

## **CONGRESSIONAL REVIEW ACT AND NLRB'S AMBUSH ELECTION RULE**

On February 16, 2012, Senators Enzi and Isakson introduced S. J. Res 36 and Representatives Kline, Roe and Gingrey introduced H. J. Res. 103. Both resolutions provide for congressional disapproval and nullification of the National Labor Relations Board's (NLRB or Board) rule related to representation election procedures. This "ambush" election rule is nothing more than the Board's attempt to placate organized labor by effectively denying employees' access to critical information about unions and stripping employers of free speech and due process rights.<sup>1</sup> The rule poses a threat to both employees and employers. Congress should immediately pass these much-needed resolutions, which will nullify the ambush election rule in accordance with the Congressional Review Act.

### **THE NLRB'S AMBUSH ELECTION RULE**

In June 2011, the Board issued a notice of proposed rulemaking that would dramatically change the NLRB's longstanding election procedures. The Board received both oral and written comments on the proposed rule, and issued a final regulation on December 22, 2011, which will become effective on April 30, 2012. While the Board somewhat modified the original proposal, the final rule is identical in purpose and similar in effect to the proposal.

#### *What the Rule Does:*

- Limits the issues and evidence that can be presented at a pre-election hearing, which denies employers due process and often will leave important questions unresolved prior to a union representation election, such as which employees are part of the proposed unit.
- Eliminates the current 25-day "grace period," which will allow elections to occur in roughly 20 days, possibly fewer, squeezing small business owners who lack the resources and legal expertise to navigate and understand the union election process within such a short time frame and effectively limiting the information employees receive about unions from their employer.

#### *Why Current Election Time Frames Work for Employees and Employers:*

- The NLRB's own statistics reveal the average time from petition to election under the existing system was 31 days, with over 90% of elections occurring within 56 days.
- Congress recognized as far back as 1959 that an election period of at least 30 days was necessary to adequately assure employees the "fullest freedom" in exercising their right to choose whether they wish to be represented by a union. As then Senator John F. Kennedy explained, a 30-day period before any election was a necessary "safeguard against rushing employees into an election where they are unfamiliar with the issues." Senator Kennedy stated "there should be at least a 30-day interval between the request for an election and the holding of the election" and he opposed an amendment that failed to provide "at least 30 days in which both parties can present their viewpoints."

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<sup>1</sup> The Coalition has challenged the final rule on the grounds that it is both procedurally and substantively flawed. For details see <http://myprivateballot.com/wp-content/uploads/2012/02/CDW-Memo-On-Seeking-Summary-Judgment.pdf>.

- In other situations involving “group” employee issues, Congress requires that employees be given at least 45 days to review relevant information in order to make a “knowing and voluntary” decision. (The Older Workers Benefit Protection Act requires 45 days for employees to evaluate whether to sign an age discrimination release in the context of a program offered to a group of employees).
- With shorter time frames, employers, particularly small ones, will not have enough time to secure legal counsel, let alone an opportunity to speak with employees about union representation or respond to promises union organizers may have made to secure union support, even though many of those promises may be completely unrealistic.

*Why Organized Labor Wants Shorter Elections:*

- Given that union organizers typically lobby employees for months outside the workplace without an employer’s knowledge, these “ambush” elections would often result in employees’ receiving only half the story. They would hear promises of raises and benefits that unions have no way of guaranteeing, without an opportunity for the employer to explain its position and the possible inaccuracies put forward by the union.
- As Board Member Brian Hayes said, the true purpose of the ambush rule is to “eviscerate an employer’s legitimate opportunity to express its views about collective bargaining” and “stifle debate on matters that demand it.”

**THE CONGRESSIONAL REVIEW ACT**

Fortunately, the Congressional Review Act (CRA) establishes special streamlined congressional procedures for disapproving regulations issued by federal agencies. Before any rule covered by the CRA can take effect, the federal agency that promulgates the rule must submit it to Congress. If Congress passes a joint resolution disapproving the rule, and the resolution becomes law, the rule cannot take effect or continue in effect. Some advantages of using the CRA to strike down agency rulemakings are as follows:

- A disapproval resolution can clear the Senate with a simple majority vote of 51.
- It allows the Senate to act on the disapproval resolution whether or not the committee of referral reports it.
- It expedites the legislative process by ensuring that resolutions approved by the House and Senate will be identical, eliminating the need for a conference report.
- If the joint resolution is approved by the President, the agency may not reissue either that rule or any substantially similar one, except under authority of a subsequently enacted law.

There is precedent for use of the CRA, as the Act was used to nullify OSHA’s controversial ergonomics standards in 2001.