

Coping With The New NLRB Quickie Election Rule

presented by:

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About Littler

Littler is the largest management side labor, employment, and benefits law firm in the world with over 1,000 attorneys devoted exclusively to representing the interests of management relating to the workplace. Littler's Workplace Policy Institute™ represents trade associations and employers on matters involving workplace policy.

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About Michael Lotito

- **Michael J. Lotito** is the Co-Chair of Littler's Workplace Policy institute. A former chair of the Society of Human Resource Management (SHRM), Michael has testified before the U.S. House of Representatives, the U.S. Senate, the NLRB, and the EEOC. An "AV" rated attorney by Martindale-Hubbell, Michael speaks before management groups around the world on workplace topics, has written numerous articles on issues of concern, and is a regular media contributor. He serves as labor counsel to the IFA and the Coalition to Save Local Business. Mr. Lotito can be contacted at milotito@littler.com.

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AGENDA

- **NLRB's new “quickie” union election rule**
 - What it does
 - Can it be stopped
- **What employers should do now**
- **What employers should do if a union files a petition**
- **Tools for rapid response**
- **New resources from the IFA**



WHY WORRY NOW?

- **The “new” union-dominated NLRB is issuing a series of game-changing rulings**
- **Unclear whether Congress or the courts can stem the tide**
- **The accumulating pressure on employers**



THE NEW NLRB “QUICKIE” ELECTION RULE

- **Effective April 14, 2015**
- **Effectively shortens the timing of union elections from 40 days to between 10-20 days.**
- **Why that matters to you**



THE OLD NLRB ELECTION PROCESS

Day 1	7-14 Days	14-28 Days	Approx. 20 days After Petition	38-42 Days
Election Petition Filed	Hearing or Stipulation	Request for Review Possible	Excelsior List Due 7 days after stipulation or DDE. Election notice sent and posted no later than 3 days before election.	Election
RD Sends to Employer	Can have hearing	No delay to election	Names and home address	Count Ballots
Commerce questionnaire	Open question if employer needs to take position on unit placement issues	Most denied		
Requests posting	Briefs filed approximately 7 days after hearing	Might impact ballot counting - impounding		
Suggest hearing date 7-14 days	DDE issued			

THE NEW RULE IN A NUTSHELL

Day 0	Day 8	Day 10	10-14 Days	15-20 Days	
Election Petition Filed	8 th Day “Hearing”	Voter List Due 2 days after Stipulation or DDE (down from 7 days)	Election Notice Sent and posted at least 2 days before election	Election	Post-Election Issues
• Immediately served on Employer	• HO discretion to disallow evidence on voter eligibility	Laid off construction workers may be eligible also, as before			• 7 days with supporting documentation
• A new mandatory poster requirement	• HO will not conduct hearing if unit placement involve less than 20% of unit	• Job classification (new)			• Hearing is discretionary
• RD sets hearing 8 days out		• Location of facility (new)			Board review discretionary
• RD requires new statement up front covering: <ul style="list-style-type: none"> ○ Who is in? ○ Who is out? ○ Supervisors ○ Contract Bar ○ If not included, forever waived ○ Election details ○ Details on all unit employees 	• Request for Review will no longer delay election	• Employee phone numbers and personal email addresses disclosed to union (new) • Home addresses also (as before)			

IMPACT OF THE NEW RULE

- **Effective date: April 14, 2015**
- **Denial of employers' due process and free speech rights**
- **Denial of employees' right to learn all the facts about unions before they vote**
- **A “back door” to Card Check?**
- **How much difference will it really make?**

CAN IT BE STOPPED?

- **Two law suits filed, in DC and Texas federal courts**
- **Status of the litigation**
- **What about Congress?**

WHAT EMPLOYERS SHOULD DO BEFORE A PETITION IS FILED

- Train managers on early warning signs plus do's and don't's (TIPS)
- Protect your facilities against unwanted union access (impact of the new *Purple Communications* case)
- Prepare a rapid response plan for union petitions
- Examine bargaining unit questions for possible restructuring
- Review Company handbook policies for vulnerabilities
- Identify potential employee “sore points”

TRAIN MANAGERS AND SUPERVISORS

- **Can they articulate company positions on unions?**
- **Do they understand their role in making the union irrelevant?**
- **Do you even know who your “supervisors” are?**
- **Empowering them with Right of Free Speech**
- **Cautioning them with TIPS**
- **Do they understand solicitation and distribution rules and how to apply them?**
- **Make them sensitive to section 7 concerted activity situations**
- **Consider the early warning signs**
- **Who is going to train, how often and in what format?**

PROTECT AGAINST UNWANTED SOLICITATION/DISTRIBUTION/TRESPASS AND OTHER ACCESS BY EMPLOYEES AND NON-EMPLOYEES

- **Develop lawful no trespass, solicitation, distribution and bulletin board rules**
- **Ensure consistency in enforcement**
- **Post signage on the property regarding rules**
- **Consider special circumstances such as business parks**
- **Who should call the police? Will they help? ULP concerns**
- **Company email policies – the NLRB *Purple Communications* case**

THE RAPID REPOSE PLAN

- **Preparing initial communications**
- **Evaluating the issues**
- **What is the unit?**
- **Who is on the management team?**
- **Language issues**
- **Training of supervisors**
- **Training of response team**
- **Preparing for multiple petitions simultaneously**
- **Who is labor counsel?**

BARGAINING UNIT CONCERNS

- ***Specialty Healthcare* considerations**
- **What are departmental units?**
- **Who are the supervisors?**
- **What other inclusions or exclusions should be considered in advance of any petition being filed?**

HANDBOOK POLICIES

- **Easy unfair labor practices to find**
- **Arbitration clause issues**
- **Key provisions:**
 - Confidentiality
 - Speaking to the media
 - Problem solving procedures
 - Speaking about wage issues
 - Solicitation rules and email policies
 - Social media policies
 - Arbitration clauses
 - And more...

CONDUCT OVERALL VULNERABILITY ASSESSMENT

- **Wage and hour issues**
- **Problem solving procedures**
- **Communication devices**
- **EEO, Workers Comp and other agency issues**
- **Hiring practices for salting**
- **Competitive wage and benefit issues**

NEW RAPID RESPONSE TO UNION ORGANIZING TOOLKIT

- **“Do’s and Don’ts For Supervisors”**
- **“How To Deal With Union Organizing”**
- **“Reasons For Opposing the Union”**
- **“Think Before You Sign”**
- **Available at franchise.org.**

WHAT EMPLOYERS SHOULD DO ONCE THE PETITION IS FILED

- **First decision: Whether to seek a court injunction against the new Rule**
- **Otherwise post NLRB Notice and perhaps electronically distribute in 2 business days**
- **Second decision: Whether to seek a hearing before the vote or “stipulate” to the election**
- **Pro’s and con’s of hearing vs. “stip.”**

IF A HEARING IS NEEDED

- **New Statement of Position required or else you may be waiving your rights**
 - Any claim of inappropriate unit (or else waived)
 - Explain why
 - Who should be added or excluded
 - Any voting eligibility issues
 - Any election bar or other issues
 - Election details (type, date, time, where, pay period, eligibility formulas)

ALSO PRIOR TO HEARING

- **New requirement to disclose names, work locations, shifts and job classes of everyone in the proposed unit, within 7 days of petition**
- **Also disclose additions or exclusions**
- **Failure to provide names will prevent employer from contesting unit or eligibility in hearing**
- **May still challenge voters for cause at election**

THE HEARING

- **Hearing to be held 8 days after the petition is filed (with rare exceptions)**
- **Presumption favoring exclusion of voter eligibility issues**
- **RD to decide what hearing issues permitted**
- **Expect to make offers of proof**
- **SOP omissions will limit employer evidence**
- **No more post-hearing briefs in most cases**

POST-HEARING ISSUES

- RD to direct election “as early as practicable”
- No more 25-day waiting period for appeals
- Parties can delay appeals until after election
- Voter list required within 2 business days after RD decision directing election (or after approval of election agreement)
- Newly required disclosure of home phone numbers, personal emails, work locations, and job classifications (plus home addresses)
- Also must list employees who are expected to be challenged at the election

POST-ELECTION CHANGES

- **Both objections and offer of proof will now be due w/in 7 days after the election**
- **Post-election hearing to be held 21 days after tally of ballots**
- **RD to make final decision on objections, subject to discretionary review by the Board**

PRESERVING ISSUES

- **Consider joining one of the pending lawsuits**
- **Consider objecting to each new rule as it comes up in the process**
- **Claim denial of due process and violation of Section 9 of the Act and the APA**

MOUNTING A “VOTE NO” CAMPAIGN POST-PETITION

- **Can it be done in time?**
- **The importance of rapid response**
- **The pro’s and con’s of outside “persuaders”**
- **Winning messages and tactics**
- **The campaign calendar**
- **More on the do’s and don’ts - what you CAN say**

ADDITIONAL RESOURCES FROM IFA

- www.franchiseactionnetwork.com
- Labor.franchise.org

QUESTIONS?



THANK YOU

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