

## How the “Ambush” Election Process Will Work: NLRB’s Acting General Counsel Issues Guidance on New Procedures

The talk of the employer community lately has been the National Labor Relations Board’s highly controversial final rule that severely and substantially modifies certain procedures in representation cases. The Board claimed that the final rule, approved December 22, 2011, was designed to reduce unnecessary litigation in representation cases and thereby enable the Board to better fulfill its duty to expeditiously resolve questions concerning representation.

The reality for employers, though, is that the rule means much faster elections, truncated election campaigns and lost appeal rights. The numerous changes affect pre- and post-election legal procedures, consolidating some legal appeals available and limiting the introduction of evidence at hearings. Employers, with good reason, view these rule changes as a radical elimination of their rights to legitimately challenge the appropriateness of bargaining unit classifications, and much worse, communicate with their own employees prior to any vote. These procedural changes went into effect Monday, April 30, 2012.

On April 26, 2012, NLRB Acting General Counsel Lafe Solomon issued a 24-page memorandum outlining how regional offices will actually implement the new representation case procedures, as well as a set of frequently asked questions and answers. These procedures will apply to all representation cases filed on or after April 30, 2012.

### Important Highlights

The key changes employers must be aware of are:

1. The virtual elimination of the pre-election hearing.
  - a. Under long-standing practice, pre-election hearings were held to resolve many issues including supervisory status of individuals, which job classifications are included in the voting unit and which are excluded, which job sites are in and which are out and which part-time and per diem casual employees could

vote. Now, litigation over the status of individuals as eligible employees or appropriateness for inclusion in the unit will occur before the election only if more than 10 percent of the petitioned-for unit is in dispute. Practically speaking, this means voting will occur and the results will be publicized well before an employer has any opportunity to challenge the make-up of the voting pool.

- > **What this means to employers:** There is virtually no way to resolve questions about who is a supervisor or which employees should be allowed to vote until AFTER an election occurs. Employers designate supervisors for campaigning with employees at their peril!
2. In those few cases where there is a pre-election hearing, the role of the hearing officer has been greatly expanded, providing officers with an unprecedented level of discretion to exclude evidence at hearings . . . evidence, mind you, that typically has been presented for over 75 years.
    - a. Specifically, with relation to individual eligibility and inclusion issues, the Board and the hearing officers will prevent introduction of this evidence at any pre-election hearing unless it is needed to decide whether an election is appropriate.
    - b. Hearing officers have been granted *carte blanche* to limit post-hearing filings and the content of post-hearing briefs. This authority includes whether briefs will even be filed, when briefs will be filed, and most worrisomely, what the brief should address.
      - > **What this means to employers:** There is no guarantee that employers will have the right to file a brief or provide any arguments in support of their positions after the close of a hearing. The Regional Directors will make their decisions and likely direct elections, most often on the union's petitioned-for unit, deferring all issues until after the elections take place.
  3. The time period for initially processing a petition has been drastically shortened, giving much less response time to employers. Additionally, requests for postponement will not be granted absent extraordinary circumstances.
    - > **What this means to employers:** There will be very little time to prepare for an election and communicate the information necessary for eligible voters to make an informed choice. Elections could occur in as little as 14-21 days (presently, the average election takes place in 42 days), less than half the time currently spent preparing for the election.
  4. The ability of employers to request special appeals has been significantly limited. They will be entertained by the Board only under "extraordinary circumstances" when it appears that the "issue will otherwise evade review." Parties may not directly appeal rulings of the hearing officer, except by special permission of the regional director. Moreover, a special appeal will not stay an election or require ballots to be impounded.
  5. The Board established presumptions related to appropriate units, again, unfairly restricting an employer's ability to present evidence challenging the presumptions.
    - > **What this means to employers:** Unions get the benefit of the doubt and Board support here.

6. The Board adopted the *Specialty Healthcare* analytical framework for determining what is an appropriate bargaining unit and will base its decision on whether the petitioned-for unit employees are “readily identifiable as a group” and whether they shared a “community of interest under the Board’s traditional criteria.” The Board will reject an employer’s attempt to add other job classifications to the unit except where the employer can show ‘**an overwhelming community of interest**’ between the included employees and the ones the employer seeks to add.
  - > **What this means to employers:** While *Specialty Healthcare* dealt directly with non-acute care provider facilities, all other employers should understand that the lessons will apply to them, too, resulting in the very real potential for multiple small bargaining units at a single worksite. The data show that the smaller the voting unit, the higher the union’s victory rate.

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## Suggested Action for Employers

The new procedures for union elections, combined with the threat of more numerous and smaller voting units, create a fertile field for union organizing. Smaller units make it easier for unions to keep their organizing efforts beneath the employer’s radar. The “ambush” elections give employers little time to run a campaign; that is, give information to voting unit employees so that they can make a fully informed decision on union representation. In this new world, employers should:

1. Educate the organization’s Board of Directors and senior leadership about the impact of the new election procedures and impact of *Specialty Healthcare*. Employers should take a look at their workforces and define potential bargaining units under the new election procedures and *Specialty Healthcare* framework;
2. Determine who is, and who is not, a supervisor as defined by Section 2(11) of the Act;
3. Develop a communications strategy and plan now; consider implementing it routinely on a pre-emptive basis to minimize organizing vulnerability;
4. Analyze union vulnerability and develop an action plan to address potential organizing issues; and
5. Create a readiness plan, including readiness response teams, to mobilize in response to organizing activity.

The final rule is still being contested through litigation in federal court. However, the new election rules went into effect on April 30, 2012. We will continue to provide updates on the status of these challenges to the new election procedures.

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If you would like more information or have any questions about the issues discussed in this Client Alert, please contact Bruce Stickler at (312) 569-1325 at [Bruce.Stickler@dbr.com](mailto:Bruce.Stickler@dbr.com) or Mark Nelson at (312) 569-1326 or [Mark.Nelson@dbr.com](mailto:Mark.Nelson@dbr.com).

## Labor & Employment Practice Group

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