

# The New Election Rules: Are You Prepared?

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A Webinar Sponsored By:



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# Goals of the Presentation

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- Purpose is to provide general information about the changes by the NLRB to make unionization of the workplace easier
- Provide some tips on what you should be doing now

# Procedural History of the Rule

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- **Initially Proposed:** June 22, 2011 (NPRM)
- **Revision Proposed:** February 6, 2014 (NPRM)
- **Public Hearings:** April 10 and 11, 2014
- **Final Rule Issued:** December 15, 2014
- **Effective Date:** April 14, 2015

# Changes: Filing the Petition

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- Petition *can* be e-Filed
- When Filed, Petition must be accompanied by:
  - Showing of Interest
  - Certificate of Service
- Petition form will now include Petitioner's requested election date, time, place and method

# Changes: Filing the Petition

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Petitioner must serve the parties named in the Petition with:

- A copy of the Petition
- Statement of Position form (new)
- Description of Procedures in R Cases  
(updated Form 4812)

# Changes: Initial Processing

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Region will serve:

- Notice of Hearing which sets:
  - Hearing Date
  - Statement of Position Due Date – generally will be noon of business day before hearing is set to open
- Notice of Petition for Election – similar to current Form 5492 but specifies the proposed unit
- Description of Procedures in R Cases
- Statement of Position Form
- Copy of the Petition

# Changes: Initial Processing

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**Date for Pre-Election hearing:** Except in cases presenting unusually complex issues, the Regional Director will set the hearing for:

- a date 8 days (excluding intervening Federal holidays) from the date of service of the Notice of Hearing, or
- the next business day thereafter if the 8<sup>th</sup> day falls on a weekend or a Federal holiday

# Changes: Initial Processing

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Employer *must* post Notice of Petition for Election within 2 business days of service of Notice of Hearing

- In conspicuous places, including all places where notices to employees are customarily posted
- Until petition is dismissed, withdrawn, or replaced by a Notice of Election

Must also distribute Notice electronically *if* Employer customarily communicates with employees electronically

- Failure to post or distribute *may* be grounds for setting aside election



# Changes: Initial Processing

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Employer's Statement of Position form (in RC case) will include:

- Jurisdiction and commerce (completed commerce questionnaire)
- Whether Employer agrees proposed unit is appropriate.  
If not:
  - Basis for contention it is not appropriate
  - The names, classifications, locations, or other employee groupings that should be added or excluded
- Individuals whose voting eligibility the Employer intends to contest at the pre-election hearing and the basis for each such contention

# Changes: Initial Processing

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## Employer Statement of Position form (continued):

- Any election bar asserted by Employer
- Other issues Employer intends to raise at the pre-election hearing
- Employer's position on election details:
  - Type (Manual, Mail, Mixed Mail/Manual)
  - Date(s)
  - Time(s)
  - Location(s)
  - Payroll Period information (length and last ending date)
  - Eligibility period (e.g. special eligibility formulas)

# Changes: Initial Processing

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Employer's Statement of Position form (continued):

- Name, title, and contact information authorized representative for service
- Alphabetized electronic list(s) of employees:
  - A. With full names, work locations, shifts and job classifications of all individuals in proposed unit
  - B. If Employer claims unit is inappropriate, a separate list of the full names, work locations, shifts and job classifications of all individuals Employer claims should be added to the unit.
  - C. If employer contends unit is not appropriate, it must also separately list the individuals whom it believes should be excluded from the proposed unit to make it an appropriate unit.

# Changes: Initial Processing

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Statement of Position form (continued):

- **Failure to provide list(s):** If the Employer fails to timely furnish the lists of employees, the Employer will be precluded...
  - From contesting the appropriateness of the proposed unit at any time and;
  - From contesting the eligibility or inclusion of any individuals at the pre-election hearing.
- **Eligibility issues not raised** – At the election, a party generally can challenge someone for cause even if their eligibility was not contested at the hearing

# Changes: Initial Processing

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**Postponement of Hearing:** The Regional Director may postpone the hearing for:

- *Up to 2* business days upon request of a party showing **special circumstances**
- *More than 2* business days upon request of a party showing **extraordinary circumstances**

# Changes: Pre-Election Hearing

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- Purpose of the hearing is to determine if a question of representation exists.
- Although appropriate unit must always be established, disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated.
- RD has discretion to postpone litigation of eligibility issues that affect a small percentage of employees in the unit. No mandatory 20% rule.
- Statement of Position is received in evidence (RD may allow it to be amended in a timely manner for good cause).
- All other parties will respond on the record to each issue raised in the Statement of Position before introduction of further evidence (RD may allow responses to be amended in a timely manner for good cause).

# Changes: Pre-Election Hearing

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- The hearing officer will not receive evidence concerning any issue as to which parties have not taken adverse positions, except:
  - Evidence regarding the Board's jurisdiction and;
  - Other evidence the RD decides is necessary, such as evidence concerning the appropriateness of the proposed unit
- Preclusion: A Party is precluded from:
  - Raising any issue,
  - Presenting evidence relating to any issue,
  - Cross-examining any witness concerning any issue, and
  - Presenting argument concerning any issue

That the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response.

# Changes: Pre- Election Hearing

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**Preclusion:** If a party contends in its Statement of Position that the proposed unit is not appropriate, but fails to specify what change would make it an appropriate unit, such party shall also be precluded from:

- Raising any issue as to the appropriateness of the unit,
- Presenting any evidence relating to the appropriateness of the unit,
- Cross examining any witness concerning the appropriateness of the unit, and
- Presenting argument concerning the appropriateness of the unit.

**Briefs:** Parties are entitled to oral argument but not allowed to file post-hearing briefs unless RD grants special permission.



# Changes: Decision & Direction of Election

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## Direction of Elections:

**Election Details** - If RD directs an election, the D&DE will ordinarily specify the type, date(s), time(s), and location(s) of the election and the eligibility period.

**Election Date** - The RD will schedule the election for the earliest date practicable. The 25-day waiting period – to allow Board to rule on a request for review – has been eliminated.

**Service** - Region will send the direction and notice of election to the parties and their representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided).

# Changes: Decision & Direction of Election

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## Direction of Elections:

- Request for Review: Parties may file a request for review at any time following the decision until 14 days after a final disposition of the proceeding by the Regional Direction.

Can file before the election or wait until after the election and see if the election results moot an appeal.

- Stay of Election, Expedited Consideration, or Impounding of Ballots:  
May be requested, but will only be granted upon a “clear showing that it is necessary under the specific circumstances of the case.”

# Changes: Election

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Voter List Due: Employer must provide an alphabetized voter (Excelsoir) list in electronic format within 2 days of the approval of the election agreement or direction of election.

Voter List Contents: Employer must provide (electronically, if feasible) the parties and the Region with a list containing the following information for all eligible voters:

- Full Names
- Work Locations
- Job Classifications
- Contact information (including home addresses, available personal email addresses and available home and personal cell telephone numbers)

# Changes: Elections

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**Voter List Contents – Voters to be Challenged:** The Employer shall also include in a separate section of the voter list the same information for those individuals who will be permitted to vote subject to challenge.

**Use of Voter list:** Parties shall not use the voter list for purposes other than:

- The representation proceeding
- Board proceedings arising from it and related matters

**Notice of Election:** Will ordinarily be transmitted with the D&DE or sent promptly after election agreement approved. Employer must post for 3 full working days and now must also distribute electronically if it customarily communicates with employees in the unit electronically.

**Election:** At the election, a party generally can challenge someone for cause even if their eligibility was not contested at the hearing.

# Changes: Post-Election

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- **Filing Objections:**

- Must be accompanied by a written offer of proof except that the Regional Director may extend the time for filing the offer of proof upon request of a party showing good cause.

- **Post-election Hearing:**

- Unless parties agree to an earlier date, will open 21 days after preparation of tally of ballots or as soon thereafter as practicable.

- **Hearing Officer Report:**

- All HO recommendations must be made to the Regional Director
- Exceptions to HO Report must be filed with Regional Director
- Except in consent election agreement cases, all RD post-election reports will be subject to discretionary review by the Board

# Changes: Blocking Charges

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**Offer of Proof:** When a party to a representation proceeding files a charge together **with a request that it block** the process of a petition or requests that its previously filed charge block further processing of a petition, the party shall simultaneously file, but not serve on any other party, a written offer of proof in support of the charge.

The offer of proof must provide the names of the witnesses who will testify in support of the charge and a summary of each witness's anticipated testimony.

**Witnesses:** The party seeking to block the processing of a petition must also promptly make available to the Region the witnesses identified in its offer of proof.

CURRENT ELECTION TIMEFRAME	
1. Petition (30% showing of interest, unit description)	}
2. Stipulated election agreement (optional)	
3. Hearing *NLRB jurisdiction (covered "employer") *appropriate bargaining unit; bars to election *voter eligibility issues (i.e.: supervisory status)	
4. Post-hearing briefs	}
5. Regional Director decision schedules an election	
6. Pre-election request for NLRB review	}
7. Voter eligibility ( <i>Excellior</i> ) list submitted by employer *includes names & home addresses	
8. Election (possible challenges/objections)	
9. Post-election proceedings	
10. Post-election request for NLRB review	
11. Certification of union or election results	

Usually **7 to 14 days**

Automatic **7 days**

At least **25 days**

**65-70 days from**  
petition to  
election if there  
is a hearing

# EXAMPLE

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- Petition Filed: January 31, 2014
- Hearing Set For: February 11
  - Unopposed Hearing Held
- Decision and Direction of Election Issues: March 11
- Location and Date for Election Set: March 25
- Election Held: April 7
- Certification Issues: April 15

**75 Days**



# EXAMPLE UNDER NEW RULES

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- Petition Filed: January 31, 2014
  - Hearing 8 days later: February 11
    - Reflects automatic extension due to the weekend
- No post hearing briefs
- Decision and Direction of Election: February 25  
(assuming 2 weeks)
- Election: March 10 (2 days for the list from the employer, 10 days for the Union to have it)
- Certification Issues: March 18

**46 days**

# WHAT YOU SHOULD BE DOING NOW

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- Train managers on positive communication strategies, recognizing and reacting to signs of union activity
- Determine who are supervisors under Section 2 (11) of The Act
- Assess bargaining unit issues
- Implement union avoidance strategies
  - Employee surveys/Vulnerability audit
  - Modify policies and practices that tend to cause employee disaffection
  - Train managers on union avoidance strategies

# Questions?



# Douglas H. Duerr

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For over 24 years, Douglas has been providing individualized advice and representation to employers nationwide. Throughout his legal career, he has worked on union election campaigns and represented business organizations before the National Labor Relations Board in union representation proceedings and in unfair labor practice cases.

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