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# LABOR NEWS & VIEWS

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## “AMBUSH ELECTIONS” COMING APRIL 2015 NLRB ADOPTS FINAL RULE AMENDING REPRESENTATION CASE PROCEDURES

BY JOHN F. BOWEN, ESQ. SPHR

### EXECUTIVE SUMMARY

- December 12, 2014: NLRB adopts the controversial “Ambush Election Rules”
- Rules adopted by 3-2 party-line vote: Democrat appointees Pearce, Schiffer, and Hirozawa voted for the rules; Republican appointees Miscimarra and Johnson dissented.
- **Rules take effect on April 14, 2015.**
- Union elections will likely occur between 10 and 20 days following the filing of a representation petition.
- NLRB: The new rules reduce unnecessary litigation and allow fair, accurate, and expeditious resolution of representation questions.
- AFL-CIO President: The “modest” rule changes “make it easier for workers to vote on forming a union in a timely manner.”
- Critics: The “ambush election rules” limit employer free speech, deprive employees of critical information essential to informed decision-making, and unfairly tip the balance in favor of organized labor.
- To remain non-union, employers must implement proactive strategies to respond to “ambush” organizing – including communication and education about unions prior to any known union activity and well before the filing of a petition.

A sharply divided National Labor Relations Board voted on Friday to adopt the controversial “expedited election rules” governing representation case procedures under the National Labor Relations Act – marking the most significant procedural changes to federal labor law in nearly half a century. The Board adopted the rules by a strict 3-2 party-line vote, with the three Democrat members voting for the rule and the two Republican appointees voting against. Assuming expected legal challenges do not delay implementation, the expedited election rules will take effect April 14, 2015.

According to the Board, the new rules “remove unnecessary barriers to the fair and expeditious resolution of representation questions,” and “streamline the process for processing union representation petitions.” Opponents of the new rules, however, contend the expedited procedures permit “ambush elections” by making it substantially easier for unions to organize employees and reducing significantly the time period between filing the petition and holding the election.

### OVERVIEW OF THE EXPEDITED ELECTION RULES

Ostensibly intended to “streamline” the processing of union representation petitions, the newly approved rules encompass a variety of procedural changes to existing representation case procedures by imposing quicker deadlines, delaying certain unit eligibility determinations until after the election, and granting more discretionary authority to Regional Directors. Although the rules do not dictate a timeframe for conducting an election, the “streamlined” process and expedited timeline will result in an election taking place between 10 and 21 days after the filing of a petition – considerably shorter than the current 38 to 45 day timeframe.

More specifically, the expedited election rules include the following changes to existing representation case procedures:

- **Filing of Representation Petitions:** Representation petitions may be filed with the NLRB Regional Office electronically.
- **Service of Representation Petitions:** The petitioner (rather than the Regional Director) must serve the petition and related documents on all interested parties.

- **Required Posting of Election Notice:** Upon the filing of a petition, the *employer must post and distribute to employees* a Board notice providing detailed information regarding the petition, the election process, and “protected activities” under the NLRA. Under existing rules, posting of a less detailed notice is voluntary.
- **Expedited Scheduling of the Pre-Election Hearings:** Upon the filing of a petition, the regional Director will schedule the pre-election hearing typically to open eight days from the date of service of the notice of hearing.
- **Pre-Election Hearing Requirements:**
  - ⊕ **Prior to the Pre-Election Hearing, the Employer Must Prepare and File a Position Statement to Identify Disputed Issues:** Employers must file a comprehensive “statement of position,” by noon on the business day preceding the pre-election hearing, identifying and stating the employer’s position regarding all issues concerning the validity of the petition or the proposed bargaining unit – such as composition, unit placement, exclusions, and eligibility. Any issues the employer omits from its statement are waived and may not be raised later.
  - ⊕ **Employer Must File a Preliminary List of Voters:** The employer must also provide a preliminary list of voters with names, work locations, shifts and job classifications in the proposed unit, but without contact information, to the petitioning union (and any other parties) and to the regional director. If the employer contends that the proposed unit is inappropriate, the employer shall separately list the names, work locations, shifts and job classifications of all individuals, if any, that it contends must be added to or excluded from the proposed unit to make it an appropriate unit.
  - ⊕ **Employer Must Submit Proposed Election Details:** In its statement of position (and on the record prior to the close of the pre-election hearing), the employer must also submit proposed election details, including the day, time, place, and type of election as well as the payroll period for voter eligibility.
  - ⊕ **More Discretionary Authority to Regional Directors:** The pre-election hearing will address only those issues necessary to determine whether an election should be conducted. The Regional Director has discretion to decide which issues will be litigated and may defer eligibility and inclusion issues that affect only a small percentage the voting unit to post-election litigation.
  - ⊕ **No Right to File a Post-Hearing Brief:** The pre-election hearing concludes with oral argument; the parties may file post-hearing briefs only when granted permission by the Regional Director.
  - ⊕ **Decision and Direction of Election:** The Regional Director must decide the issues litigated (no transfer to the Board). Also, the Regional Director specifies the election details in the Direction of Election, including the day, time, place, and type of election and the payroll cut-off date to determine voter eligibility.
  - ⊕ **Review of Regional Director Rulings:** If election results have not made rulings moot, either party may seek review of all regional representation case rulings through a single request for a post-election review by the Board. Elections will not be stayed or delayed after the Direction of Election absent a specific order from the Board.
- **New Excelsior List Requirements:**
  - ⊕ **Earlier Submission of Excelsior List:** The employer must electronically transmit the required *Excelsior* list directly to the petitioning union (and any other parties) within two (2) business days (rather than seven (7) calendar days) after approval of the Election Agreement or issuance of the Direction of Election.

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*Under the new rules, NLRB elections will likely occur between 10 and 21 days following the filing of the representation petition.*

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*Critical issues regarding the inclusion of classifications in the bargaining and specific voter eligibility are delayed until after the election.*

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- **New Excelsior List Requirements:** The *Excelsior* List must include the name and contact information of the employees in the approved bargaining unit. The required information must include available personal (non-business) email addresses, available telephone numbers (home and cell), work locations, work shifts, and job classifications.
- **Earlier Elections:** Elections are to be set “for the earliest date practicable”–permitting the Regional Director to schedule an election as early as a few days after the Election Agreement or Direction of Election (assuming non-employer parties waive their right to have the *Excelsior* list at least 10 days before the date of the election). As a practical matter, the new rules permit the Regional Director to schedule an election as early as ten (10) days following the filing of the petition.

Although the rules are set to take effect on April 14, 2015 (120 days after the December 15<sup>th</sup> publication of the final rule in the Federal Register), expected legal challenges from several business groups may ultimately delay the effective implementation date.

### **A CHALLENGE FOR NON-UNION EMPLOYERS**

For non-union employers who want to stay “union-free,” the new ambush election rules require adopting much more proactive union awareness strategies. With a potential election just 10 to 21 days after the filing of a representation petition, employers cannot reasonably wait until a petition is filed to determine the appropriate course of action, identify potential issues, train supervisors, formulate communication strategies, and develop campaign messages.

This is particularly true in light of other recent NLRB decisions – approving “micro-bargaining units” that enable unions to dissect employers by targeting smaller employee groups within a larger facility; expanding single and joint employer status to employers who use contingent workers; allowing employees to use employer e-mail systems for organizing; and increasing union access to employer property to engage in organizing activity. Moreover, at the same time the Board is making it easier for unions to organize, it has issued decisions limiting the rights of employers to communicate about unions and control on-site access and activities.

In light of the foregoing, the challenge to remain union-free is becoming significantly more difficult. Employers need a *comprehensive* and *proactive* plan to respond to potential organizing, or risk being caught off-guard by a “blitz” card signing campaign and ambush election. As a result, a historically non-union employer could very quickly become a unionized employer without ever having the opportunity to respond effectively to the union organizing activities.

### **EMPLOYER ACTION PLAN**

The possibility of ambush elections and increased union activity place a premium on proactive strategies and advanced employer preparation. Many employers will regard the advanced preparation as awkward and difficult, however, because it requires communicating with employees about unions even if there is no evidence of suspected union activity. Non-union employers who want to remain union-free must overcome such apprehension or risk the significant difficulties of ambush organizing.

As a threshold matter, “No employer has ever lost an NLRB election that was never held.” The wisdom of that axiomatic brain teaser as a union avoidance strategy may never be more true than it will be under the Board’s new rules. Put more simply, the

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*Employers must provide the home address, telephone number, and personal e-mail address of employees directly to the union.*

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*An employer can be caught off guard and become unionized without ever having the opportunity to respond effectively to union activity.*

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best way to avoid a union, is to provide a work environment where unions are unnecessary and irrelevant.

Effective union avoidance, therefore, begins with a strong labor-relations platform that makes unionization irrelevant. The essential tenants of such a platform include: open, honest, and direct communication; competitive wages and benefits; recognizing and rewarding employee achievement and merit; and treating employees fairly – with dignity and respect.

Moreover, because most union organizing is “issue driven,” employers become much more vulnerable to union organizing when there are unresolved issues and concerns for the union to exploit. Accordingly, employers should strive to eliminate issues – conducting employee focus groups and audits to identify issues, formulating effective approaches to resolve the issues, and then holding the leadership team accountable.

In addition, employers should develop a “rapid response plan” specifically designed to respond to potential “ambush” organizing, including:

1. Develop and implement a comprehensive labor relations platform – including the employer’s position on unions;
2. Conduct vulnerability assessments at select or at-risk locations to prioritize strategy implementation;
3. Educate employees regarding the company’s position on unions as well as the company strengths that make unions unnecessary;
4. Determine which employees meet the NLRB test for supervisor status;
5. Train the leadership team regarding the early warning signs of union activity, responding to union activity and pro-union argument, and how to lawfully and effectively communicate with employees about unions.
6. Prepare a draft campaign calendar that fits within the 10-21 day time period for elections.
7. Determine the logistics necessary to hold multiple employee meetings as well as to send letters and other communications to employee’s homes;
8. Develop appropriate campaign material in advance of a petition being filed;
9. Identify and train a management response team to work with counsel in developing effective communications with employees.
10. Analyze potential bargaining unit issues including the supervisory status of employees, single or multi-site units, community of interest issues, and the potential for unions to target micro-bargaining units;
11. Prepare an outline for the required NLRB position statement and collect supporting exhibits. Draft “boiler plate” language for legal arguments related to supervisory status, community of interests, single or multi-site bargaining units, etc.
12. Review handbooks and personnel policies to ensure NLRB compliance and avoid a possible rerun election.

For more information about the new ambush election rules or to discuss the development and implementation of a Rapid Response Plan, please contact John Bowen at (612) 801-6642 or via e-mail at [jfbowen@johnfbowen.com](mailto:jfbowen@johnfbowen.com)

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*“No employer has ever lost an NLRB election that was never held.”*

*- Anonymous Labor Law Guru*

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*Employers should develop a “Rapid Response Plan” designed to respond to potential “ambush organizing.”*

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