

Chapter 27

Clearing the Path to Unionizing America’s Workforce: The NLRB’s New Rules Governing Union Elections and Bargaining Units

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§ 27.01. Introduction.

Section 7 of the National Labor Relations Act (the NLRA) ensures private sector employees the right “to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . [and] to refrain from any or all of such activities.”¹ In cases where employers and employees disagree over the question of unionization, Section 9 of the NLRA provides the National Labor Relations Board (the Board or the NLRB) with authority to resolve “questions of representation” by holding union representation elections.²

The basic representation election procedures are set forth in Section 9, and clarified in corresponding regulations. The overall framework established in Section 9 is relatively straightforward. First, an employee, group of employees, or labor organization must file a petition for certification alleging that a “substantial number” of employees “wish to be represented for collective bargaining and that their employer declines to recognize their representative.”³ Once a petition has been filed, one of the Board’s regional

1 29 U.S.C. § 157.
 2 *Id.* § 159(b).
 3 *Id.* § 159(c)(1)(a).

directors reviews the petition and determines, among other things, whether the union seeks to represent an “appropriate” bargaining unit.⁴ In determining whether a petitioned-for unit is appropriate, the regional director considers whether the employees in the unit have shared interests.⁵ At this stage, the employer may suggest that, even though the employees in the proposed unit have such shared interests, the unit is nonetheless inappropriate because it excludes other employees with similar interests. In many cases, if these other employees have similar interests to those in the petitioned-for unit, the regional director would not approve the smaller, petitioned-for unit.

If the regional director is satisfied that the union has support from at least 30 percent of an appropriate bargaining unit of employees and that the petition presents a “question of representation,” it will then direct an election or approve an election agreement.⁶ The resulting election, completed through secret ballot, typically takes place at the employer’s place of business.⁷ Following the election, the Board certifies the election’s results, and business at the (potentially unionized) workplace resumes as normal.⁸

While most employers are familiar with the basic concepts of bargaining units, union representation, and collective bargaining, the filing of an election petition under Section 9 can still come as a surprise. Employers are often blindsided by a union petition, and it can take several days to begin developing a response strategy. Because elections have historically been held approximately 40 days following the filing of a petition, employers have traditionally had sufficient time to develop a strategic campaign.⁹

4 *Id.* § 159(b).

5 *See, e.g.,* American Cyanamid Co., 131 N.L.R.B. 909, 910 (1961); Chrysler Corp. (Detroit, Mich.), 76 N.L.R.B. 55, 59 (1948) (“The principal criterion used by the Board in grouping employees for bargaining purposes has been community of interest. The Board has generally held that employees with similar interests shall be placed in the same bargaining unit.”).

6 29 U.S.C. § 159(c).

7 *Id.*

8 *Id.*

9 NLRB, *Summary of Operations, 2002-2012 Reports*, National Labor Relations Board, <https://www.nlr.gov/reports-guidance/reports/summary-operations> (last visited Aug. 15, 2015) (demonstrating that elections traditionally occurred within thirty-eight days following the filing of the petition).

Unfortunately for employers, this is no longer the case. On April 14, 2015, the NLRB enacted new regulations that significantly altered the procedures governing representation elections.¹⁰ While these new rules affect many aspects of the union election process, they have the largest impact on the overall election timeframe. For instance, elections held under the new rules can take place as little as 10 to 12 days following the petition's filing.¹¹ The Board has also developed a new test that makes it much easier for a union to demonstrate that smaller employee groups are appropriate for purposes of allowing a representation election to proceed. Taken together, these new rules have cleared the path to the unionization of America's workforce.

This chapter will examine the effects that the Board's new rules governing union elections and bargaining units will have on employers' ability to respond effectively to union organization efforts. Section 27.02 will address the rules — past and present — governing representation elections. This section will review the traditional election procedure rules, offer background information regarding the Board's rule-changing process, and provide an in-depth look into the specific procedures and processes mandated by the new rules. This section will also address the many legal attacks currently being levied against the Board's new rule in federal courts across the country. Section 27.03 will focus on the Board's 2011 *Specialty Healthcare* decision, which dramatically changed the standard that the Board has traditionally relied upon to determine bargaining unit appropriateness.¹² This part will review the traditional appropriateness analysis, discuss the radically different test first articulated in *Specialty Healthcare* but subsequently applied in many

¹⁰ Representation — Case Procedures; Final Rule, 79 Fed. Reg. 74308 (Dec. 15, 2014), available at <http://www.gpo.gov/fdsys/pkg/FR-2014-12-15/pdf/2014-28777.pdf>; NLRB, *Representation Case Rules Effective April 14, 2015*, National Labor Relations Board, <https://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015> (last visited Aug. 15, 2015).

¹¹ *Ambush Election Update; 40 Percent Reduction in Campaign Time, Almost 100 Percent More Petitions*, Hunton Employment & Labor Perspectives (May 12, 2015), <http://www.huntonlaborblog.com/2015/05/articles/nlr/ambush-election-update-40-percent-reduction-in-campaign-time-almost-100-percent-more-petitions/>.

¹² *In Re Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 N.L.R.B. No. 83 (Aug. 26, 2011).

additional contexts, and analyze the potential import of these changes on organizing efforts. Finally, Section 27.04 will demonstrate why the Board’s dramatic departure from traditional procedure and precedent — in regards to both representation elections and bargaining unit appropriateness — necessitates that employers take steps to prevent unionization *before* unions file election petitions.

§ 27.02. Rules Governing Representation Elections: From Efficient and Fair to a Total Ambush.

[1] — Representation Elections Prior to April 14, 2015.

Before the new ambush election rules were enacted on April 14, 2015, representation elections were governed by a set of regulations that not only struck a fair balance between employer and union interests, but also ensured elections were conducted in an efficient manner without unnecessary delay. Under these traditional rules, elections were held an average of 38 days following the filing of the election petition — a number that fell below the Board’s internal target of 42 days.¹³ This period gave both employers and unions sufficient opportunity to adequately present their positions and provided employees enough time to make reasoned and well-informed decisions — all within a relatively condensed timeframe. This section will address several procedural components of representation elections held under the traditional rules, including the election petition, the pre-election board hearing, statements of employer position, and disclosure of employee information.

[a] — The Election Petition.

Under the traditional rules, the election process began with the filing of an election petition by a group of employees or a union. Within 48 hours of filing the petition, the union was required to furnish “showing of interest documentation” evidencing that at least 30 percent of the employees in the proposed bargaining unit supported the petition.¹⁴ Such support could be

¹³ See *Summary of Operations, 2002-2012 Reports*, *supra* note 9.

¹⁴ 29 C.F.R. 101.17 (2014) [Reserved by 79 FR 74476]; *Id.* § 101.18(a) (2014) [Reserved by 79 FR 74476].