP election campaign, and the employer's ULP or misconduct would render slight the chances of a new majority support campaign reflecting the free and fair choice of the employees, then the Board shall certify the union as the exclusive bargaining representative for the bargaining unit.
- For purposes of a finding of a ULP or misconduct, **a misrepresentation of fact or law by an employer, an employer's representative, or agent is a ULP or misconduct.**
- No **T**hreats, **I**nterrogation, **P**romises, **S**urveillance, or **S**oliciting Grievances.
- *Think this through...*



## What kind of things could be viewed as TIPSS?

- “The company will have to close its doors if the union gets voted in.”
- “We’ll have to cut employees’ hours if the union gets voted in.”
- “What do you think the union can offer you that the company cannot?”
- “We were going to give everyone raises next month, but if the union gets voted in, then we might not be able to do that.”
- “Please let us know if anyone is approached by any aggressive organizers.”

# What happens if an employer takes adverse action against an employee during an MSP campaign?

Subdivision (k) says:

- If an employer disciplines, suspends, demotes, lays off, terminates, **or otherwise takes adverse action** against a worker during a union's MSP election campaign, there **shall be a presumption that the adverse action was retaliatory**.
- The employer may rebut the presumption if they can provide clear and convincing evidence that the adverse action would have been taken in the absence of the MSP election campaign.

## Cal. Lab. Code, § 1160.10

- Effective January 1, 2023.
- An employer who commits a ULP shall be subject to a civil penalty up to \$10,000 for each violation.
- If the ULP involves **discrimination or retaliation** against an employee, or if the ULP results in “serious economic harm” to an employee, then the civil penalty is doubled up to \$25,000 for each violation.
- The Board has authority to impose personal liability on directors/officers, if directors/officers had actual or constructive knowledge of the ULP and failed to prevent it.

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*The Employers' Law Firm*

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