



## Return Of The Ambush: NLRB Resurrects Expedited Election Rules

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On February 5, the National Labor Relations Board re-issued a proposed rule change that would drastically expedite union representation elections. These “ambush election” rules are an attempt to achieve many of the same ends that unions have long sought, and failed, to achieve through legislation and prior rule proposals.

Union supporters contend that the procedures for unionizing a workforce take too long. Under current procedures, the time period from petition, or election-request, to election generally lasts from a little over a month to several months. During that time, both employers and the union can make their cases to employees, raise important issues about voting and campaigning, and hold hearings, deciding those issues before the election takes place. Unions would like to do away with this due process, hold a quickie election, and only then take up any disputed issues for review by the National Labor Relations Board.

These ambush elections hold many advantages for unions. Chief among them is that the union will often be able to run a one-sided campaign, springing an election before the employer has an opportunity to make its case against unionization. The “ambush” strategy stems from the nature of the union’s organizing tactics. Unions rarely give employers warning when they begin soliciting employees. Employers often only become aware of the effort after the union “petitions” for an election – usually after the union has already gathered “cards” indicating majority support of any “unit” of employees that will give it to them. Current procedures give employers (and unions) some time after that petition, but before the election, to mount a campaign and formally raise issues regarding the petition, the unit, voting, and other important matters.

Union-supporters have pursued a variety of strategies to eliminate or shorten this post-petition, pre-election period. They have long tried, but failed, to pass so-called “card check” legislation which would allow unionization based on cards alone and without any election. Sensing a legislative dead-end, union supporters then attempted to achieve similar goals through rule-making. Thus, in 2011, a union-friendly Board issued a proposed rule change that would drastically shorten the time period between petition and election, and eliminate virtually all pre-election procedural protections for employers. This first manifestation of the ambush election rules was ultimately defeated in court on procedural grounds, as the issuing Board lacked a quorum.

Now that it has reconstituted its quorum, the Board has re-issued virtually the same set of rules. The rules drastically alter the election process in many ways, including the following:

- The proposed rules eliminate nearly all pre-election hearings. No longer will employers be allowed to challenge the proposed voting-bloc of employees or campaign abuses until after the election. Further, even challenges to the sufficiency of the petition would be postponed unless it concerns more than 20% of the potential voters.
- Pre-election rulings by a regional director of the National Labor Relations Board would not be appealable until after the election.
- The proposed rules also make it discretionary whether the Board even entertains post-election disputes. Such a change could result in a union-friendly Board ignoring challenges to election conduct where the union prevailed, but entertaining challenges if the union lost an election.
- The rules even eliminate the pre-existing mandatory 25 day period between an election request and the election.
- The rules also require employers to hand over employee phone numbers and emails to union leaders prior to the election.

Despite the rhetoric of supporters, the significance of these rules goes far beyond “streamlining the process.” Indeed, it effectively eliminates many substantive rights of employers, including the right to challenge union campaign tactics, voting irregularities, dubious unit designations, and other critical matters until after the election has already been held. Further, the proposal allows stealth campaigns ending in a titular “ambush” election that takes place before an employer can mount a response to the union. That is, it achieves many of the same goals of the “card check” laws: the ability to achieve unionization quickly, secretly, and without meaningful challenge or response from employers.

The deadline for comments on the proposed rules is April 7, 2014, with replies due by April 14. The Board’s hearing on the rules will also take place during the week of April 7, 2014. Employers are advised to keep abreast of developments and consider the implications of the proposed rules for their businesses.

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