

PRESENTED AT

25th Annual Labor and Employment Law Conference

May 10-11, 2018

Austin, TX

Recent Developments Under The National Labor Relations Act

John V. Jansonius

Rod Tanner

Author Contact Information:

John Jansonius
Jackson Walker L.L.P.
Dallas, TX
jjansonus@jw.com
214-953-6000

Rod Tanner
Tanner and Associates, PC
Fort Worth, TX
rtanner@rodtannerlaw.com
817-377-8833

Table of Contents

	<u>Page</u>
I. Union Representation Process.	1
A. The Election Rules: Quickie Elections And The Trump Board’s Request For Information.	1
1. Expedited Election Rules.	1
2. Effects Of The Revised Rules.	2
3. The Trump Board’s Request For Information.	3
B. Micro Units.	3
II. Conduct Policies And Employee Handbooks: The Current Landscape.	8
A. GC Memorandum 18-02.	8
B. The Boeing Company.	8
C. Post-Boeing Review Of Handbook Cases By The NLRB.	10
III. Browning-Ferris, Hy-Brand And The Current State Of The Joint Employer Doctrine. ...	10
A. Hy-Brand Industrial Contractors, Ltd., 365 NLRB No. 156 (Dec. 14, 2017)	10
B. Hy-Brand Industrial Contractors, Ltd., 366 NLRB No. 26 (Feb. 26, 2018).....	12
IV. Developments In The Law of Collective Bargaining.	13
A. Arc Bridges, Inc. v. NLRB, 861 F.3d 193 (D.C. Cir. 2017).	13
B. Raytheon, 365 NLRB No. 161 (Dec. 15, 2017).....	14
V. Remedies And Settlements In ULP Cases.	16
VI. Class Action Waivers in Arbitration.	19
A. D.R. Horton, Inc., 357 NLRB 2277 (2012)	19
B. The Class Action Waiver Cases Pending In The Supreme Court.....	20
C. Memorandum OM 17-11: Impact Of Murphy Oil On Pending Cases.....	22
VII. Public Employee Agency Fees.	23

I. Union Representation Process.

A. The Election Rules: Quickie Elections and the Trump Board's Request for Information.

In April 2015, the National Labor Relations Board implemented new rules that substantially changed procedures and timing in union representation cases. Times from filing of election petitions to conduct of elections have been shortened, but thus far the volume of organizing and results of campaigns have not changed significantly.

1. Expedited Election Rules.

On December 15, 2014, effective April 14, 2015, the Board adopted new expedited election rules. 79 FR 74308. As described by former NLRB Chairman Mark Pearce, the rules are meant to avoid delays in the election process by focusing only on major questions concerning representation raised by the parties before conducting elections, rather than litigating all disputes up front. They are also meant to ease the filing process for petitioners. Although the final rules do not set a hard deadline, or even a target timeline, for the amount of time between filing of an election petition and an election, the election is to be held "as soon as practicable."

In March 2015, majorities in both houses of Congress voted in favor of a joint resolution disapproving the rules. President Obama vetoed the resolution on March 31, 2015. Business organizations also raised legal challenges to the new rules in the U.S. District Court for the Western District of Texas and in the U.S. District Court for the District of Columbia. Both challenges were rejected. See *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215 (5th Cir. 2015), affg. No. 1-15-CV-026 RP, 2015 WL 3609116 (W.D. Tex. June 1, 2015); *Chamber of Commerce of United States of Am. v. Nat'l Labor Relations Bd.*, 118 F.Supp.3d 171 (D.D.C. July 29, 2015). The amendments took effect on April 14, 2015. The changes included:

- a. Allowing filing of representation petitions electronically;
- b. Requiring service of representation petitions and related documents by the petitioner;
- c. Requiring employer posting and distribution of a Board notice about the petition and election to the employees;
- d. Scheduling of the pre-election hearing 8 days from the notice of hearing;
- e. requiring non-petitioning parties to state a position and requiring the employer to provide names, shifts, work locations, and job classifications of the employees in the petitioned-for unit 1 day before commencement of the pre-election hearing;
- f. Specifying that the purpose of the pre-election hearing is to determine whether there is a question of representation;

- g. Giving the regional director discretion to decide, in light of the purpose of the hearing, which, if any, voter eligibility issues should be litigated before an election is held;
- h. Requiring that the hearing close with oral argument unless the regional director grants permission to file briefs;
- i. Requiring the regional director to decide the matter and prohibiting sua sponte transfer to the Board;
- j. Allowing a party to request Board review after the election;
- k. Eliminating the automatic stay of elections in anticipation of requests for Board review;
- l. Requiring an employer to provide a list of voters, including their shifts, job classifications, and work locations, within 2 business days of the direction of election;
- m. Requiring that parties file objections and offers of proof in support within 7 days of the conclusion of the election;
- n. Requiring that any post-election hearing on challenges and objections commence 21 days after the tally or “as soon as practicable thereafter;” and
- o. Requiring the regional director to issue a final decision.

As part of its rulemaking on the expedited election rules, the Board directed the General Counsel to provide guidance about use of electronic signatures to support a showing of interest for an election. In a Memorandum originally released in September 2015 and amended on October 26, 2015, the General Counsel concluded that electronic signatures would be accepted, and that the evidentiary standards that the Board traditionally applied to handwritten signatures shall be applied to electronic signatures. Guideline Memorandum on Electronic Signatures to Support a Showing of Interest, Office of the General Counsel, Memorandum GC 15-08 (Revised) (Oct. 26, 2015).

2. Effects of The Revised Rules.

NLRB data tracking the median days from petition to election confirms that the amended rules have significantly reduced the time from when a union petition is filed to election.¹ In fiscal year 2014, the last full year under the old rules, the median time from a union petition being filed to election was 38 days (37 with an election agreement, 59 with contested cases). For fiscal year

¹ <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election>. Last date accessed: April 5, 2018.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Recent Developments Under The National Labor Relations Act

First appeared as part of the conference materials for the
25th Annual Labor and Employment Law Conference session

"Flip-Flop at the Board: What's Gone, What's New, What's Coming Under the NLRA"