

# Trump's NLRB and the Change in Labor Law that Will Affect Employers: From Elections and Dues Check Off to Social Media

33<sup>rd</sup> Annual Labor & Employment Conference

A panel discussion with Theodore J. St. Antoine, Robert Vercruysse, and Dennis Boren

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# THE CURRENT BOARD



# QUICKIE ELECTION RULES ARE NOT LIKELY TO CHANGE

OLD RULES	NEW RULES
<p>Parties cannot electronically file election petitions. Parties and NLRB regional offices do not electronically transmit certain representation case documents.</p>	<p>Election petitions, election notices and voter lists can be transmitted electronically. NLRB regional offices can deliver notices and documents electronically, rather than by mail.</p>
<p>The parties and prospective voters receive limited information.</p>	<p>Parties will receive a more detailed description of the Agency's representation case procedures as well as a Statement of Position form, when served with the petition. The Statement of Position will help parties identify the issues they may want to raise at the pre-election hearing. A Notice of Petition for Election, which will be served with the Notice of Hearing, will provide employees and the employer with information about the petition and their rights and obligations. The Notice of Election will provide prospective voters with more detailed information about the voting process.</p>
<p>The parties cannot predict when a pre or post-election hearing will be held because practices vary by Region.</p>	<p>The Regional Director will generally set a pre-election hearing to begin eight days after a hearing notice is served and a post-election hearing 14 days after the filing of objections.</p>

OLD RULES	NEW RULES
<p><b>There is no mechanism for requiring parties to identify issues in dispute.</b></p>	<p>Non petitioning parties are required to identify any issues they have with the petition, in their Statements of Positions, generally one business day before the pre-election hearing opens. The petitioner will be required to respond to any issue raised by the non-petitioning parties in their statements of Positions at the beginning of the hearing. Litigation inconsistent with these positions will generally not be allowed.</p>
<p><b>The employer is not required to share a list of prospective voters with the NLRB's regional office or the other parties until after the regional director directs an election or approves an election agreement.</b></p>	<p>As part of its Statement of Position, the employer must provide a list of prospective voters with their job classifications, shifts and work locations, to the NLRB's regional office and the other parties, generally one business day before the pre-election hearing opens. This will help the parties narrow the issues in dispute at the hearing or enter into an election agreement.</p>
<p><b>Parties may insist on litigating voter eligibility and inclusion issues that do not have to be resolved in order to determine whether an election should be held.</b></p>	<p>The purpose of the pre-election hearing is clearly defined and parties will generally litigate only those issues that are necessary to determine whether it is appropriate to conduct an election. Litigation of a small number of eligibility and inclusion issues that do not have to be decided before the election may be deferred to the post election stage. Those issues will often be mooted by the election results.</p>

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# SIGNIFICANT UNIT CASES

## Unit Cases

- Mixed-guard units
  - Obama Board found mixed-guard units lawful
    - *Loomis Armored US, Inc.*, 364 NLRB No. 23
  
- Student athletes are not covered employees
  - Obama Board did not assert jurisdiction over athletes
    - *Northwestern University*, 362 NLRB No. 167 (2015)
  
- Graduate student employees
  - Obama Board asserted jurisdiction over graduate students
    - *Columbia University*, 364 NLRB No. 90

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# SIGNIFICANT UNIT CASES

## Unit Cases

- Specialty healthcare units
  - Obama Board found small units
    - *Macy's Inc.*, 361 NLRB No. 4 (2014)
    - *Bergdorf Goodman*, 361 NLRB No. 11 (2014)
    - *NLRB v. Contemporary Cars, Inc.*, 667 F3d 1364 (11th Cir. 2012)

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## SIGNIFICANT ULP CASES

- No permanent replacement
  - Obama Board found permanent replacements unlawful; standard lowered
    - *American Baptist Homes of the West*, 364 NLRB No. 13
- Protected concerted activity: wildcat strikes
  - Obama Board found wildcat strikes are protected concerted activity
    - *Coca Cola Puerto Rico Bottlers*, 362 NLRB No. 125

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# SIGNIFICANT ULP CASES

- Joint employer
  - Obama Board found single bargaining unit for joint employer
    - *Miller & Anderson, Inc.*, 364 NLRB No. 39
  - Obama Board found two or more employers can be joint employer
    - *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186



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# SIGNIFICANT ULP CASES

- Bargaining
  - Obama Board found duty to bargain no annual pay increase *after* expiration
    - *Finley Hospital*, 362 NLRB No. 102
  
- Duty to bargain/established past practice
  - Obama Board found duty to bargain health care changes despite management rights clause and past practice after expiration
    - *E.I. Du Pont de Nemours*, 364 NLRB No. 113

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# SIGNIFICANT ULP CASES

- Discipline: new bargaining units
  - Obama Board found duty to bargain discipline with new unit
    - *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106
  
- Rules
  - Obama Board found rules prohibiting negative comments about doctors to patients unlawful
    - *William Beaumont Hospital*, 363 NLRB No. 162
  
  - Obama Board found vulgar and obscene language to be protected concerted activity despite policy prohibiting such conduct
    - *Pier Sixty, LLC*, 362 NLRB No. 59

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# SIGNIFICANT ULP CASES

## Rules (cont.)

- Recordings
  - Obama Board found rule against employee use of camera phones unlawful
    - *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190
  - Obama Board found rule prohibiting recording without permission unlawful
    - *Whole Foods Market, Inc.*, 363 NLRB No. 87
- Witness statements
  - Obama Board found witness statements must be provided to union
    - *Piedmont Gardens*, 362 NLRB No. 139

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# SIGNIFICANT ULP CASES

## Rules (cont.)

- Investigations
  - Obama Board found confidentiality of investigation rule or policy unlawful
    - *Boeing Co.*, 362 NLRB No. 195
  - Obama Board found rule prohibiting email solicitation unlawful
    - *Banner Estrella Medical Center*, 362 NLRB No. 137
- Employer's email
  - Obama Board found rule prohibiting recording without permission unlawful
    - *UPMC*, 362 NLRB No. 191

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# SIGNIFICANT ULP CASES

## Weingarten Rights

- Choice of union representation
  - Obama Board found unlawful not providing employee union representative of choice
    - *Fry's Food Stores*, 361 NLRB No. 140
- Drug testing
  - Obama Board found denying steward before drug testing unlawful
    - *Manhattan Beer Distributors, LLC*, 362 NLRB No. 192

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# SIGNIFICANT ULP CASES

- Dress codes: Union Insignia
  - Obama Board found right to wear union insignia in traditional American grill
    - *Grill Concepts Services*, 364 NLRB No. 36
  
- Dues collection
  - Obama board found union letter seeking to collect dues with no union security clause lawful
    - *UNITE HERE! Local 5 (Hyatt Corp.)*, 364 NLRB No. 94

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## SIGNIFICANT ULP CASES

- After termination of CBA
  - Obama Board found obligation to collect dues survives contract expiration
    - *Lincoln Lutheran of Racine*, 362 NLRB No. 188
- Mandatory arbitration agreements
  - Obama Board found mandatory arbitration unlawful
    - *SolarCity Corp.*, 363 NLRB No. 83

# THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

CLARK HILL