RIP "Ambush Elections": NLRB Substantially Modifies Union Representation Election Rules

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Private sector union membership has steadily dropped over the past 40 years, from almost 25% of the eligible workforce in the mid-1970s to approximately 6% today. In 2014, organized labor was hopeful that this trend would be reversed by virtue of the National Labor Relations Board's (NLRB's) changes in union election rules that dramatically shortened the time that employers have to campaign in advance of a union election. Businesses, on the other hand, were decidedly unhappy with these NLRB rule changes, which they feared would work to the benefit of union organizers and result in what some management representatives decried as "quickie elections" or "ambush elections."

On December 13, 2019, almost exactly five years after it announced the rule changes, the NLRB published a new final rule that, while retaining much of the form of the 2014 rule, marks a return to the time frames that existed before the 2014 changes. While employers operating under the 2014 rules' very short deadlines understand the problems those rules presented, the new changes, like the 2014 ones, are likely to have little impact on the actual results of union elections going forward. The union win rate in elections has remained steady at about 65% in the past decade, with little if any noticeable difference associated with the 2014 rule changes.

The new representation election rules will apply to petitions filed with the NLRB after April 16, 2020. Among the specific important changes to the rules are:

- Under the 2014 rules, an employer served with a petition for a union election had seven *calendar* days to prepare and file a statement of position setting forth any legal or factual arguments it intended to raise concerning the petition. The new rules allow the employer eight *business* days, meaning between 10 and 12 calendar days, to prepare and file the statement of position. For employers who have never thought about union issues, this extra time is critical. While many petitions are straightforward, others are very complicated and require the advice of counsel familiar with this area of the law.
- The pre-election hearing itself will be held 14 business days—almost three weeks—from the initial petition, as opposed to eight calendar days under the 2014 rules;
- Parties are allowed five business days to file a post-hearing brief; the 2014 rules allowed briefs only under special circumstances;

- Under the new rules, the employer must provide a list of eligible voters five business days after the direction of an election as opposed to two calendar days afterwards. Taken with the other changes, this means that the petitioning union will not be entitled to the names and contact information of the employees until 35 days after the petition is filed, as opposed to as short as 10 days after the filing of the petition; and
- The election itself cannot be scheduled any sooner than 20 days after the direction of an election, which will result in a minimum time for a contested election of approximately 55 days after the petition, as opposed to as short as 25 days under the 2014 rules.

The rule changes will allow employers to be more thoughtful about the legal arguments, and the factual bases for those arguments, that they may choose to raise concerning the composition of the bargaining unit or other substantive issues under the National Labor Relations Act. The extra time will also allow employers more opportunity to let employees/voters know why they may not wish to vote for a union.

If past experience is any guide, however, the extra campaign time will have little impact on the ultimate outcome of most union elections. The most effective time for employers to take steps to remain non-union—through a mindful and robust employee relations program—is well before a union gets to the point of filing a petition for an election. Employees who believe they work for a fair employer and are fairly compensated are not fertile targets of labor organizers.