

## Final NLRB "Ambush Election" Rule Will Boost Union Organizing

Article By:

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With private-sector union membership rates at historic lows, organized labor has received a boost from the *National Labor Relations Board* ("NLRB" or the "Board") that is expected to help union organizers win more certification elections. Employers and employees have considerable cause for concern.

On December 15, 2014, the Federal Register published the Board's [final rule](#) governing the filing and processing of petitions relating to the representation of employees for purposes of collective bargaining. The rule will dramatically shorten the time between the filing of a certification petition and the conduct of an NLRB secret ballot election. It is set to become effective April 14, 2015, although the Chamber of Commerce and other organizations have filed suit in federal court in the District of Columbia asking the court to vacate the rule.

In the years 2002-2010, more than 90% of representation elections were conducted within 56 days of the filing of a petition. During the same time, the median time between petition and election was 37-38 days. Since 2010, the median time from petition to election was 38 days. The rule does not mandate that an election occur within a certain period of time but, by overhauling NLRB representation case procedures, the rule is expected to reduce campaign time to 21-24 days, and possibly less.

Two Board members, Philip A. Miscimarra and Harry I. Johnson, III, dissented from the Board's final rule, citing, among other problems, its destructive effect on employers' and employees' ability to communicate among themselves regarding the prospect of a union in the workplace. "The Final Rule has become the Mount Everest of regulations: Massive in scale and unforgiving in its effect," the dissenters wrote. "The Rule's primary purpose and effect remain . . . : Initial union representation elections must occur as soon as possible." As a result, the dissenters asserted that "[t]he Rule improperly shortens the time needed for employees to understand relevant issues, compelling them to 'vote now, understand later.'"

The NLRB rule, also known as the "quickie election" rule or the "ambush election" rule, eliminates pre-election evidentiary hearings and requests for review and defers decision on virtually all issues relating to appropriateness of units and voter eligibility now decided at the pre-election stage. The new rule also expands the personal information relating to employees which employers are required

to disclose to unions in voter eligibility lists known as “Excelsior lists.” Specifically, the Board will require that both telephone numbers, including mobile phone numbers, and email addresses, if available, be included along with employees’ names and addresses. In addition, the NLRB will require that the employer disclose the employee’s work location, shift, and classification.

The effect of the rule could be significant. In union organizing drives, organizers often conduct their activities underground and employers have no hint of organizing activity until the union files its petition at the NLRB. Under the NLRB’s current process, the median campaign time of 38 days is a relatively short period which generally helps unions. The NLRB’s election statistics show that, under current rules, unions won well over 60% of certification elections in 2008-2013 period. By shortening the time between petition and election, the NLRB proposal will certainly increase organized labor’s win rate.

The NLRB’s rulemaking signals the Board’s most aggressive use ever of regulatory power to accomplish objectives advocated by organized labor, and private-sector employers should be prepared to see more union organizing activity. The old adage that an ounce of prevention is better than a pound of cure will become more and more relevant. Employers should consider proactive measures to prepare for a higher risk of organizing, including proactive human resources practices, the cultivation of a positive workplace culture, regular supervisor training in employee relations, and communication to employees regarding how a union in the workplace can affect them. Effective communications with employees to cement the relationship between employees and the employer and build employee trust also will be essential.

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