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Update on Labor Relations in the Era of Quickie Elections

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Review: “AMBUSH ELECTION RULES”

The NLRB’s “quickie” or “ambush” election rules went into effect in April 2015. Here is where we are approximately two years later.

The New Election Rules at a Glance

Length of time between petition and election date:

- Eliminates 25-day period between date election is ordered and the election is held.
- Elections to be held “as soon as practical.”
- Elections likely to be held between 10-24 days (versus prior average of 42 days post-petition).



“AMBUSH ELECTION RULES”

Employer must submit Statement of Position (“SOP”)

- SOP must be submitted by noon of the day before the hearing is originally scheduled for.
- Must detail any challenges to the unit and specifically identify any classifications, locations, or employees/employee groups the employer contends should be added to or excluded from the proposed unit and the basis for such contentions.
- SOP must include an alphabetized list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit.
- Any argument not raised in SOP deemed waived absent showing of “good cause.”

Timing of the pre-election hearing

- The pre-election hearing will normally begin eight days after a hearing notice is served (except in cases presenting “unusually complex issues”).



“AMBUSH ELECTION RULES”

Hearing

- Only certain issues *must* be litigated in a pre-election hearing: (1) jurisdiction; (2) labor organizations status; (3) bars to election; (4) appropriate unit (*but see below*); (5) multi-facility/multi-employer issues; (6) expanding and contracting unit issues; (7) employee status of “significant portion” (20%+) of the unit; (8) seasonal employees; (9) inclusion of professional employees or guards with other employees in unit; (10) eligibility formulas; and (11) craft and health-care employees.
- The Regional Director may defer until after the election issues with respect to:
 - Whether individuals are ineligible because they are not “employees” within the meaning of the Act (*e.g.*, issues of supervisory or managerial status or whether someone is a “temporary employee”); and
 - Whether individuals or relatively small groups of employees fall within the terms used to describe the unit (*e.g.*, office clerical versus plant clerical).
- No right to have appeal of Regional Director’s voter eligibility and inclusion decisions heard until after the election.
- Although oral arguments are permitted there is no right to submit post-hearing brief.



“AMBUSH ELECTION RULES”

Voter eligibility (“Excelsior”) list

- Must be electronically submitted within two days of approval of election or direction of election.
- In addition to home addresses the list must include home and cellular phone numbers and personal email addresses “if available.”

Notices

- “Notice of Petition for an Election” and “Notice of Election” must be posted in *all* places where notices to employees are customarily posted.
- Notices must be posted in such a manner that all pages are *simultaneously* visible.
- Notices must be electronically distributed to all employees that the employer customarily communicates with electronically.



“AMBUSH ELECTION RULES”

Post-election procedures

- Objections to an election must be electronically filed within seven days of the tally of ballots and be accompanied by an offer of proof identifying witnesses and summarizing their anticipated testimony. Objections must be served on all parties (but not the offer of proof).
- The Board has broad discretion to determine whether to review aspects of post-election decisions made by the Regional Director.



LENGTH OF TIME BETWEEN PETITION AND ELECTION DATE

R Case Statistics

Median days between Petition Filing and:	2016	2015	2014
• Election			
• With Election Agreement	23	32	47
• Contested Cases	35	55.5	59



THE SKY IS NOT FALLING: Number of RC Petitions

According to the Board's Most recent data, and despite an uptick in 2015, the total number of RC petitions filed has stayed fairly flat:

Petitions Filed	
FY10	2380
FY11	2108
FY12	1974
FY13	1986
FY14	2053
FY15	2198
FY16	2029



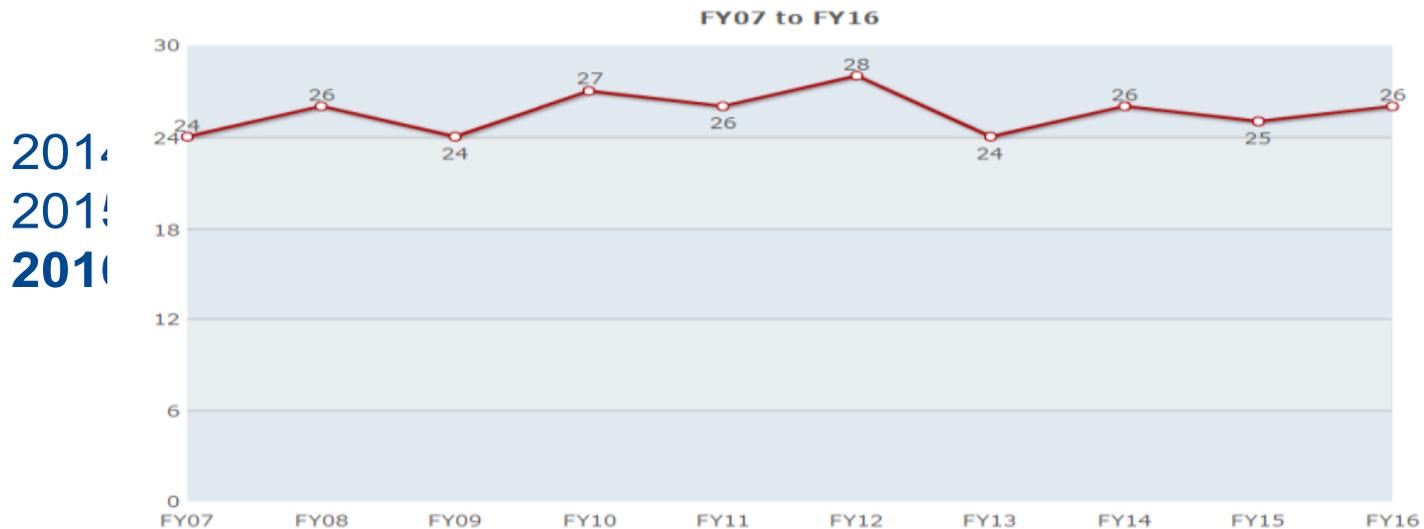
THE SKY IS NOT FALLING: Elections Held

The number of RC petitions going to election has also stayed relatively flat:

	Petitions Filed	Election Held	Percent to Election
FY10	2380	1571	66%
FY11	2108	1398	66%
FY12	1974	1348	68%
FY13	1986	1330	67%
FY14	2053	1407	69%
FY15	2198	1574	72%
FY16	2029	1396	69%

LITTLE CHANGE IN MEDIAN UNIT SIZE

The median bargaining unit size in elections has varied very little over the last ten years:



2014
2015
2016

Median Size	
FY07	24
FY08	26
FY09	24
FY10	27
FY11	26
FY12	28
FY13	24
FY14	26
FY15	25
FY16	26

CLOUDS APPEAR: Union Win Rate

Union election wins have increased slightly over the last two years:

	Election Held	Union Win	Union Election Win Percent
FY10	1571	1036	66%
FY11	1398	935	67%
FY12	1348	868	64%
FY13	1330	852	64%
FY14	1407	952	68%
FY15	1574	1120	71%
FY16	1396	1014	73%



CLOUDS APPEAR: Union Loss Rate

Union election losses have stayed relatively flat:

	Election Held	Union Loss	Union Election Loss Percent
FY10	1571	535	34%
FY11	1398	463	33%
FY12	1348	480	36%
FY13	1330	478	36%
FY14	1407	440	31%
FY15	1574	480	30%
FY16	1396	401	29%

Difference caused by increased card check and private election agreements



THE QUICKER THE ELECTION THE HIGHER THE UNION WIN RATE

A Bloomberg BNA study extensively analyzed election speed and union win rates, and found:

- 5-year trend of higher union win rates in quicker elections
 - Union win rate tends to decrease as the number of days from the petition to the election increases
 - In every year from 2010 through 2014, union win rates were higher in elections resolved in 30 days or less
 - During that period, however, these quicker elections made up only 15%-20% of all elections held in any year
- Since the rule changes, roughly 80% of petitions reach the election stage within 30 days.
 - In 2016, less than 1% took longer than 56 days, which is roughly the average for contested cases in 2015



SIGNIFICANT PRACTICAL PROBLEMS: WHO ARE THE SUPERVISORS

Supervisors are essentially excluded from the coverage of the National Labor Relations Act and are defined in Section 2(11) as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

They play a critical role in an organizing drive.

- They are the front line representatives on the employer team.
- As representatives, however, the employer is responsible for their conduct, which if unlawful or “objectionable” can result in the setting aside of an employer win and the direction of a second election (and, in extreme cases, an order to bargain with a union).

Knowing who is or is not a supervisor is a matter of critical importance, but it is not as simple as titles.



SIGNIFICANT PRACTICAL PROBLEMS: WHO ARE THE SUPERVISORS

There has been a significant change under the new rules and regulations that poses an extremely serious problem for employers.

- Under the prior regulations, if supervisory status was in dispute, the employer could insist that the issue be resolved in a hearing at least by the time an election was held.
- Under the current regulations, the employer no longer has this right and **disputes as to supervisory status are resolved *only after the election has been held.***
- Thus, the employer is left to make an educated guess who is or who is not a supervisor – and if the employer guesses wrong, a favorable election result is at serious risk of being set aside.



SIGNIFICANT PRACTICAL PROBLEMS: WHO ARE THE SUPERVISORS

The right to hire or fire, or effectively recommend the same, are the two safest indicia of supervisory status.

- But just because someone is involved in the hiring or firing process, makes a recommendation, and that recommended result is what occurs does not establish supervisory status.
- While instances of actual hiring (beyond ministerial employment offers) are typically straightforward, more situations involve a claim that an individual has “effectively recommended” hiring.
- ***Get your supervisors involved in hiring / firing decision and document it.***



SIGNIFICANT PRACTICAL PROBLEMS: WHO ARE THE SUPERVISORS

What constitutes the power to effectively recommend?

Your Public Radio Corporation, Case 05-RC-13206 (2014) explained it as follows:

- It requires more than mere screening of applications or other ministerial participation in the interview and hiring process.
- To be found “effective,” management must be prepared to implement the recommendation *without an independent investigation* of the relevant circumstances.
- An individual does not effectively recommend hiring unless there was a delegated authority to participate in the hiring process and not merely an employer’s respect for an individual’s opinion on an applicant.

The Board has declined to find supervisory status of individuals based on authority they were never notified they possessed and where its exercise was sporadic and infrequent. See *Greenspan, D.D.S. P.C.*, 318 NLRB 70, 76 (1995) *enf’d*. 101 F.3d 107 (2nd Cir. 1996).

Essentially the same standard applies with respect to claims of supervisory status by virtue of the authority to discipline/discharge or effectively recommend the same. See *ITT Lighting Fixtures*, 265 NLRB 1480 (1982); *Hawaiian Telephone Company*, 186 NLRB (1970).



SIGNIFICANT PRACTICAL PROBLEMS: GENERATING THE VOTER ELIGIBILITY LIST

The “Excelsior” or Voter Eligibility List

- Employers have long been required to provide unions with a list of bargaining unit employees that included their home addresses so unions could communicate with them during an organizing campaign.
- The failure to provide an accurate list in a timely manner will result in an employer win being set aside and a new election directed.
- Under the new rules, the Excelsior list must be electronically submitted within 2 days of the approval of an election agreement or the direction of an election.
- In addition to home addresses, the list must include certain other information, including the ***home and cellular phone numbers and personal email addresses of employees “if available.”***



SIGNIFICANT PRACTICAL PROBLEMS: GENERATING THE VOTER ELIGIBILITY LIST

The “Excelsior” or Voter Eligibility List must be captioned “Eligible Voters” and contain the following information:

- An alphabetized list of full names;
- Work locations;
- Shifts;
- Job classifications; and
- Contact information including home addresses, available personal email addresses, and available home and personal cell phone numbers.



SIGNIFICANT PRACTICAL PROBLEMS: PERSONAL CONTACT INFORMATION

An employer must exercise “reasonable diligence” to provide all contact information, particularly including “available” personal email addresses, home telephone, and personal cell telephone numbers.

What is required to meet the “reasonable diligence” standard?

- Unless an employer has all of the personal contact information in its employee personnel files and “core” HR database (such as Lawson), limiting the search to these is insufficient.
- An employer must search *all* files and databases that might contain this information.
- ***This includes searching for informal contact lists maintained by departments of individual supervisors or managers.***



“AMBUSH ELECTIONS” – Concluding thoughts and observations...

The undisguised intent of the rules was to assist unions in winning representation elections, which they do in three general ways:

- I. They accelerate the election process – and, as noted, the overwhelming majority of the quickest elections went labor’s way.
- II. They impede management’s effort to campaign effectively by denying it a clear understanding of who can properly be viewed as part of management’s team, leaving uncertain precisely who the eligible voters are, and distracting management with various procedural issues, potentially dissipating the focus on winning.
- III. Because of the uncertainties and complexities they cause employers, the rules increase the possibility that a union can get a second shot if it loses the first vote, for example, by successfully asserting that the voter eligibility list was inadequate or that the employer incorrectly viewed someone as a supervisor.



2017 & BEYOND: What to Expect

Policy Issues

- *Browning-Ferris* Joint Employment Policy
- Preservation of Independent Business Model

Rescind

- Expedited Ambush Election Rule
- Partial labor unit rule (specialty healthcare)

Potential Legislation – Clarifying

- Union access to workplace
- Appropriateness of arbitration

2017 & BEYOND: What to Expect

Chair

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?- Nov. 2017