

EMPLOYERS AND LAWYERS, WORKING TOGETHER

The Practical **NLRB** Advisor

Ambushed! The NLRB changes the rules

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Late on a Thursday afternoon an email appears in the human resources (HR) department inbox at a mid-sized manufacturing company. The sender is the International Brotherhood of Teamsters, and the subject line reads, "Petition for Representation Election."

Fortunately, the administrative personnel in HR do not treat the email as spam—they are sophisticated enough to recognize its importance. They forward it to the company's HR director, and thus begins a union organizing campaign.

Like all union organizing drives, this one will become the company's central focus for the coming weeks, it will occupy most of management's time, and it will disrupt the normal business of the company. But this organizing campaign will be different. It will be conducted under the National Labor Relations Board's (NLRB) new "ambush" election rule. The company will likely have only a little more than three weeks from the moment that email arrives until the time its employees will cast their votes. The outcome of that vote may dramatically change the future of the company and of everyone who works there.

Despite the importance of the decision that employees eventually will make, the new rule governing NLRB union elections has dramatically reduced the amount

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BRIAN IN BRIEF



Welcome to the first issue of Ogletree Deakins' *Practical NLRB Advisor*. Our goal in providing this quarterly newsletter to our clients and friends of the firm is to guide companies through the life cycle of the union-employer relationship—from initial union organizing drive through collective bargaining negotiations, processing union

grievances, and addressing strikes, work stoppages, and other union activities—all while helping employers navigate the often counterintuitive workings of the National Labor Relations Act and the National Labor Relations Board (NLRB). We'll offer practical, strategic guidance on working with the NLRB regional offices, dealing with the unions and, ultimately, optimizing employee engagement and job satisfaction—which is at the heart of any sound labor relations strategy.

Ogletree Deakins has launched the *Practical NLRB Advisor* in the face of unprecedented developments at the NLRB. While the agency has long fluctuated in its perspective and its policies as Washington, D.C.'s political winds have turned, the Board under President Obama has ushered in

truly seismic changes: reversing decades-long precedents, extending its reach beyond the traditional union environment, and substantially reworking the procedures for conducting union elections. The latter is the subject of this, our inaugural issue. The questions raised and challenges presented by the revised election rules will be discussed in greater depth in future issues as well; they give us much to talk about.

The *Practical NLRB Advisor* is not intended to replace advice of counsel, of course. We encourage you to contact your attorney to discuss any labor relations issues that arise in your workplace. Let us know if you have specific questions about the content. Are there specific matters that you would like to see addressed in forthcoming issues? If so, please let us know. We're eager to hear your thoughts.

Sincerely,

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About Ogletree Deakins' *Practical NLRB Advisor*

At Ogletree Deakins, we believe that client service means keeping our clients constantly apprised of the latest developments in labor and employment law. With the whirlwind of activity taking place at the National Labor Relations Board (NLRB) in recent years—affecting both unionized and nonunion employers—a quarterly newsletter focused on the NLRB is an essential tool to that end.

Ogletree Deakins' *Practical NLRB Advisor* seeks to inform clients of the critical issues that arise under the National Labor Relations Act and to suggest practical strategies for working successfully with the Board. The firm's veteran traditional labor attorneys will update you on the critical issues in NLRB practice, with practical, "how to" advice and an insider's perspective. Assisting us in this venture are the editors of Wolters Kluwer Legal and Regulatory Solutions' *Employment Law Daily*.

The *Practical NLRB Advisor* is not legal advice. However, it does seek to alert employers of the myriad issues and challenges that arise in this area of practice, so that they can timely consult with their attorney with specific legal concerns.

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of time employees have to consider their choice, as well as the time that employers have to explain their views on this important decision. Under the new rule, most elections will be held approximately 25 days after that email arrives. Some elections may be conducted in even less time. Not only has the time been dramatically shortened, the procedural burden on employers has been significantly increased as well.

The stakes have not changed, but the rules have. This is no place for the unprepared.

As the clock ticks ...

Employers receiving an election petition are faced with several immediate challenges. They must:

- Make critical strategic decisions about such matters as the company's position on the scope of the bargaining unit, the supervisory status of certain individuals, and the type, time, and place of the election.
- Address new procedural requirements imposed by the rule—posting and circulating notices, preparing formal position statements, and preparing employee lists.
- Educate their employees about both the benefits of remaining union-free and the drawbacks of working in a unionized environment.

The dramatically shortened election period requires that these challenges be met at warp speed since the time-consuming new tasks of making up-front strategic decisions and complying with additional procedural burdens leave employers with less time to focus on their most critical mission: engaging with employees in the company's own campaign.

The shortened time frame will, no doubt, result in some unprepared employers acting rashly and without proper legal guidance. It is important, however, to keep in mind that the NLRB carefully scrutinizes employer conduct during an organizing drive. Serious violations have serious legal

consequences. Even minor violations or missteps can wind up nullifying an employer election victory.

What's new and what's changed in the new election rule?

The two NLRB members who dissented from the decision to issue the rule referred to the rule as “the Mount Everest of regulations—massive in scale and unforgiving in its effect.” Lost, however, in its size and complexity is the fact that its central purpose was to dramatically shorten the time between the filing of the petition and the employee vote. To the rule's proponents, the goal of increased speed mattered more than anything else.

However, the notion that speed matters most is one that former Board member Brian Hayes, now a shareholder at Ogletree Deakins, would reject. In his view, the election process and attendant rules “should foster an atmosphere of fair, informed, and open debate, where communication is encouraged and where the goal is the most *informed* employee choice, not simply the most rapid employee choice.” As implemented, however, the new rule plainly comes down on the side of speed.

So, how does an employer avoid being “ambushed” under the new rule? Here are a few fundamental guidelines:

1. Be prepared to act quickly.

Timelines in the new rule are so compressed that employers that have not put together a comprehensive response plan long before any union organizing activity occurs are unlikely to be able to react fully and effectively. Before the new rule was implemented, the median time between the filing of an election petition and the actual vote was 38 days. Under the new rule, however, elections will likely be held within 21 and 30 days from the filing of the petition and technically could be held in as few as 10 to 21 days.

Here's a hypothetical timeline, and a look at how it contrasts with the handling of election petitions under the prior rule:

Hypothetical timeline

Day 1

New rule. The union serves the Petition for Election on the employer and simultaneously files the petition with the NLRB. The filing and service can be done electronically, by mail, or in person. The Board, most likely on the same day, provides notice to the employer of a pre-election hearing to be held in no more than eight days.

Old rule. The union filed a hard copy or fax petition with the Board; the Board then notified the employer. The time of the hearing was less rigid and often occurred more than eight days after the filing of the petition.

Day 3	
New rule. The employer must post a formal notice regarding the Petition for Election. In addition to posting the notice, if the employer typically communicates with employees via email, it must circulate the notice electronically. This must be done within two business days.	Old rule. All posting and notification at this stage was optional for employers.
Day 7	
New rule. By noon on the day before the scheduled hearing, the employer must serve its written Statement of Position on the union and the NLRB. The statement must outline all issues the employer wants to raise, including, for example, the appropriateness of the proposed bargaining unit, the inclusion or exclusion of individual employees and/or employee classifications, and details about the election itself. Any issue that is not raised in the statement will be waived and cannot be raised later.	Old rule. The entire requirement of a pre-hearing statement, and its “raise it or waive it” effect, is new.
Day 8	
New rule. The hearing typically will be set to open on the eighth day after the Notice of Hearing was served.	Old rule. The hearing time frame was 10-14 days later
Day 9 (or later)	
New rule. If the parties do not agree to all the issues related to the petition, and if the NLRB determines those issues are material, the NLRB will hold a hearing and issue a Decision and Direction of Election (D & D) resolving those contested issues. The D & D could be issued as soon as one day after the hearing (assuming there is no hearing held). Along with the D & D, the NLRB will send a notice of election that must be posted and circulated for three full working days in advance of the election.	Old rule. The employer was entitled to a hearing to resolve disputed issues. Because of both the new rule and recent NLRB case law regarding the contours of a proposed bargaining unit, the likelihood of there ever being a hearing is greatly diminished. In the event there is a hearing with a subsequent D & D, the new rule also completely eliminates the required 25-day waiting period between the issuance of the D & D and any scheduled election.
Day 11 (or later)	
New rule. The employer must provide the voter eligibility list, or “ <i>Excelsior</i> list,” within two business days of the NLRB issuing the D & D or the voluntary election agreement; in addition to the employees’ names and home addresses, the list must include each employee’s personal phone number, email address (if the employer has this information), shift, job classification, and work location.	Old rule. The employer had seven days to provide the list, and it was required to include only the employee’s name and home address.
Day 13 (or later)	
New rule. The election will be held if the union waives the 10-day period allotted for it to have had the <i>Excelsior</i> list in its possession.	Old rule. The 25-day waiting period, to allow the Board to rule on a request for review, has been eliminated.
Day 22 (or later)	
New rule. The election will be held if the union does not waive the 10-day period for it to have had the <i>Excelsior</i> list in its possession. The election is to be held at the earliest date practicable.	

2. Think ahead or get caught short.

Employers are now required to take a position with respect to all issues that could be raised regarding the election petition, in writing, and before the actual pre-election hearing. So they *must* think ahead. Any subsequent litigation inconsistent with the employer's initial position statement will not be permitted except on "good cause"—however that comes to be defined.

Because there is so little time, a prudent employer will have thought through these issues long before it ever gets a petition, determined its best positions, and marshalled the facts and law in support of those positions. Waiting until a petition arrives is a risky proposition and will often result in an employer getting caught short.

Some issues are unique, but others are common to every representation case. Common issues include the "appropriateness" of the bargaining unit, including the question of which classifications of employees are included or excluded and, in a multi-location operation, which locations are included or excluded; the "placement" of individuals in or out of the bargaining unit, most often because of their "supervisory" status; and the election arrangements, including time, place, and location.

"Elections are most often won and lost by two things: the configuration of the bargaining unit and the ability of supervisors to effectively communicate management's message during the campaign," notes Tom Davis, Co-Chair of Ogletree Deakins' Traditional Labor Relations Practice Group and a veteran of scores of organizing campaigns. "If you get a petition and then have to start thinking about who your supervisors are, what unit is most favorable, and how to prove it is appropriate, you are way behind the curve, and your prospects for electoral success are greatly diminished."

3. Understand the limitations and requirements of the new rule and prepare for them.

Under the new rule, an employer will only receive a hearing if the issues that it raises bear on whether there is "a question concerning representation" (QCR). The most common issue bearing on the existence of a QCR is whether the bargaining unit sought by the union is "appropriate." If an employer is going to contest the appropriateness of the unit, beyond having developed the

evidence in support of its position well in advance, the employer will need to articulate its position in its pre-hearing statement, outline its legal argument, provide a list of all the employees that it contends must be added to the requested unit, and be prepared on the day of the hearing to make an "offer of proof" detailing all the evidence it will present in support of its position. If the NLRB hearing officer decides after all this that a QCR has been raised, the employer will have to be prepared to immediately present witnesses and documentary evidence attesting to the claims made in its offer of proof. All of this requires careful preparation.

To the extent written legal argument is helpful—as it almost always is with respect to these complex bargaining unit issues—an employer may want to prepare and submit a *pre-hearing* legal memorandum. Remember that the new rule does away with the automatic right of parties to file a post-hearing legal brief, and the hearing officer may limit the parties to presenting an oral argument at the close of the hearing, so employers run the risk of being denied the opportunity for a written submission at the close of the hearing.

Understand that even if a hearing is granted, it will *not* involve the presentation of evidence on *unit placement* issues unless such issues affect a substantial percentage of the bargaining unit. Unit placement issues involve whether certain individuals or groups of individuals should be placed in a unit with appropriate contours. They often involve the question of whether individuals or groups of individuals are "supervisors" under the National Labor Relations Act (NLRA) and, thus, legally excluded from a unit, or "employees" and therefore included. Unless the number of employees involved constitutes a substantial percentage of the proposed unit, an employer will almost certainly *not* get a hearing on this issue—which is of critical importance. Leaving the matter unresolved, though, means an employer operates at its own peril. This dilemma is one of the strongest arguments in favor of extensive pre-planning.

4. Understand and prepare for the degree of disclosure under the new rule.

The NLRB has determined that "increasing transparency" will improve its electoral process. While many dispute the specific application of this general view, the fact remains that the new rule does provide for increased disclosure by employers, and employers need to be prepared to comply.

As noted earlier, in conjunction with filing its Statement of Position, the employer must now disclose a list of prospective voters, including those in the petitioned-for unit, as well as any employees the employer seeks to add to the unit. This pre-hearing list must include the employees' names, job classifications, work shifts, and work locations. The employees' personal contact information is not required for this *first* list.

The employer also must disclose the length of the payroll period for employees in the petitioned-for unit and the date the last payroll period ended.

The Board intends to be quite picky about the way the employee information is to be provided: Required employee lists must be alphabetized, either overall or by department. It must include the full first name, not merely a first initial. Unless the employer certifies that it does not have "the capacity" to do so, the lists must be in table form in a Microsoft Word file or Word-compatible file; the first column of the table must begin with each employee's last name, and the font size of the list must be equivalent to Times New Roman 10 or larger.

In addition to the initial employee list, employers must subsequently provide unions with an electronically supplied voter list. This list must include each employee's name, home address, personal telephone number (both home and cell), personal email address, work location, shift, and job classification.

An employer is required only to provide personal telephone numbers and emails if it has the information in its possession or the information is otherwise available. The NLRB has yet to make clear what "otherwise available" means. Consequently, if you don't have a business need to maintain employees' personal email addresses or phone numbers, consider not collecting that information. The new rule requires direct service to the union, not just the NLRB regional director, as before.

Enforcement of voter information requirements: a first look

The strictness with which the voter information requirements are likely to be enforced, and the consequences of failing to comply with the requirements of the new rule, were both recently made evident in the case of *Danbury Hospital*.

Danbury Hospital involved a Board election in which there were nearly 900 eligible voters, and in which the petitioning labor union lost the election by a vote of 390-346. Following the loss, the union filed objections to the election, claiming that the employer had not supplied all the employee contact information required by the new rule.

In compiling the required contact information, the employer utilized, "Lawson," its HR database. The employer provided all the email addresses in the Lawson database and, using all the information in the database, provided a phone number for 94 percent of all the eligible voters.

However, in compiling the contact information the employer did not search other available sources like its staffing database or individual unit records, which would have provided more complete and more accurate information than was contained solely in the HR database.

Because the provided information was not complete and because alternative sources existed for making a more complete and accurate disclosure, the NLRB's regional director upheld the union's objection to the election, and ordered that the results be vacated and the election rerun.

The employer has filed a request for review of the *Danbury Hospital* decision by the full NLRB, which may or may not affirm the regional director.

Until there is some further or different determination by the Board, however, the regional director's decision stands as a stark reminder of how strictly the new rules are going to be enforced and how serious the consequences for noncompliance can be.

5. An ounce of prevention . . . and keeping one's eye on the ball

The new rule presents two distinct problems for employers.

First, almost all organizing campaigns are born out of a toxic combination of problematic policies, practices, or supervision, coupled with a perception by employees that management does not listen to them. With a shortened campaign period there simply is insufficient time to lawfully address problems that are this deep-rooted.

Second, the new rule not only shortens the time, but also imposes time-consuming new obligations on employers. Employers that are scrambling to decide their positions on

unit issues, marshal evidence, or assemble voter lists are not spending their time communicating with eligible voters.

These two realities underscore the necessity for prevention and preparation. Employers need to avoid a petition in the first place by practicing, monitoring, and fostering good employee relations on an ongoing basis. Those values must be a part of the corporate DNA. Additionally, a prudent employer has to “wear a belt and suspenders,” assuming that its best efforts will not forestall a petition and planning carefully ahead of time how it will handle one.

We'll discuss all of these concerns and challenges in greater detail in forthcoming issues of the *Practical NLRB Advisor*. ■

The bargaining unit can be make-or-break

Recent NLRB decisions have given unions a huge advantage in shaping the contours of the bargaining unit in which the election will take place. A union will obviously attempt to configure the unit in such a way that it optimizes its likelihood of electoral success. Prudent employers need to ask themselves ahead of time: What bargaining unit would a union likely propose to optimize its hopes for victory?

In contrast, what bargaining unit makeup would boost the employer's chances of winning? What organizational and policy changes can an employer make *now*—in advance of an election petition—to increase the likelihood that the employer's own proposed bargaining unit will prevail over the union's petitioned-for unit come election time?

The Board has said that the manner in which employers choose to structure their operations, including the manner in which employees' particular skills and training are utilized throughout the operation, and the manner in which employees are supervised, are important considerations in the NLRB's bargaining unit determination. NLRB case law reveals that the Board's bargaining unit determinations often turn on whether separate groups of employees have common supervision, whether they are in the same or different departments or administrative units, whether they have common or overlapping job duties, and whether personnel is interchanged on a temporary or permanent basis.

“Depending upon the employer's particular operation or industry, employers can consider combining job classifications, cross-training employees in multiple job duties, and rotating employees among classifications or jobs. Doing so helps to establish a broad ‘community of interest’ among all employees, and makes it more difficult for unions to successfully petition for a small ‘micro-unit,’” according to Eric C. Stuart, a Shareholder in the Morristown office of Ogletree Deakins and a member of the firm's Traditional Labor Relations Steering Committee.

Stuart advises employers to document the degree of interchange between departments and across job classifications and to structure supervisor responsibilities so that oversight of multiple departments is shared among several individuals. These actions also will reduce the likelihood that a narrow micro-unit favored by the union will be considered appropriate.

“Of course, such structural decisions require an individualized risk assessment and a consideration of operational and structural needs unique to their businesses,” Stuart notes. “To be sure, these steps may not make sense for every business, but are worthy of consideration, particularly in light of the NLRB's ambush election rule.”

Don't wait for the union to come knocking

The National Labor Relations Board's (NLRB) new election rule, with its expedited election cycle and new procedural demands, puts employers in a difficult time crunch. The only solution for this is advance planning. Employers simply do not have enough time to do everything they should—if they have not done anything by the time the petition arrives. When the union appears at the proverbial door, the employer needs a plan in place *before* the union knocks.

Here are several important actions that employers can and should undertake *now*:

- **Assemble your response team.** Identify the members of your organization who will serve as your management response team and who will work with outside counsel to respond to a union petition in the most effective manner. While there is no hard-and-fast rule for the composition of your response team, it typically would include representatives from your general counsel's office, HR, security, corporate communications, and at least one key member of your operations leadership. This is the team that will ready the company to interact with the NLRB; plot the legal strategy; gather the requisite employee information; develop an effective employee communications plan; craft your broader campaign; guard your organization's reputation from union attack; ensure the safety and security of the worksite and your workforce; and make sure that operations will be maintained at optimal efficiency in the face of distraction.
- **Develop a contingency plan.** As part of its organizing strategy, a union may seek to disrupt your operations. Employers should take steps now to ensure that business operations will not be unduly hampered in the event of an employee work stoppage or picketing in conjunction with a union organizing drive. A thorough operational plan, drafted in advance, that addresses the many operational problems posed by a strike or picketing will help to keep business disruption at a minimum.

Preparing a full public relations response plan is also a prudent step. Remember, many organizing drives now take the form of a "corporate campaign" in which the union

seeks to publicly damage your organization's reputation. You need to plan, in advance, how you will counter this organizing strategy as well.

- **(Pre-)State your position.** Spend some time now—while you have the luxury of reasoned deliberation—to anticipate likely election issues, draft a template position statement, compile any legal support that may bear on anticipated issues, and collect the necessary information and exhibits to support your stance.

Consider, too, what offers of proof you would make in support of your position. Make a list of exhibits and possible witnesses that would support those positions. You may even want to prepare testimony summaries for each potential witness and prepare these witnesses for the possibility that they may be called on to give actual testimony on short notice.

- **Gather employee information.** Begin now to collect the contact information that you will have to turn over to the union upon receipt of an election petition. As noted, there will be little time once the election clock starts running—and you will now be required to provide the initial employee list before the hearing date and the final voter eligibility list *within two business days* of the notice of an election—so maintain an updated list and have it readily accessible. Assembling the list can be time-consuming if an employer has not already gathered the information and made it ready for disclosure. Bear in mind, however, if you do not currently collect or have a business need for employees' personal numbers and email addresses, it is information you may want to consider *not* gathering.

For your own purposes, the NLRB-required employee information isn't enough. HR should maintain easily retrievable data about employees' job titles, salary histories, disciplinary records, duties, and positions in the hierarchical scheme within their respective operational units. All of this information will be essential in crafting an argument for what you believe will be the optimal bargaining unit for a favorable election outcome.

Information about employees' close coworkers, family, employee benefits elections, primary language, record of grievances, or complaints filed will help you fine-tune your own message to individual employees; it may also help you identify their likely support for or opposition to the union.

- **Assess your vulnerabilities.** Conduct periodic vulnerability assessments of any at-risk locations to gauge the facility's readiness to withstand a union organizing campaign. Dig deep to unearth potential employee dissatisfaction and to understand the particular issues of concern to your workforce. Are there "problem" supervisors in your midst? Is there an unsettling record of employee turnover? Are there meaningful opportunities for advancement and professional growth?

There are a number of tools available to gauge your organization's vulnerabilities:

- anonymous employee "attitude" surveys
- suggestion boxes
- employee issue forms
- corporate interviews with management at each facility
- focus groups (conducted by officials outside the employees' standard chain of command to ensure candor)
- communications meetings
- a review of disciplinary and turnover trends
- in-person labor audits by the company's labor attorneys
- a (privileged) audit conducted by outside counsel
- online assessment tools

These are all components of a positive employee relations program, which will help employers meet employee expectations, promote employee engagement, improve the company's reputation (which will, in turn, help companies recruit and retain employees), improve employee attendance, and, generally, help the company promote its business objectives.

Note that it is particularly important to utilize these tools *before* a union election petition is ever filed. Doing so during the campaign period will very likely result in an unfair labor practice charge that you are improperly "soliciting employee grievances" in violation of the National Labor Relations Act (NLRA).

- **Know—and train—your supervisors.** Determine which of your employees will likely meet the definition of "supervisor" within the meaning of Section 2(11) of the NLRA. If it makes business sense to do so, structure operations and employee job functions to ensure that key personnel in your organization's hierarchy fall solidly within the ranks of statutory supervisors. Remember, job descriptions or job titles, alone, do not make someone a statutory supervisor. True supervisors must possess and meaningfully exercise the types of authority described in the statute. You may want to have labor counsel review any borderline situations concerning supervisory status ahead of time.

Remember that supervisors are considered part of "management"; they are excluded from coverage under the NLRA and cannot vote or be included in any union bargaining unit. They are also an employer's most valuable asset in any organizing campaign.

An employer simply cannot run a successful campaign without its supervisors. They are vital in conveying your message to employees about unionization. And, given their status as the employer's "agents," if they act improperly their actions are automatically attributable to the company and can result in meritorious unfair labor practice charges. It is imperative that supervisors are properly trained on what they can and cannot do or say during a union election campaign.

Ogletree Deakins offers two web-based online vulnerability assessment tools that can be used either company-wide or at individual facilities. Consult Ogletree Deakins' website for more information about these valuable tools.

A “TIP” to remember

Here's an easy acronym to share with your management team to remind them about prohibited employer conduct during a union election campaign:

TIPS-D.

Managers cannot ...

Threaten,
Interrogate,
Promise,
Spy, or
Discriminate against employees

... during union election campaigns.

Train your managers and supervisors on how to spot potential union organizing activity and how to lawfully respond. Equip them with a basic knowledge of the legal rules, and prepare them to immediately and effectively engage employees on the subject of unionization if or when the need arises.

There is very little about the NLRA's proscriptions that is intuitive, so you will need to offer specific instructions as to what supervisors can and can't do under the law as they engage in the dual tasks of (1) maintaining productivity amid the growing distractions of an organizing drive, and (2) disseminating the company's own message on unionization. A well-trained supervisor will exercise the employer's free speech rights without running afoul of the restrictions imposed by the NLRA.

In addition to instructing supervisors on the legal dos and don'ts during an election campaign, instruct management at all levels on employee relations and basic communication and interpersonal skills, if needed. Most of all, impress upon

supervisors at all levels that effective communication with those who work under their direction is essential.

In addition, educate your managerial staff about:

- typical union organizing strategies and signs to watch for;
- identifying and addressing employee protected, concerted activity;
- the effects of unionization in your industry or geographic location; and
- the sources of employee dissatisfaction, the employer's vulnerabilities, and how to address them.

Finally, stage a “dress rehearsal,” simulating the typical issues that would unfold during an organizing drive, to ensure that your management team is well-prepared to respond effectively and lawfully.

- **Review your employee handbook and employment policies.** Unions seeking to organize your workplace will pore over the company handbook in hopes of “drawing a foul,” i.e., having a pro-union employee violate a work rule that the NLRB may deem suspect. Ask your attorney to conduct a compliance review of your handbook and HR policies to ensure that your provisions pass muster under the NLRA, particularly in light of the Board's recent zeal in scrutinizing employer handbooks.

Simply having a policy in place—regardless of whether it's actually enforced in a manner that might be construed as hostile to organizing activity—can be reason enough to set aside an employer's election win. Moreover, several key handbook provisions will be particularly tested during the heat of an organizing drive, such as rules on nonsolicitation or distribution of literature, or worksite access by off-duty employees. It's not enough to begin enforcing such policies after a petition is filed; such selective enforcement will surely draw unfair labor practice charges. If the policies are truly necessary and make business sense, then they should be enforced with equal vigilance and consistency now and not merely in the lead-up to a representation election.

- **Plan your campaign strategy.** Armed with detailed knowledge of your organization's potential vulnerabilities, and with your response team primed and ready, prepare to make your case to employees on why they should elect to remain union-free. Employees will look to you for guidance when the union launches its campaign, and they will be persuaded and

reassured by your preparedness, your conviction, and your objective, informed grasp of the issues that matter to them and to the company. Unless you can hit the ground running when a petition is filed, your employees may be required to vote without being fully informed of the critical facts.

State your position. Draft a formal company position on unions and the impact they have within your industry. Stress your concerns about the effect of a third-party's intrusion on employer-employee relations and your emphatic view that the most productive means of working together toward common goals is without outside interference. Encourage employees to avail themselves of your open-door policy if they have work-related concerns.

Include your position statement in your employee handbook. Instill the message in your managers and supervisors to ensure they can articulate your position and confidently discuss it with their subordinates.

Prepare your “talking points.” Educate employees about the competitive value of your salary and benefits offerings relative to your competitors, both union and nonunion. Encourage employees to share their positive

accounts of working at the company—in video format, ideally, or in writing. Amass your “human interest” stories about the positive force your organization has been for your employees and within your community.

Ready your calendar. Prepare a draft campaign calendar that fits within an expedited 21-day time period. Your calendar should include a built-in communications strategy that incorporates social media, standard internal communications methods, interactive meetings between employees and management, and correspondence to employees' homes. When your employees cast their votes for or against union representation, they should have no doubt as to where the company stands on the issue of unionization and why it stands that way.

- **Render a union unnecessary.** Ensure that your company treats employees fairly and equitably as a matter of standard practice and as a component of your corporate mission by establishing appropriate complaint procedures, instituting adequate supervisory training, and offering competitive wages and benefits.

These preemptive strategies will be explored in greater detail in future issues of the *Practical NLRB Advisor*. ■

Selling employee engagement

Retail employers in attendance at the National Retail Federation's Committee on Employment Law Spring 2015 meeting stated that they focus on employee engagement as a key tactic in their union avoidance strategies. “Their approach is to take proactive steps to provide employees with the opportunity to have a voice in their organizations without the need for unions, thereby preventing the possibility of union elections in the first place,” notes Diane M. Saunders, a Shareholder in Ogletree Deakins' Boston office, and Co-Chair of the firm's Retail Practice Group. “Dissatisfied employees are harmful to the success of a company in that they result in organizational dysfunction and a decline in employee engagement, both of which also happen to provide an opening for union organizers.”

“The strategies these retailers are using to improve employee engagement are far more extensive than the

usual employee engagement surveys,” Saunders notes. “Proactive retailers are stepping up their monitoring of social media and training their managers on how to develop their associates and their ‘voices,’ as well as on how to identify and address vulnerable areas and problems in the workplace and fix them. They are also setting up programs and mechanisms to allow associates to tell management what they think through hotlines and virtual suggestion boxes. In addition, they are using in-house company advocates to publicize the steps the retailers are taking to improve the workplace, as well as to educate employees about what unions can and cannot do.”

Ultimately, treating your employees respectfully and fairly—and getting prompt, reliable feedback when you miss the mark—is critical to the success of your union avoidance campaign. It also makes good business sense.



What the new rules hath wrought

Since the National Labor Relations Board's (NLRB) "ambush" rule only went into effect on April 14 of this year, the statistical data currently available is limited. Even this small sample, however, suggests that most of the negative predictions about the impact of the rule are turning out to be accurate.

The numbers. As of October 15, 2015, 1,169 petitions for a representation election had been filed, a more than 5 percent increase over the same time period for 2014. The vast majority of these cases were processed without any hearing. During the six-month period, regional directors have issued only 64 Decisions and Direction of Elections following a contested hearing.

The average time from petition to election is 25 days (down from a median of 38 days under the old rules and from Ogletree Deakins' typical outcome of 42 days). That average will trend downward by a few more days over time, most believe.

Between April 14, 2015, and October 15, 2015, 593 petitions have gone to election. The outcome: 186 company wins

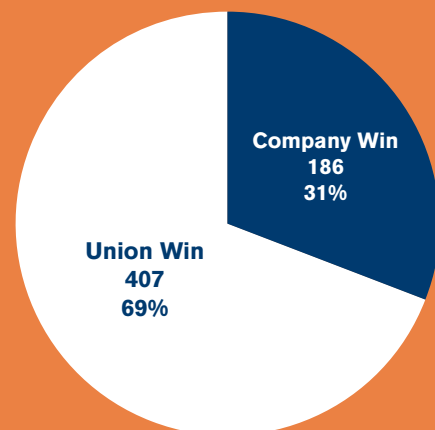
and 407 union wins—which represents an approximately 70 percent union win rate. That compares with an average win rate for unions of 63.3 percent for NLRB fiscal years 2004–2013.

Other significant statistics include:

- 68,932 employees are affected by those petitions.
- The average bargaining unit size is 62, but the largest involves 6,300 voters and 158 units involve 100 or more employees.
- The petitions are spread out across the country, but the most active states have been New York, California, Pennsylvania, Illinois, and New Jersey.
- The most active unions are the International Brotherhood of Teamsters, Service Employees International Union (SEIU), International Union of Operating Engineers (IUOE), International Brotherhood of Electrical Workers (IBEW), International Association of Machinists and Aerospace Workers (IAM), and United Food and Commercial Workers International Union (UFCW).
- Healthcare and life sciences are the industries with the sharpest uptick in election petitions filed.

Ambush Election Statistics [April 14, 2015 through October 15, 2015]

- **Number of petitions:** 1,169 (a 5.32 percent increase over the same time period for 2014)
 - **Average time to election (all ballot types):** 25 days
 - **Number of elections held:** 593
 - **Win rate:** Company - 31 percent; Union - 69 percent
- **Smallest unit size:** 1 employee
 - **Largest unit size:** 6,300 employees
 - **Median unit size:** 22 employees
 - **Average unit size:** 62 employees



What the new rules hath wrought

Top five states for petitions filed:

1) NY 2) CA 3) PA 4) IL 5) NJ

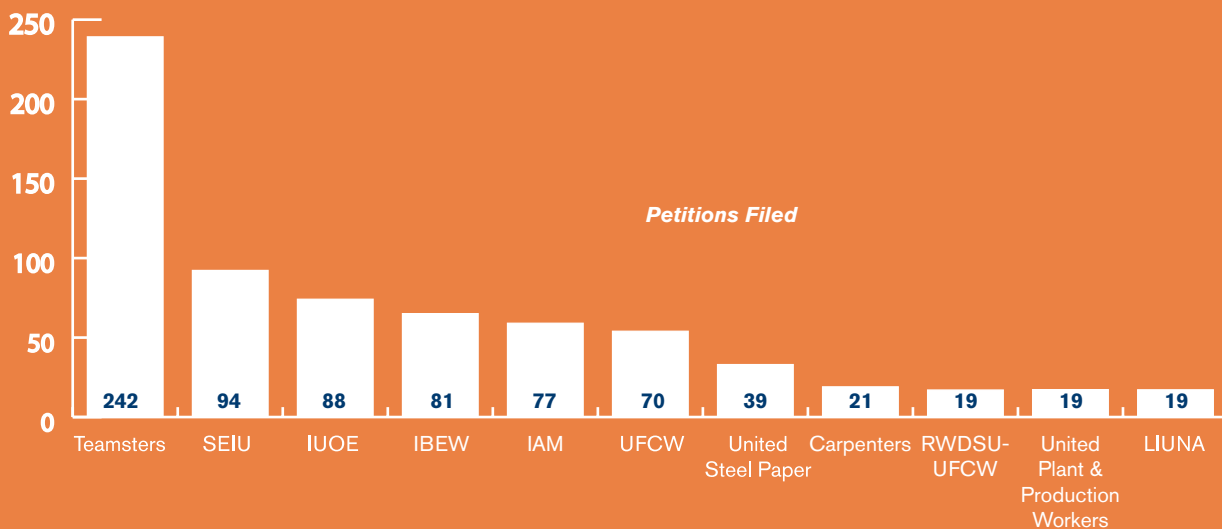
State	Petitions
NY	206
CA	155
PA	72
IL	72
NJ	61
MI	46
TX	37
NV	32
WA	31
MA	31
OH	30
FL	27
PR	25
MD	24
VA	23

Top five industries by petition count:

- 1) Healthcare and life sciences
- 2) Construction, engineering, and landscape
- 3) Transportation
- 4) Manufacturing
- 5) Security

Industries generally	Count
Healthcare and Life Sciences	179
Construction, Engineering, and Landscape	111
Transportation (Passenger and Freight)	106
Manufacturing	87
Security	80
Wholesalers	56
Energy, Oil, and Utilities	51
Retail	49
Hospitality	47
Real Estate and Property Management	45
Food Processing	35
Education and Childcare	33
Airline and Railway	26
Equipment Leasing and Rental	24
Defense Contracting	21
Waste Management	21

Top 10 unions by petition count:



A done deal? Challenges to NLRB election rule fall short

Trade groups seeking to overturn the National Labor Relations Board's (NLRB) new union-representation election procedures in court have so far gone winless in two attempts. Most recently, in July of 2015, a federal district court judge in the District of Columbia upheld the controversial rule. The plaintiffs in that case, the U.S. Chamber of Commerce, National Association of Manufacturers (NAM), Society for Human Resource Management (SHRM), and other organizations, failed to show that the rule contravened the National Labor Relations Act (NLRA) or the Constitution, was arbitrary and capricious and thus ran afoul of the Administrative Procedure Act (APA), or was an abuse of Board discretion, the court found in *Chamber of Commerce of the United States of America v. National Labor Relations Board*. "Ultimately, the statutory and constitutional challenges do not withstand close inspection, and what is left is a significant policy disagreement with the outcome of a lengthy rulemaking process," the court wrote.

"Ultimately, the statutory and constitutional challenges do not withstand close inspection, and what is left is a significant policy disagreement with the outcome of a lengthy rulemaking process," the D.C. District Court wrote.

Earlier, in June of 2015, a federal district court in Texas had rejected a similar challenge brought by the Associated Builders and Contractors (ABC), concluding in *Associated Builders and Contractors of Texas, Inc. v. National Labor Relations Board* that the rule did not on its face violate either the NLRA or the APA. The plaintiffs in the earlier case argued to no avail that the newly promulgated rule impermissibly restricts employers' ability to litigate threshold issues during a union election; invades employees' privacy by requiring the disclosure of their personal information; or interferes with employers' free speech rights during organizing campaigns. Moreover, according to the court, the plaintiffs "point[ed] to nothing in the record which supports their conclusion that the Board intended to favor organized labor," a charge that the agency denies. ABC filed its notice of appeal the next day.

The fight goes on. "We remain committed to fighting this battle on all fronts," NAM Senior Vice President and General Counsel Linda Kelly said following the adverse

ruling in the *Chamber of Commerce* litigation. Kelly noted that the trade group also was equipping manufacturing employers with the necessary tools to help them comply with the "onerous regulation."

SHRM also issued a statement calling the decision "a loss for workers everywhere" and noting that it prevents employees from having the information they need to make an informed decision about unionizing. "SHRM will continue to work with HR professionals on strategies to protect their direct and open communication with employees about the workplace."

Congressional challenges. Days before the July NLRB court win, Senator Orrin Hatch (R-UT) and Rep. Tom Price (R-GA) introduced bicameral legislation that would roll back the NLRB's election rule changes. The Republican lawmakers resurrected the *Employee Rights Act* (S. 1874/H.R. 3222), a bill that according to its sponsors "champions workers' rights and strengthens our economy." In addition to rolling back the NLRB's "quickie" election rule, the measure would require unions to get "opt in" approval before dues could be deducted from workers'

paychecks, get rid of "card check" authorization for unionization and strikes, and require union recertification after significant workforce turnover. Hatch had introduced the legislation in 2011 and 2013, but it did not make it out of committee.

As introduced in 2015, the legislation would require employers to provide only the names and home addresses of employees within seven days of the Board's determination of the appropriate unit or following any agreement between the employer and union about the eligible voters. Employees also would have the right to be excluded from the list with written notification to the employer.

The bill also would prevent any election from taking place until a hearing is conducted "with due process on any and all material, factual issues regarding jurisdiction, statutory coverage, appropriate unit, unit inclusion or exclusion, or eligibility of individuals" and until the issues are resolved by a regional director—subject to appeal and review—or by the Board.

The bill would preclude election results from being final and prevent unions from being certified as a bargaining representative of bargaining unit employees until the Board has ruled on all pre-election issues not resolved before the election, has conducted a hearing in accordance with due process, and has resolved each issue pertaining to the conduct or results of the election.

More bills. This is not the only bill targeting the election rule. In April of 2015, Republicans floated another pair of legislative proposals hoping to undo the rule's key provisions. Their legislative response was the **Workforce Democracy and Fairness Act** (S. 933/H.R. 1768) also first introduced in 2011, and introduced recently by Sens. Lamar Alexander (R-TN) and John Kline (R-MN), and the **Employee Privacy Protection Act** (H.R. 1767), introduced by Rep. David Roe (R-TN). According to their sponsors, these proposals would:

- ensure workers have enough time to make an informed decision in a union election by prohibiting any election from taking place in less than 35 days;
- provide employers at least 14 days to prepare their case to present before an NLRB election officer and protect their right to raise additional concerns throughout the pre-election hearing;
- reassert the Board's responsibility to address critical issues before certifying a union, including voter eligibility and the appropriate unit of employees that will form the union; and
- empower workers to control their personal information by allowing each employee to determine the personal contact information that is provided to union organizers.

The pocket veto. All these legislative proposals came on the heels of a rare joint resolution by Congress to invalidate the rule under the Congressional Review Act—a maneuver that President Obama blocked by way of a **pocket veto**. To block the election rule from being implemented, lawmakers had used a provision of the Congressional Review Act, which permits Congress to disapprove of a regulation to prevent it from taking effect. But that disapproval is subject to a presidential veto that can only be overridden by a two-thirds majority in both Houses of Congress. Obama opted not to sign the legislation (*S.J. Res. 8*) and instead to send a memorandum of disapproval to Congress.

Senate Republicans failed to sustain momentum that would ultimately counter President Obama's pocket veto. On May 5, senators voted 96-3 to table the veto message. There was little chance of garnering the two-thirds majority that would be necessary to revive the joint resolution and ultimately prevail against the president.

The power of the purse. In other countermeasures, the Senate Committee on Appropriations approved by a 16-14 vote on June 25 the fiscal year 2016 Labor, Health and Human Services, and Education and Related Agencies (Labor-HHS) Appropriations Bill, a \$153.2 billion measure that makes substantial budget cuts at the NLRB (among other agencies). The measure would give \$247 million to the NLRB—a \$27 million decrease from the FY2015 enacted level. It also includes several provisions aimed to restrain what it sees as regulatory overreach by the Obama administration, including:

- prohibiting funding for any change in the NLRB's current joint-employer standard;
- barring the NLRB from using funds to enforce its so-called "quickie" election rule; and
- prohibiting the NLRB from using funding to authorize "micro-unions."

On June 24, the House Appropriations Committee approved its draft FY2016 Labor, Health and Human Services (LHHS) funding bill on a vote of 30-21. The bill includes \$200 million for the NLRB, a decrease of \$74.2 million (27 percent below last year's level) and \$78 million (28 percent below the president's budget request). The House appropriations bill also includes several policy provisions:

- a prohibition on the use of electronic voting in union elections;
- a prohibition on implementing new regulations on representation-case procedures;
- a prohibition on issuing new joint-employer standards; and
- a prohibition on exercising jurisdiction over Indian tribes.

Further budget jockeying will ensue; the extent to which Congress can rein in the Board by controlling its purse strings remains to be seen. ■

Not just rulemaking

While the National Labor Relations Board's (NLRB) "ambush" election rule has garnered a lot of attention, rulemaking is not the only way in which the Board is having an impact on union organizing efforts. Board decisions and guidance from the General Counsel's Office to the agency's regional offices are both having an effect on the process. Here are some of the more notable examples.

Employer email. In *Purple Communications, Inc.*, a Board majority in December of 2014 ruled that employees who regularly have access to an employer's email system have a statutory right to use the system, on nonwork time, to engage in union and other concerted activity. In so deciding, the Board overruled its 2007 decision in *Register Guard* to the extent it held that employees have no statutory right to use their employer's email systems for purposes of engaging in protected activity under Section 7 of the National Labor Relations Act (NLRA).

The *Register Guard* Board had found that an email system is analogous to employer-owned equipment and that prior cases established that employers may broadly prohibit nonwork use of such equipment. After *Purple Communications*, the Board now presumes that employees who have rightful access to their employers' email systems in the course of their work have a right to use the email systems to engage in Section 7-protected communications during nonwork time. An employer may rebut the presumption by demonstrating that "special circumstances" necessary to maintain production or discipline justify restricting its employees' rights. However, most observers believe that the current Board majority will set the "special circumstances" bar very high.

Micro-bargaining units. In 2011, the NLRB issued its groundbreaking decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, in which it changed its mode of analysis for determining whether a union's requested bargaining unit was "appropriate." In changing the rules, the Board permitted unions to petition for elections in smaller, "micro-units" where their chances of electoral success were greatly enhanced. Efforts in the federal courts to reverse or rein in the *Specialty Healthcare* ruling have, so far, not met with success, and the Board continues to approve organizing elections in small, discrete segments of an employer's business.

One of the most recent examples was the *Macy's* case decided by the Board in July of 2014. In *Macy's*, a divided Board found that a petitioned-for departmental unit consisting only of cosmetics and fragrances employees was appropriate. Because the employer failed to show the store's other selling and nonselling employees shared an "overwhelming community of interest" with the petitioned-for employees, it upheld the small bargaining unit under the *Specialty Healthcare* test. The case is currently on appeal in the Fifth Circuit.

Just a week later, in *The Neiman Marcus Group, Inc. dba Bergdorf Goodman*, the Board held that even the *Specialty Healthcare* rule has some limits. It found that a petitioned-for bargaining unit of all women's shoe sales associates at a retail store was not an appropriate unit under *Specialty Healthcare*. Importantly, the Board observed that while one shoe department in the store made up the whole of the department, a second would be carved out of a separate department. Further, the two shoe departments were located on separate, non-adjacent floors, and it was only at the highest level of store management that the petitioned-for unit employees could be said to share supervision. Thus, a smaller unit made up of only one of the shoe departments may have been more appropriate.

Read together, the cases make clear how important the Board considers the employer's own operational configuration of its business. It appears as if the current Board will always find a "departmental" unit with separate supervision to be appropriate.

Nonsolicitation policy. In *Conagra Foods, Inc.*, a divided Board found an employer unlawfully issued a verbal warning to a union supporter for a production-floor conversation that took mere seconds and during which no union authorization cards changed hands. The employee's conduct in telling two coworkers that she had placed authorization cards in their locker did not amount to solicitation, said the Board, which also found that Conagra's nonsolicitation policy, while itself lawful, was improperly applied here. According to long-standing Board precedent, union solicitation involves actually asking an employee to sign his or her name to an authorization card. Drawing the line there makes sense,

the Board noted, because that act prompts an immediate, affirmative response from the individual being solicited, “and therefore presents a greater potential for interference” with productivity during work time.

Viewed through this lens, the employee’s passing statement to her coworkers wasn’t solicitation. There were no cards presented for their signatures, no request to take action, and no reasonable risk of interference with productivity.

Employee handbooks. Union and nonunion employers alike have had to keep a watchful eye on the NLRB in recent years as the agency has begun to challenge a number of common handbook provisions on the grounds that they interfere with employees’ protected rights under the NLRA. As many of these cases illustrate, enforcement of a rule is not necessary to find a violation. The mere existence of a rule may be deemed to have a “chilling effect” on employees’ rights and therefore violate the statute.

BFI is one of the most significant decisions the NLRB has issued in recent years and has serious implications in the areas of liability, secondary boycott protection, bargaining obligation, and employer-to-employer contract law.

The Board’s preoccupation with this issue and its sometimes confusing decisions prompted the NLRB General Counsel to issue a memorandum in March of 2015 (Memorandum [GC 15-04](#)) detailing the Board’s evolving views on lawful and unlawful employee handbook rules and the Board’s interpretation of whether employees would reasonably construe employer rules to prohibit Section 7 activity.

Joint-employer standard. In August of 2015 a sharply divided NLRB issued its long-anticipated decision in *Browning Ferris Industries of California, Inc. dba BFI Newby Island Recyclery (BFI)*. The issue in Browning Ferris was whether individuals who worked for Leadpoint, a labor supplier, and who worked at the BFI site, were jointly employed by Leadpoint and BFI. The Board used this case to revisit and radically alter its 30-year-old joint-employer test. Under the previous standard, two separate employers would be found to be joint employers only where they shared or codetermined matters governing the essential terms and conditions of employment.

While the Board majority reiterated this formula, it greatly expanded it by holding that potential and indirect control, rather than only actual and direct control, was sufficient to impose joint-employer status. Thus, for example, where a “user employer” retains the right to reject any employee provided by a supplier employer, that is an indicia of potential control, even if the right is never exercised. Similarly, if the user and supplier contract with one another on a cost-plus basis, that may be evidence of indirect control by the user over the wages of the supplier’s employees, and an indicia of joint-employer status.

BFI is one of the most significant decisions the NLRB has issued in recent years and has serious implications in the areas of liability, secondary boycott protection, bargaining obligation, and employer-to-employer contract law. The decision is not confined to only the user/supplier situation, but arguably extends to other common business-to-business relationships, such as franchisor/franchisee, contractor/

subcontractor, and others. The decision and its many implications will be explored in the next issue of the *Practical NLRB Advisor*.

In the present context, the decision also signals a renewed

interest by unions in organizing so-called “contingent” employees. A related matter concerning organizing is currently pending before the Board in a case called *Miller and Anderson*. The issue in *Miller and Anderson* is whether jointly employed “contingent” employees can be combined in the same bargaining unit with the user employer’s regular workforce. For over a decade, the NLRB has held that such a “mixed” bargaining unit of jointly and singly employed individuals is not permissible unless both of the employers consent to the unit. Most observers believe the current Board majority will use its decision in *Miller and Anderson* to overturn this precedent.

E-signatures. As part of the rulemaking process for the final representation election rule, the Board solicited comments regarding whether the proposed regulations should permit the use of electronic signatures to demonstrate the required showing of interest in support of a union petition. On September 1, 2015, the General Counsel announced in a guidance memorandum (Memorandum [GC 15-08](#)) that it will accept electronic signatures in support of a union’s showing

of interest if the Board's traditional evidentiary standards are satisfied. On October 26, 2015, the General Counsel issued Revised Memorandum [GC 15-08](#) providing more detail and examples of how the new process will work. Thus, unions can immediately start using email and social media to gather signatures, further enabling and enhancing their organizing efforts.

The memoranda instruct regional directors to accept electronic signatures as evidencing the required showing of interest where, as with handwritten signatures, the electronic method provides the regional director with sufficient evidence (1) that an employee has electronically signed a document purporting to state the employee's views regarding union representation and (2) that the petitioner has accurately transmitted that document to a region. As is the law now with respect to handwritten signatures, the documents submitted by the parties are presumed to be valid.

Submissions supported by electronic signature must contain the signer's name; email address or other known contact

information (e.g., social media account); telephone number; the specific language that evidences the signer's desire regarding union representation; the date the electronic signature was submitted; and the employer's name. The party submitting the electronic signatures must also submit a declaration identifying the electronic signature technology used and attesting that the employee signed the document.

Although the memorandum states that the requirements for electronic signatures are more stringent than those currently required for nonelectronic signatures, as signature lists are not required to contain any personal contact information, the General Counsel also stated in a footnote in the memorandum that: "As is now the case with handwritten signatures, an electronic signature submitted in support of a showing of interest that meets the requirements set forth herein will be presumed to be valid absent sufficient probative evidence warranting an investigation of possible fraud. Mere speculation or assertions of fraud are not now, and will not in the future, be sufficient to cause the Agency to investigate." ■

Other NLRB developments

A brief summary of other noteworthy National Labor Relations Board (NLRB) decisions handed down in recent months:

Procedural posturing by the NLRB in joint-employer litigation. Issuing only a perfunctory ruling in the ongoing unfair labor practice proceedings in which McDonald's Corporation is charged as a joint employer along with its franchisees, a divided five-member NLRB held that an administrative law judge did not abuse her discretion when she denied the company's motion for a bill of particulars or, in the alternative, to strike the joint-employer allegations and dismiss the complaint. McDonald's argued that the General Counsel failed to plead factual allegations in support of joint-employer liability, leaving it without adequate notice of the charges against it. The Board majority, however, concluded that the allegations in the consolidated complaint were sufficient to put McDonald's on notice that the General Counsel was alleging joint-employer status based on the company's control over the labor relations policies of its franchisees (*McDonald's USA, LLC*, August 14, 2015).

Members Miscimarra and Johnson dissented in part, lamenting the majority's rote recitation of NLRB notice-pleading rules. They pointed out that the General Counsel intends to pursue a more expansive theory of joint-employer liability than existed under then-current Board law (note, this decision came down before *Browning-Ferris*; see "Not Just Rulemaking," p. 17) and, while the language of the complaint is consistent with the Board's current joint-employer standard, it provides no notice regarding the *new* joint-employer standard upon which the General Counsel intends to rely, nor what facts will prove joint-employer status under the alternative standard. As a matter of due process, the dissenting members argued, McDonald's was entitled to know the contours of the General Counsel's alternative joint employer theory and to receive a bill of particulars setting forth the facts on which the General Counsel intends to rely to support his case under that theory.

Punting on college football. In an anxiously anticipated ruling, the NLRB declined to assert jurisdiction in a representation case involving Northwestern University football players who receive grant-in-aid scholarships. The

five-member Board unanimously concluded that to do so would not effectuate the policies of the National Labor Relations Act (NLRA). Even assuming—but expressly not deciding—that college players were statutory employees, to exercise jurisdiction over them would not promote stability in labor relations, the Board reasoned (*Northwestern University*, August 17, 2015).

Key to the decision was the nature and structure of NCAA Division I college football. The NLRB pointed out that Northwestern's team competes in the NCAA Division I Football Bowl Subdivision (FBS) and that of the roughly 125 colleges and universities that participate in FBS football, 108 are state-run institutions over which the NLRB lacks jurisdiction. Also, the respective conferences and the NCAA itself exert considerable control over individual college teams, so asserting jurisdiction over a single team would not further the goal of labor stability, the Board said. The NLRB was careful to note that its holding was narrowly focused to apply only to the players covered by the petition in this particular case, and it “does not preclude a reconsideration of this issue in the future.” But while the NLRB technically left the door open for other college athletes, “from a policy perspective, the door is shut,” notes former NLRB Member and current Ogletree Deakins Shareholder Brian Hayes, Co-Chair of the firm's Traditional Labor Relations Practice Group.

Emphasizing that the case involved “novel and unique circumstances,” the Board stressed that the football players did not fit the analytical framework used in cases involving other students or athletes—most notably, graduate student assistants, for whom collective bargaining rights have been a contentious matter at the NLRB over the years—but also “student janitors and cafeteria workers whose employee status the Board has considered in other cases.” In fact, the Board took care *not* to disturb its precedent regarding the status of graduate students under the Act.

Extending dues checkoff. When it stopped checking off union dues after its contract with a union expired, an employer acted unlawfully, ruled a divided five-member NLRB. In so ruling, the Board overruled *Bethlehem Steel*, a 50-year-old precedent that an employer's obligation to check off union dues ended when its bargaining agreement with the union expired (*Lincoln Lutheran of Racine*, August 27, 2015).

According to the majority, the Board had never articulated a coherent explanation for its long-standing *Bethlehem Steel* rule. Allowing an employer to unilaterally cancel dues checkoff both undermines the union's status as the employees' collective bargaining representative and creates administrative hurdles that can undermine employee participation in the collective bargaining process, it reasoned. In contrast, requiring employers to honor dues checkoff arrangements post-contract expiration serves the statutory goal of promoting collective bargaining. *Bethlehem Steel* was inconsistent with established federal labor policy generally condemning unilateral changes in terms and conditions of employment, was contradicted by both the plain language and legislative history of the only statutory provision addressing dues checkoff, and found no justification in the policies of the Act.

Members Miscimarra and Johnson dissented, asserting that the *Bethlehem Steel* exception was justified by statutory and policy considerations that warranted its continuation. This change in long-standing Board law will substantially alter the current balance that exists between the interests of employers and unions upon contract expiration, the dissenters pointed out.

Gerrymandering a micro-unit? The NLRB has recently approved a bargaining unit composed of just 13 out of 20 hourly employees working in a small, integrated commercial printing operation. The union petitioned for a bargaining unit of all the hourly employees working in the pre-press, digital and offset bindery, digital press, and shipping and receiving operations, but excluding all hourly employees working in the offset printing operation. The employer asserted that the only appropriate unit consisted of all 20 hourly employees, not merely the 13 encompassed by the union's request. Citing the principles set forth in its *Specialty Healthcare* decision, a 2-1 Board majority concluded that the employer failed to show that the offset-press employees shared an overwhelming community of interest with the petitioned-for employees, and, thus, the smaller requested unit was appropriate (*DPI Secuprint, Inc.*, August 20, 2015).

The offset-press employees shared *some* community-of-interest factors with the petitioned-for employees, like common supervision and functional integration, and they enjoyed the same benefits and had roughly similar pay rates. This did not establish an overwhelming community of interest,

the majority said. For example, they worked in a separate department and their work required greater skill and more training. In addition, while there was considerable sharing of work at the facility, the offset-press employees were the only ones who set up, operated, adjusted, and maintained the offset printing presses. They worked different hours; longer shifts; were the only nonsupervisory employees who worked weekends; and were the only employees not sent home when work was slow.

In a lengthy dissent decriing the “arbitrary gerrymandering” at play here, Member Johnson wrote that the majority’s decision “reads like a doctrinal obstacle course where the overwhelmingly shared interests connecting the petitioned-for and excluded employees are factors to be explained away in a post-hoc justification of that result, a justification so strained that it is difficult to track the actual rationale being applied here.” He believed the proposed bargaining unit was too narrow in scope for meaningful bargaining. He also took the opportunity to reiterate his objection to the *Specialty Healthcare* decision itself, which he asserted “fairly well guarantees the proliferation of fractured units that can only hobble a unionized employer’s ability to manage production and to retain a necessary flexibility to respond to industry change.” Johnson warned: “The trend toward smaller units—or units comprised of employees not significantly distinguishable from their coworkers except by the extent of organizing—cannot foster labor peace.”

Conceding that while a unit including the offset-press employees “would be an appropriate unit, or perhaps even a more appropriate unit,” the majority stressed “that is not, and has never been, the relevant question. The Act requires only that the unit be ‘appropriate,’ and the petitioned-for unit satisfies that standard.”

Successorship obligations and worker retention statutes. Considering how to apply its successorship doctrine in cases where a new employer is legally required to retain its predecessor’s employees for a specific period of time under a state or local worker retention statute, a 2-1 NLRB panel held, in a case of first impression, that the appropriate time to determine successorship status is when the new employer assumes control over the business and hires the predecessor’s employees under the retention statute, not after the statute’s mandatory retention period has ended (*GVS Properties, LLC*, August 27, 2015).

A company that purchased several real estate properties in New York City was required under the Displaced Building Service Workers Protection Act (DBSWPA) to retain the predecessor’s employees for at least 90 days. The properties’ building maintenance staff worked for a subcontractor and were covered by a collective bargaining agreement. However, the new owner intended to manage the property itself, and it informed the employees that they would no longer have their job with the subcontractor. Pursuant to the DBSWPA, though, it hired seven of the eight bargaining unit employees on a temporary, 90-day trial basis. The union asked the new owner to recognize and bargain with it, but the employer refused, calling the request premature because it would not employ a “substantial and representative complement of employees until after expiration of the 90-day transition period mandated by the DBSWPA.” At the end of the 90-day period, the new owner discharged three unit employees and hired four new ones. It then refused to bargain, saying it had not hired the predecessor’s employees and so was not compelled to bargain.

However, the Board held the employer’s bargaining obligation arose during the statutorily mandated retention period, when the workforce was composed entirely of the predecessor’s employees. The employer made the “conscious” decision to hire the employees when it purchased the buildings and took over the business, presumably cognizant of the requirements of the DBSWPA. Board precedent has long held that a successorship determination is not affected by the temporary or probationary status of the predecessor’s employees in the successor’s workforce. It was no different here simply because the probationary period and the employee retention itself was required by statute, rather than by the employer alone or by contract, the majority reasoned.

The Board’s holding in essence allowed a legislative body to “assume the Board’s statutory responsibility to determine Federal successorship law,” Member Johnson wrote in dissent, and it amounted to an unprecedented case of “reverse preemption.” The only proper standard is to wait to apply the Board’s successorship doctrine until after the statutorily mandated retention period has run, he argued to no avail.

Boeing confidentiality rule (still) found unlawful. A divided NLRB panel ruled that Boeing Company’s confidentiality notice for employees participating in HR investigations violated Section 8(a)(1) of the NLRA

because it had a reasonable tendency to inhibit protected activity. The company gave the notice to all employees involved in HR investigations. An earlier version of the notice stated that “you are directed not to discuss this case with any Boeing employee other than company employees who are investigating this issue or your union representative, if applicable.” When the Board deemed *that* notice invalid, Boeing revised it, substituting the statement, “we recommend that you refrain from discussing this case” with coworkers. The revised version was virtually identical—and equally problematic, according to the majority. It did not merely reflect a “preference” for confidentiality, the Board reasoned, noting that employees would not feel free to disregard Boeing’s “recommendation” where it is part of a formal policy and is reinforced by the requirement that employees sign it (*The Boeing Company*, August 27, 2015).

Boeing argued that its confidentiality requirement was based on legitimate business justifications, but the Board held that a blanket policy was unlawful. The company could prohibit employee discussion of an HR investigation, according to the Board, “only when its need for confidentiality with respect to that specific investigation outweighs employees’ Section 7 rights.” That meant Boeing had to determine, under the specific circumstances of a particular investigation, whether there were “legitimate concerns of witness intimidation or harassment, the destruction of evidence, or other misconduct tending to compromise the integrity of the inquiry.”

Member Johnson dissented, arguing that the confidentiality notice was a noncoercive expression of opinion protected by NLRA Section 8(c). But the majority countered that “Section 8(c) cannot ever be relied on to adopt rules that would reasonably tend to interfere with the exercise of employees’ Section 7 rights.”

On arbitration, (still) digging in heels. The NLRB invalidated an arbitration agreement that required employees to resolve employment-related claims through individual arbitration *unless* they opted out of the agreement within 10 days. The opt-out requirement put a significant burden on employees’ exercise of Section 7 rights, according to a 2-1 Board majority. First, the agreement was a mandatory condition of employment and consequently was unlawful under *D. R. Horton* (and *Murphy Oil USA*,

Inc.), the Board held. The NLRB rejected the employer’s argument that the opt-out procedure ensured that employee assent was voluntary, thus placing it outside the scope of *D.R. Horton*’s prohibition on mandatory arbitration agreements. Rather, the opt-out procedure reasonably tended to interfere with employees’ Section 7 rights because it burdened them to take affirmative steps to retain those rights, the majority reasoned (*On Assignment Staffing Services, Inc.*, August 27, 2015).

Moreover, the opt-out procedure required employees who wished to retain their right to pursue class or collective claims—protected Section 7 activity—to “make ‘an observable choice that demonstrates their support for or rejection of’” concerted activity. Under long-standing Board law, “any attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge on his Section 7 rights.” The opt-out procedure placed employees in a similar predicament because it forced them to reveal their sentiments concerning concerted activity.

Further, deciding an issue left open by its (much-maligned) *D. R. Horton* decision, the Board found that even if employees were *not* required to sign onto the arbitration agreement as a condition of employment, the agreement was still unlawful because it required employees to prospectively waive their Section 7 right to engage in concerted activity. It is the individual agreement itself not to engage in concerted activity that threatens the statutory scheme, said the Board; whether the agreement was imposed or entered into voluntarily is beside the point. Any binding agreement that precludes individual employees from pursuing protected, concerted legal activity in the future (i.e., to pursue class litigation) amounts to a prospective waiver of Section 7 rights—rights that “may not be traded away.”

Member Johnson disagreed. He argued that the employer lawfully maintained an arbitration agreement with a “universally recognized” contract formation mechanism that places employees on the same footing as employers if they choose to opt out. Johnson also asserted anew his fundamental disagreement with the Board’s central holdings in *D.R. Horton* and *Murphy Oil*. ■

Save the dates!

Ogletree Deakins invites you to learn more about key labor law issues and developments at its upcoming events. For details, visit www.ogletreedeakins.com/events.

December 10-11, 2015

Not Your Father's NLRB: Is the Ambush Now a Siege?
The Venetian
Las Vegas, NV

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Not Your Father's NLRB

While the ambush election rules are incredibly significant, they are just the icing on the cake for unions. Over the last seven years, the NLRB has given labor a proverbial wish list of new, favorable rules regulating both union organizing and collective bargaining. From micro-unit concepts that give unions power to define who gets to vote, to rules allowing certain employees to use employer email to organize at work, the playing field has been tilted in labor's favor. More recently, the NLRB has completely redefined the joint-employer definition and stands ready to rule that a union can force jointly employed workers into the same voting unit with an employer's regular employees. Plus, unions can now use "electronic signatures" on virtual union authorization cards.

These are just a few of the changes that will be covered at the latest installment of Ogletree Deakins' popular "*Not Your Father's NLRB*" program on December 10-11, 2015, at The Venetian in Las Vegas. This timely and informative two-day program is designed for both union and nonunion employers and will feature an outstanding group of experienced speakers who will explain the latest developments and provide practical tips to help protect your organization.

To maintain the interactive experience of this event, attendance is limited, so make your reservations soon. For more information or to register, visit www.ogletreedeakins.com/our-programs.

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