

Congress of the United States
Washington, DC 20515

April 18, 2018

The Honorable John Ring
Chairman
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570

RE: RIN 3142-AA12: Representation Election Rule, Request for Information

Dear Chairman Ring:

We write in response to the National Labor Relations Board's (NLRB or Board) December 14, 2017, Request for Information (RIN 3142-AA12) concerning its 2014 representation election rule (2014 rule). We support rescinding the 2014 rule and replacing it with a new standard outlined below. We urge you to adopt a standard that gives parties adequate time and an appropriate process to prepare for an election, while also protecting the privacy of employees.

The 2014 rule made significant changes to the NLRB's representation election process. Pre-election hearings are now generally held only eight days after the service of the hearing notice. Employers are now required to file a new "Statements of Position" articulating various legal positions by noon on the business day before the pre-election hearing if the pre-election hearing will occur eight days from service of the hearing notice. Many important issues, if not raised in the Statement of Position, are waived. Elections are held in as little as 11 days after the filing of a petition. In addition, the 2014 rule requires that employers provide unions, within two business days of the direction of an election, with employees' home addresses, work locations, shifts, classifications, and available home telephone numbers, personal cellular telephone numbers, and personal email addresses. These changes stymie an employee's right to choose whether to be represented by a union, needlessly increase strife during representation elections, limit an employer's ability to communicate with employees, and infringe upon employee privacy.

As the committees of jurisdiction over the *National Labor Relations Act* (NLRA) and the NLRB, the House Committee on Education and the Workforce and Senate Committee on Health, Education, Labor and Pensions (Senate HELP Committee) have examined this topic thoroughly. Since the 112th Congress, the Committee on Education and the Workforce and Senate HELP Committee have held numerous hearings where witnesses discussed the Board's 2014 rule. Additionally, the Committees took legislative action to address this issue. In every Congress since 2011, the Committee on Education and the Workforce has favorably reported legislation addressing the 2014 rule, including two bills, the *Workforce Democracy and Fairness Act*¹ introduced by Representative Walberg and the *Employee Privacy Protection Act*² introduced by Representative Wilson, both of which were introduced in the 115th Congress. And in every Congress since 2013, Senator Alexander introduced the *Workforce Democracy and Fairness Act*.

¹ H.R. 2776 (115th Cong.) (2017).

² H.R. 2775 (115th Cong.) (2017).

Moreover, and significantly, both houses of Congress passed S.J. Res. 8, a *Congressional Review Act* resolution to overturn the 2014 rule. President Obama subsequently vetoed S.J. Res. 8.³

Accordingly, these comments are rooted in a thorough examination of the topic and designed to encourage the NLRB to facilitate a rule that fairly accommodates all parties.

The 2014 Rule Does Not Give Employees Enough Time to Prepare

The 2014 rule significantly shortened the time between the filing of a petition and the earliest date at which an election can be held. Employees may now have as few as 11 days to consider the consequences of unionization before they have to vote. This is not an adequate timeframe for employees to educate themselves, especially when their employers' time will be monopolized by legal preparations. As a result, employees often hear one side of the story from the union, but not their employer's point of view. At a 2011 Committee on Education and the Workforce hearing, Larry Getts, an employee of the Dana Corporation, described his experience with union organizers and illustrated why it is necessary for employees to hear from their employer as well as the union:

[Organizers stated] that our shop would make the same as the workers in the other — much larger — Fort Wayne plant [T]hat did not seem plausible because we were making twelve dollars an hour, and in Fort Wayne they were making twenty-one dollars an hour. Of course, much of what they told us proved to be false, but it's fair to say we weren't lacking information from union officials.⁴

At the same hearing, John Carew, president of Carew Concrete and Supply Co., described his experience with a union organizing drive and election:

[E]mployees would receive mail containing not enough information, misinformation, and misleading information on issues such as striking, health care insurance, wages and pensions. At times employees were inaccurately told they would receive increased wages, similar to cities with higher wages nearly 100 miles away.⁵

At a 2017 Committee on Education and the Workforce Subcommittee on Health, Employment, Labor, and Pensions (House HELP Subcommittee) hearing on the NLRB, Raymond LaJeunesse of the National Right to Work Legal Defense Foundation testified that the shortened timeframe infringes upon workers' rights:

[T]he shortened time-frame for representation elections has adversely affected the ability of individual employees to fully educate themselves about the pros and cons of monopoly union representation, and hampered the ability of employees

³ See S.J. Res. 8, 114th Cong. (2015).

⁴ *Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice: Hearing Before the H. Comm. on Educ. and the Workforce*, 112th Cong. 24 (2011) (prepared statement of Larry Getts).

⁵ *Id.* at 36 (prepared statement of John Carew).

opposed to union representation to organize themselves in opposition to unions and timely obtain legal counsel.⁶

The need for more time to allow employees to educate themselves before voting was even recognized by then-Senator John F. Kennedy, who stated the following in a debate over amendments to the NLRA:

[T]here should be at least a 30-day interval between the request for an election and the holding of the election.⁷

The 30-day waiting period is an additional safeguard against rushing employees into an election where they are unfamiliar with the issues.⁸

For these reasons, we recommend the Board adopt a standard where an election will not be held fewer than 35 days after the filing of a petition to give workers the time they need to gather all the facts to make a fully informed decision.

The 2014 Rule Does Not Give Employers Enough Time to Prepare

Under the 2014 rule, absent special or extraordinary circumstances, employers have just seven days from service of the hearing notice to find legal counsel and prepare their Statement of Position. Many critical issues, if not raised in the Statement of Position, are waived and cannot be addressed later. With such a short timeframe, there is little opportunity for election agreements by the parties. To ensure no issues are waived, employers will spend their time preserving their positions rather than working with the regional director to reach a voluntary agreement. The impact of this is particularly burdensome for smaller employers.

At a 2015 Senate HELP Committee legislative hearing, Mark Carter, testifying on behalf of the U.S. Chamber of Commerce, voiced his concerns with the new, onerous Statement of Position requirement.

Th[e] Statement of Position is, for all intents and purposes, a legal brief . . . which is an outrageous requirement to ask of employers, and particularly those small employers who do not have legal counsel.⁹

At a 2017 House HELP Subcommittee legislative hearing, Nancy McKeague, testifying on behalf of the Society for Human Resource Management, raised concerns about the ability of employers to properly and legally communicate with their employees during a shortened election. She stated the following:

⁶ *Restoring Balance and Fairness to the National Labor Relations Board, Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 115th Cong. 10 (2017) (prepared statement of Raymond J. LaJeunesse).

⁷ 105 Cong. Rec. 6434 (1959) (statement of Sen. Kennedy).

⁸ 105 Cong. Rec. 5984 (1959) (statement of Sen. Kennedy).

⁹ *Ambushed: How the NLRB's New Election Rule Harms Employers and Employees: Hearing Before the S. Comm. on Health, Education, Labor and Pensions*, 114th Cong. 12 (2015) (prepared statement of Mark A. Carter, Labor Practice Group Chair and Partner, Dinsmore & Shohl LLP).

The ambush election rule significantly impairs small employers' ability in responding to petitions in an accelerated manner and presents significant burdens for large employers with diverse and significant voting units. For example, small employers may not have an HR professional on staff or access to legal counsel that specializes in labor issues.¹⁰

Robert Sullivan, testifying on behalf of the Retail Industry Leaders Association at a 2011 Committee on Education and the Workforce legislative hearing, stated these requirements "will wreak similar havoc with small and large employers."¹¹ Small employers will have access to factual information, but they will not have in-house experts to evaluate the legal issues.¹² In contrast, large employers will have the advantage of having in-house experts or access to outside experts, but their size will complicate legal issues.¹³

In his testimony before the Senate HELP Committee, Charles Cohen, Senior Counsel with the firm of Morgan, Lewis & Bockius, stated that the previous Board's 2014 rule "proffered the gimmick of a hurried and emasculated hearing, a binding statement of position under the threat of waiver, offers of proof instead of actual testimony, preclusive rules to limit issues, and frenetic time deadlines that disregard other obligations of employers and their counsel, all in an attempt to get to the election as soon as humanly possible and without giving the employer time to communicate with its employees."¹⁴ Mr. Cohen emphasized that the 2014 rule "will undermine an employer's ability to mount a lawful, effective information dialogue with its employees on whether or not to select union representation."¹⁵

Accordingly, we urge the Board to adopt a standard where employers are provided with at least 14 days to prepare their case before a hearing is held. Furthermore, employers should retain the right to raise additional issues throughout the pre-election hearing. These changes will better protect due process rights and enhance the quality of representation hearings while ensuring a speedy process.

The 2014 Rule Delays Important Decisions until Post-Election

The 2014 rule also delays answers to important questions, such as voter eligibility, until after the election. Leaving open questions, such as the composition of the bargaining unit, could result in significant problems for employers. At a 2017 House HELP Subcommittee hearing, labor attorney Kurt Larkin testified about this issue:

¹⁰ *Legislative Reforms to the National Labor Relations Act: H.R. 2776, Workforce Democracy and Fairness Act; H.R. 2775, Employee Privacy Protection Act; and, H.R. 2723, Employee Rights Act: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 115th Cong. (2017) (prepared statement of Nancy McKeague).

¹¹ *H.R. 3094, The Workforce Democracy and Fairness Act: Legislative Hearing Before the H. Comm. on Educ. and the Workforce*, 112th Cong. 20 (2011) (prepared statement of Robert Sullivan).

¹² *Id.*

¹³ *Id.* at 21.

¹⁴ *Ambushed: How the NLRB's New Election Rule Harms Employers and Employees: Hearing Before the S. Comm. on Health, Education, Labor and Pensions*, 114th Cong. 7 (2015) (prepared statement of Charles I. Cohen, Senior Counsel, Morgan, Lewis & Bockius LLP).

¹⁵ *Id.* at 6.

[I]f an employer believes an employee in the proposed unit is a statutory supervisor, it cannot obtain a determination whether the individual should be excluded from the bargaining unit until after the election. This presents an obvious conundrum for the employer: it can treat the employee as a supervisor during the campaign, and risk unfair labor practice liability for doing so, or it can back off, and lose the ability to campaign through an individual who may well not even be eligible to vote.¹⁶

At a 2015 Senate HELP Committee hearing, Elizabeth Milito of the National Federation of Independent Business (NFIB) shared what the delay means for small businesses:

As a result, employees [] vote in an election without knowing which employees will ultimately make-up the bargaining unit. And some employees who vote might be found ineligible to be part of the bargaining unit. For small businesses, deferral of issues essentially means waiver and defeat. A small business simply cannot afford on-going litigation and legal fees.¹⁷

Employers and employees should have these issues settled before voting begins. Therefore, we urge the Board to adopt a standard where critical issues, including unit determinations and voter eligibility, are addressed before the election.

The 2014 Rule Violates Employees' Privacy

Furthermore, contained within the 2014 rule are requirements that force employers to disclose employees' personal information to union organizers even if employees have already chosen to reject the union. Previously, an employer was required to provide the Board seven days after an election was ordered with employees' names and home addresses. In addition to the previously required information, the rule now mandates that employers provide the Board and union organizers with employees' work locations, shifts, classifications, and available home telephone numbers, personal cellular telephone numbers, and personal email addresses within two business days after an election order. This is a radical expansion of existing policies that already leave workers vulnerable to intimidation, threats, and coercion.

At the 2015 Senate HELP Committee hearing, Ms. Milito expressed her concerns that requiring employers to provide sensitive employee information is particularly risky and burdensome for small businesses:

Disclosing this information to a union organizer without the employee's consent would create a breach of trust and animosity on the part of employees and undermine employer-employee relations. This is particularly so in a small

¹⁶ *Restoring Balance and Fairness to the National Labor Relations Board: Hearing Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Educ. and the Workforce*. 115th Cong. 5 (2017) (prepared statement of Kurt Larkin).

¹⁷ *Ambushed: How the NLRB's New Election Rule Harms Employers and Employees: Hearing Before the S. Comm. on Health, Education, Labor and Pensions*, 114th Cong. 19 (2015) (statement of Elizabeth Milito, Senior Executive Counsel, NFIB Small Business Legal Center).

business, where the owner is often responsible for keeping personnel records and other sensitive information which the employee deems confidential.¹⁸

At a 2017 House HELP Subcommittee legislative hearing, employee Karen Cox testified about her experience attempting to decertify an unwanted union and how her privacy was infringed as a result. She stated the following:

In November 2012, I made the two-hour trip to Peoria and filed the first petition with the NLRB. On my way back[,] I got a phone call from my dad. He told me a union rep contacted him and mentioned something about people losing their jobs and said that I needed to settle my grievances. My dad said, "Watch your back, because that was a threat." I was shocked.¹⁹

Of equal concern are potential union misuses of personal employee information outside an organizing campaign. In the fall of 2007, 33 AT&T employees at the company's Burlington, North Carolina, facility resigned from Communications Workers of America (CWA) membership and ceased paying union dues.²⁰ In apparent retaliation, the CWA Local posted the 33 AT&T employees' names and social security numbers on a publicly accessible bulletin board located in a hallway close to the building entrance, stating the employees had resigned from the union and ceased paying dues.²¹

The 2014 rule provides only a vague warning that employees' personal information should not be misused. It states that employee information shall not be used "for purposes other than the representation proceeding, Board proceedings arising from it, and related matters." Labor attorney Seth Borden testified at the 2017 HELP Subcommittee legislative hearing that "despite numerous comments seeking assurances about enforcement of this provision, the Board declined to include any specific mechanisms to protect against abuse."²²

Employees clearly face significant and, at times, unlawful union pressure. However, union communications need not be unfair labor practices or criminal acts to be unwelcome. In testimony before the House HELP Subcommittee, witnesses described their negative and unwelcome experiences with union organizers. In her 2013 testimony, Ms. Marlene Felter, a medical records coder at Chapman Medical Center in Orange, California, stated the following:

¹⁸ *Id.*

¹⁹ *Legislative Reforms to the National Labor Relations Act: H.R. 2776, Workforce Democracy and Fairness Act; H.R. 2775, Employee Privacy Protection Act; and, H.R. 2723, Employee Rights Act: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce, 115th Cong. 2 (2017) (prepared statement of Karen Cox).*

²⁰ News Release, Nat'l Right to Work Legal Def. Found., Inc., AT&T Workers Petition U.S. Supreme Court to Overturn Union Exemption for Identity Theft Laws (July 19, 2012), <http://www.nrtw.org/en/press/2012/07/fisher-supreme-court-appeal-07192012>.

²¹ *Id.*

²² *Legislative Reforms to the National Labor Relations Act: H.R. 2776, Workforce Democracy and Fairness Act; H.R. 2775, Employee Privacy Protection Act; and, H.R. 2723, Employee Rights Act: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce, 115th Cong. 12 (2017) (prepared statement of Seth Borden).*

From July to November 2011, my co-workers reported that [Service Employees International Union] operatives were calling them on their cell phones, coming to their homes, stalking them, harassing them, and even offering to buy them meals at restaurants to convince them to sign union cards.²³

Employees should not have their privacy rights infringed due to a union organizing campaign. We urge the Board to adopt a standard that protects employee privacy. Under the new standard employers should be given seven days to provide a list of employee names and one additional piece of contact information chosen by each individual employee. Such a standard will balance the interests of workers in maintaining their privacy with that of unions in being able to provide information to workers.

Conclusion

We appreciate that the Board is considering addressing these important issues and urge you to adopt the suggested standards discussed above. We look forward to seeing a new rule that provides free and fair elections for workers, unions, and employers.

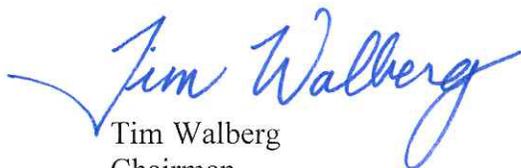
Respectfully Submitted,



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²³ *Hearing on H.R. 2346, Secret Ballot Protection Act, and H.R. 2347, Representation Fairness Restoration Act: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce, 113th Cong. 23 (2013) (prepared statement of Marlene Felter).*