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Happy New Year from the Board:  
What Did the NLRB Bring to  
Employers for 2015

February 26, 2015

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Agenda

- > *Purple Communications:*
  - Navigating the Board’s New Email Rules and Employee Use of Social Media
- > New Year, New Rules:
  - The NLRB’s Quickie Election Rules and What You Need to Know Now to be Ready When They Take Effect in April
- > Employers Take Note:
  - Practical Tips for Responding to Increased Union and NLRB Activity in 2015

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*Purple Communications: Navigating  
the Board’s New Email Rules and  
Employee Use of Social Media*

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**NLRB**

- > Background
  - NLRA (1935)
  - The Board (1) oversees process by which unions represent employees and (2) prosecutes violations of the Act
- > The Board as Investigator, Prosecutor and Court
  - Section 7 Individual Rights: "mutual aid or protection"

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*Register Guard*

> (2007)



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*Register Guard – Cont'd*

> Employer's property right outweighs individual's section 7 rights



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*Purple Communications*

- > December 11, 2014
- > NLRB Overrules *Register Guard*



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*The Board's Decision*

- > Employers who voluntarily give employees access to their email system
- > Employers may choose to ban all non-work email use but must demonstrate "special circumstances" to do so
- > Decision does not address non-employees or non-email electronic communications

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*The Takeaways*

- > Employers with business-use only policies should consider modifications
- > Expect unions to use ULPs as effective organizing tools
- > Caution: Prohibiting employees from using emails to organize during a campaign will almost invariably result in a challenge and could lead to the Board overturning a win.

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*New Year, New Rules: The NLRB's Quickie Election Rules and What You Need to Know Now to be Ready When They Take Effect in April*

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**What Happens at the NLRB?**

- > Union election petition (require 30% support)
- > Notice of hearing
- > Hearing or agreement on the "bargaining unit"
- > Election typically held within 42 days of the filing of the petition
- > If union wins, company must bargain over wages, hours, and terms and conditions of employment
- > If union loses, no election for 12 months in the same bargaining unit
- > Election is won by a majority of those voting

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**Current NLRB Election Rules**

- > Absolute right to a hearing to litigate issues, including:
  - Scope of the unit
  - Supervisory status
- > Right to file post-hearing briefs
- > Election typically scheduled at least 25 days after the NLRB's decision issues
- > Right to appeal the Regional Director's decision *before* the election

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### Duration of NLRB Proceedings

- > Cards → Days to Months
- > Petition to Election → 42 to 60+ days
- > Challenges/Objections → 7 days after election
- > Hearing → Weeks to Months
- > Certification → 7 Days to Months
- > Refusal to Bargain/  
Test of Certification → Months to Years

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### New NLRB Election Rules – Cont'd

- > New NLRB rules governing union representation elections are scheduled to go into effect on April 14, 2015
  - Substantially the same as the rules that were scheduled to take effect on April 30, 2012
  - The previous rules were invalidated by the U.S. District Court for the District of Columbia and ultimately withdrawn by the NLRB
- > The new rules are already subject to a legal challenge to the Board's authority to implement the rules. *Chamber of Commerce, et al. v. NLRB*, No. 15-cv-00009 (D.D.C. filed January 5, 2015).

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### New NLRB Election Rules – Cont'd

- > When the new rules take effect, they will dramatically change the way the NLRB handles union elections:
  - No automatic right to litigate issues at a hearing
  - The Hearing Officer — who is not a judge and has no judicial training — makes the determination whether to permit litigation and what issues can be litigated
  - Important issues, including supervisory status, may no longer be subject to pre-election litigation.
    - Instead, disputed supervisors may be permitted to vote subject to challenge and their supervisory status litigated *after* the election

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### New NLRB Election Rules – Cont'd

- > This potentially forces employers to choose between two bad options:
  - Treat the supervisors like employees and lose the ability to use them in the election campaign; or
  - Treat the supervisors as supervisors and run the risk that the NLRB will later determine they are employees and overturn the election

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### New NLRB Election Rules – Cont'd

- > Post-hearing briefs are only permitted if the hearing officer permits them
- > No right to appeal until *after* the election
- > Because there is no pre-election appeal, election will be scheduled soon after the decision, instead of the current 25+ days
- > Bottom line: No right to file briefs (7-14 days) + no pre-election appeal (25 days) = election to be held a **month or more** sooner than under the current rules

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### Additional Disclosures Required by New Election Rules

- > Employers will be required to submit a detailed position statement setting forth the issues to be litigated at the hearing
  - Must be submitted by noon the day before the hearing
  - Failure to include an issue in this filing will result in the issue being waived and the employer will be precluded from introducing evidence
- > The *Excelsior* list requirements have also been expanded:
  - List of eligible voters must now be filed within 2 business days of the election agreement or decision
    - 7 days under the current rules
  - List must now include personal phone numbers and email addresses
    - Current rule only requires addresses

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### What Do the New Rules Mean?

- > The significantly shortened time between the filing of a union election petition and the election itself means that the union has the upper hand in any campaign
- > The union can collect cards for a period of months (up to a year) while generating support for a "Yes" vote
- > But the employer may only have a few short weeks to communicate its views on unionization

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### Timeline Under the Old Rules

- > Petition to hearing: 10 days
- > Hearing: 1–5+ days
- > Post-hearing briefs: 7–14 days
- > Time until decision: 14–28+ days
- > Time from decision until election: typically 25 days
- > Total: 35–75+ days in many cases from the date the petition is filed until the election is held

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### Timeline Under the NEW Rules

- > Petition to hearing: 8 days
- > Hearing: 0–5+ days
- > Post-hearing briefs: 0–14
- > Time until decision: 0–28+ days
- > Time from decision until election: 0–20 days
- > Total: As few as **two weeks** from the date the petition is filed until the election is held

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New NLRB Procedures Would Hinder Employers' Ability to Communicate During an Election Campaign

<p>&gt; <b>Current Rules</b></p> <ul style="list-style-type: none"> <li>- Absolute right to a hearing</li> <li>- Right to file post-hearing briefs</li> <li>- Election typically scheduled at least 25 days after the NLRB's decision issues</li> <li>- Right to appeal the Regional Director's decision before the election</li> </ul>	<p>&gt; <b>New Rules</b></p> <ul style="list-style-type: none"> <li>- No automatic right to litigate issues at a hearing</li> <li>- No right to file post-hearing briefs</li> <li>- No requirement that election be scheduled 25 days after the decision; will likely be scheduled much sooner</li> <li>- No right to appeal until after the election</li> </ul>
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Practical Tips to Address Union Organizing Under the Current ("Pearce") NLRB

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Effective Actions for Dealing with the NLRB

- > In a more aggressively regulated union-organizing regime, employers may take various steps to reduce the risk of union organizing.
- > Any member of the executive team tasked with recommendations in this must be or become thoroughly knowledgeable about the employer's business strategies and plans.
- > Work force liability issues, including the potential for union organizing, should fit within the business strategies and plans.

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## Suggested Steps for Employers

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### Executive Philosophy about Labor Organizing and Risk Aversion

- > Ensure work force planning is consistent with the executive team's preferences
- > Balance corporate interests (e.g., between line operations, development and government affairs)
- > Settle on one approach for the entire organization
- > If Company has parent/sub entities or potential "co-employer" relationships (see GC's McDonald's Complaints) make sure risks and philosophies are discussed.

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### Top Down Organizing

- > Major governance, investor, legislative and regulatory initiatives should be identified and scrubbed for union involvement
- > A stakeholder analysis should be performed by management, investor relations, government affairs, HR and legal
- > Neutrality agreement and LMRA Section 302 tactics should be weighed if appropriate
- > Uniform, cogent plan of attack

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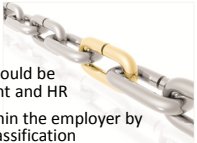
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### Bottom Up Organizing

- > Vulnerabilities in work force issues should be mapped and assessed by management and HR
- > Ranking vulnerable organizations within the employer by division, department, location, job classification
- > Strategic and tactical decisions should be determined to address vulnerabilities
  - Management training on union organizing and non-union employee protected, concerted activity
  - Lawful communications
  - Lawful changes to terms and conditions of employment and employment practices and policies
  - Lawful use of persuaders



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### Practical Prevention

- > DON'T S.P.I.T.:
  - Spy
  - Promise
  - Interrogate
  - Threaten



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### Bottom Up Organizing Cont'd

- > Structural and Bargaining Unit Planning
  - Scope issues
  - Composition issues
  - Project-based issues
  - Outsourcing, subcontracting, and other
- > Cogent roll-out based on budget and priorities

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## Transactional Planning

- > Identify corporate transactions in the pipeline or process for tying new opportunities to labor plan as they arise
- > Tie due diligence into both representational and claims liability analyses
- > Perform outcome-based planning

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## Questions?



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