

# HOW THE NEW NLRB ELECTION AND HANDBOOK RULES CHALLENGE EMPLOYERS

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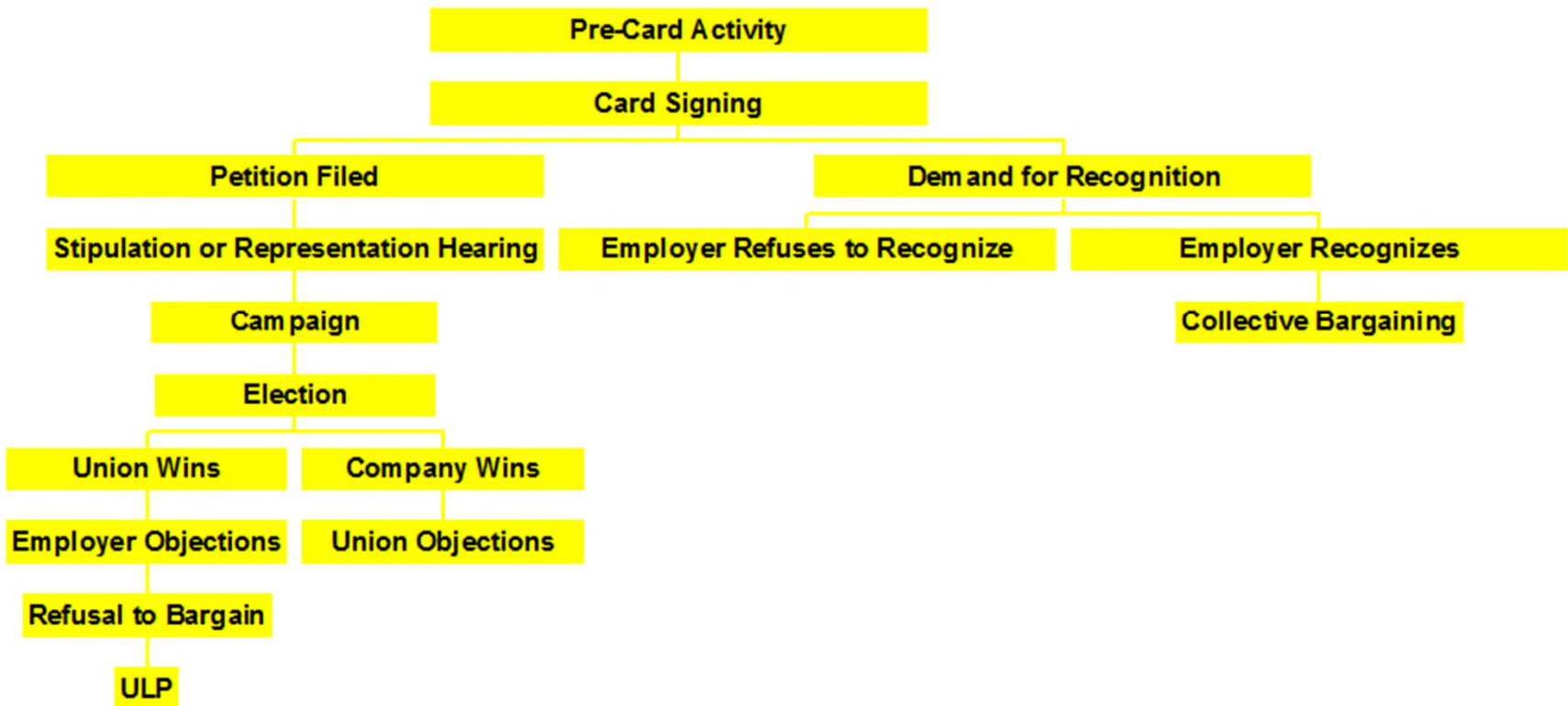
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# OBJECTIVES

- Understand the new procedures used in NLRB representation elections.
- Understand how the new rules impact non-union employers.
- Understand the causes and warning signs of a union organizing campaign.
- Learn how increased scrutiny by the NLRB of employment handbook policies can impact representation elections.

# ELECTION PROCESS

## Election Process



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# EMPLOYEES' RIGHTS TO ORGANIZE

- Section 7 – “Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities* for the purpose of collective bargaining or other mutual aid or protection. . . .” (Emphasis Added)
- Section 9(a) – “Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:...”
- Section 9(b) – The Board decides the appropriate bargaining unit.
- Section 9(c)(1) – The Board investigates RC, RD and RM petitions and holds hearings if reasonable cause exists that a question on representation exists.
- Section 9(c)(3) – One year bar rule.

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## EARLY WARNING SIGNS

- Are employees gathering in small groups?
- Have social and personal interactions changed?
- Have unilateral changes been made to wages or benefits that do not equally impact all employees?
- Are strangers talking to the employees outside the office?
- Has the grapevine gone dead?

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## EARLY WARNING SIGNS

- Have some workers become belligerent?
- Have problem employees become angels?
- Are employees getting lists of names, addresses and job classifications?
- Have new leaders become visible?
- Is there unnatural movement of people in the facility?

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# AUTHORIZATION CARDS

- Union needs 30% of employees to sign cards to file a petition. Unions usually have between 45% and 75% showing of interest before filing a petition.
- Employers may advise employees how they can revoke their authorization cards.
- The employer may not offer employees assistance in revoking the authorization cards or otherwise created impression that they would be in peril if they refrained from revoking cards.
- The employer should refuse to review the cards if the union presents them to the employer.
- The cards do not bind the employee to vote for the union.

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## THE PETITION

- RC Petition is filed by a union or employee and seeks to have a labor organization appointed as the employees' exclusive bargaining agent.
- Box 5 of the petition contains the proposed bargaining unit.
- Under the new rules, the union can file the petition electronically, by facsimile or in hard copy, with the regional director.
- Under the new rules, the union must serve the employer with a copy of the petition along with a Board Form 4812 (Notice of Procedures) and a Statement of Position form.
- Union must file proof of a showing of interest when it files the petition.



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# INVESTIGATION

- Notice of Hearing in which the regional director sets a hearing date for eight days after service of the Petition.
- Notice of Petition for election served with the Notice of Hearing and employer must post the Notice of Petition in a conspicuous place within two days and maintain it until Notice of Election is posted.
- Statement of Position
  - Employer must file Statement with the regional director and the parties by noon the day before the hearing is scheduled to commence.
  - Statement sets out employer's position on issues requiring a hearing.
  - Employer must provide an electronic alphabetized list of employees in the unit, and if the employer argues that another bargaining unit is more appropriate, the employer must provide list of employees that the regional director should include or exclude from the unit.

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## APPROPRIATE BARGAINING UNIT

- The Union need only designate an appropriate unit, not the most appropriate unit.
- Community of Interest factors (common wages, hours, working conditions, supervision, skills, interchange or functional integration and bargaining history).
- The Board can accept and designate an appropriate unit, not the most appropriate bargaining unit.
- Micro-Units
  - Advantage and disadvantage.
  - If proposed unit satisfies community of interest, the regional director will find it appropriate.
  - Employer must demonstrate that the employees it seeks to add to the unit share an “overwhelming” community of interest with the petitioned for employees.

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# EMPLOYEES EXCLUDED FROM BARGAINING UNITS

- Supervisors
- Agricultural laborers
- Domestic Servants
- Individuals employed by parents or spouse
- Employees covered by the Railway Labor Act
- Confidential employees
- Managerial employees
- Professional and non-professionals
- Guard units
- Craft units

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# ELECTION AGREEMENTS

- Consent elections
  - Waive right to hearing, and
  - Regional director's rulings are final and binding.
- Stipulated election
  - Waive right to hearing before the election, and
  - Party may request Board review of regional director's resolution of any dispute.
- Full Consent Election
  - Waive right to appeal,
  - Designate the regional director as the final authority to resolve disputes.

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# REPRESENTATION HEARINGS

- If parties cannot reach an election agreement, the regional director will issue a Notice of Hearing.
- A “question of representation” exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining.
- The Board will ordinarily not litigate disputes concerning individuals’ eligibility to vote or inclusion in an appropriate unit before an election is conducted.
- Based on the record, the regional director will direct an election if s/he finds that a question of representation exists.

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# CONDUCT OF HEARING

- The hearing continues day to day until completed.
- The hearing is conducted by a hearing officer appointed by the regional director, and the regional director may direct the hearing officer concerning issues to be litigated.
- At the beginning of the hearing, all parties must respond on the record to each issue raised in the Statement of Position.
- The hearing officer may not take evidence on any issue on which the parties have not taken an adverse position. The Federal Rules of Evidence do not apply.
- Offers of Proof.
- The hearing office must solicit the parties' position on the type, date, time and location of the election and the eligibility period.
- Post hearing briefs are only permitted by leave of the regional director.

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## DIRECTION OF ELECTION

- If the regional director finds that a question of representation exists, s/he will issue a Direction of Election.
- Contents of the Direction of Election:
  - Specifies the type, date(s), time(s) and location(s) of the election and the eligibility period.
  - The regional director will schedule the election for the earliest date practicable, consistent with the rules.
  - The regional director will transmit the Notice of Election.
- Parties may request Board review of the Direction of Election but the request will not stay the election.

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# NOTICE OF ELECTION

- Notifies employee of the type, date, time and place of the election.
- Notifies employees which individuals are subject to challenge and advise the employees that the individuals are neither included in, nor excluded from, the bargaining unit.
- The Notice will inform the employees that the regional director will resolve the eligibility of the challenged individuals after the election.
- The employer must post the Notice of Election in conspicuous places at least three full working days prior to 12:01 a.m. of the day of the election. If the employer provides notices to employees electronically, then the employer must serve the Notice of Election on the employees electronically.



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# VOTER LIST

- Employer must provide the Excelsior list to the regional director and parties within two business days of the issuance of the Direction of Election.
- Contents of the list must include the following information concerning eligible voters:
  - Their full names.
  - Their work locations, shifts and job classifications.
  - Their contact information (including home addresses, available personal email addresses, and available home and personal cellular (“cell”) telephone numbers).
- In a separate section of the list, the employer must provide the same information concerning challenged voters.
- The employer must alphabetize (overall or by department) and provide the list in an electronic format approved by the Board’s General Counsel.

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## ELIGIBLE VOTERS

- The eligibility period is typically the payroll period that immediately precedes the direction of the election.
- There are special eligibility rules for employees who are:
  - Part-time,
  - Temporary and seasonal,
  - Probationary,
  - Laid off,
  - Absent,
  - Sick leave,
  - Terminated,
  - Strikers, and
  - Relatives of management.

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## PRE-EMPTIVE ACTIONS BY EMPLOYERS

- Union avoidance initiatives
- Gallup or related services
- Review (and fix if necessary) company culture or DNA
- Open and maintain effective communications with employees
- Ensure respectful, positive supervision

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## POST ELECTION PROCEDURES

- If there are no objections, and the number of challenged ballots are insufficient to affect the result, the regional director will issue a certification.
- Parties must file objections within 7 days of the tally of ballot along with a written offer of proof supporting each objection.
- The regional director may dismiss the objection without a hearing if s/he finds that the offer of proof does not set forth fact(s) sufficient to set aside the election.
- If the offer does raise sufficient grounds, s/he will order a hearing within 21 days of the tally of the ballots.
- Hearing
- Certification

# HOW INCREASED SCRUTINY BY THE NLRB REGARDING EMPLOYMENT HANDBOOK POLICIES IMPACT THE REPRESENTATION ELECTION PROCESS

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# REPORT OF THE GENERAL COUNSEL REGARDING EMPLOYER WORK RULES

March 18, 2015

GC Guidance states “Even if the work rule does not explicitly ‘ban union activity’ ,the rule could still be unlawful if”:

- Employees would reasonably construe the rule’s language to prohibit Section 7 activity.
- The rule was promulgated in response to union or other Section 7 activity.
- The rule was actually applied to restrict the exercise of Section 7 rights.

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# WHICH RULES ARE THE FOCUS?

GC Report is divided into two parts:

- Comparison of unlawful v lawful rules

The memo focuses on the types of rules frequently at issue including confidentiality rules, professionalism rules, anti-harassment rules, trademark rules, photography/recording rules, and media contact rules.

- Discussion Of Recent Case with Examples of “Bad Rules”

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# HOW CAN THIS IMPACT AN ELECTION?

## Objections and Challenges:

- The Board will review the policies cited and could also review the entire Handbook/All Work Rules.
- Likely the review could find a limitation on speech.
- Could form the basis to set-aside the Election.



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## HOW CAN THIS IMPACT AN ELECTION? (CONT.)

Rules can form the basis of an NLRB charge

- Pending charges?
- New charge based on work rules?

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# PENDING CHARGES

Consider if the employer has pending charges during an election:

- The pending charge(s) could become fodder for additional scrutiny.
- Has the NLRB found “Bad Rules”.
- Did the employer terminate anyone under the “Bad Rules”.
- Could result in lost wages/reinstatement.

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## BEST PRACTICE

Review your handbooks and work rules!

- Consider all rules - in particular those concerning speech - and consult counsel to ensure the rules do not violate current board law and NLRB guidance.

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# QUESTIONS?



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THANK YOU

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