



## COALITION FOR A DEMOCRATIC WORKPLACE

### Eliminating the Ambush Elections Rule

*Democrats on the NLRB and in Congress are attempting to reinstate the Obama-era “ambush elections” rule that attacked both employer free speech rights and employee free choice. The NLRB under President Trump undid many of the damages caused by this rule, but Democrats are pursuing all available avenues to codify the most damaging provisions into law. Congress should immediately pass legislation that will prevent implementation of the rule.*

#### **THE AMBUSH ELECTIONS RULE**

In December 2014, the Obama-era ambush elections rule made dramatic changes to the Board’s long-standing union representation election procedures through which employees vote on unionization. The rule, which went into effect in April 2015, was designed to speed up elections in order to increase union density and dues revenue streams, largely at the expense of employees’ right to hear from both sides of the debate before an election and employers’ free speech and due process rights.

#### **EFFORTS TO IMPLEMENT THE AMBUSH ELECTION RULE**

On August 25, 2023, the NLRB issued a [direct final rule](#) reinstating much of the original ambush elections rule. The rule will take effect on December 26, 2023. The rule:

- Provides only 8 calendar days between the service of a Notice of Hearing and the pre-election hearing (from the current 14 business days);
- Establishes that pre-election hearings can only be postponed if there are special or extraordinary circumstances (currently, regional directors can delay for any period of time if a party shows good cause);
- Requires employers file their Statement of Position the day before the pre-election hearing (from the current 10 calendar days after service of the Notice of Hearing);
- Establishes that the due date for the Statement of Position can only be postponed if there are special or extraordinary circumstances (currently, regional directors can delay for any period of time if a party shows good cause);
- Eliminates the petitioner’s responsive Statement of Position and requires they respond orally at the pre-election hearing (currently, they must file a written response 3 business days before the pre-election hearing);
- Requires employers post and electronically distribute the Notice of Petition for Election 2 business days after the service of the Notice of Hearing (from the current 5 business days);
- Eliminates the requirement that eligibility and inclusion issues be litigated and resolved before the election (leaving resolution of these fundamental issues until after the election);
- Prohibits post-hearing briefs except if granted special permission by the regional director or hearing officer (currently, briefs could be filed for any reason up to 15 business days after the hearing);
- Urges regional directors to specify election details in the decision and direction of election and transmit the Notice of Election with the decision and direction of election



## COALITION FOR A **DEMOCRATIC WORKPLACE**

(currently, the emphasis was placed on the regional director's discretion to convey the details in a later-issued Notice of Election); and

- Requires elections be held at “the earliest date practicable” (eliminating the current 20-business day waiting period).

As dissenting Board member Marvin Kaplan explained, the Board has decided to value “quick elections over fully informed voters.” Under the changes, workers will have little time to become fully informed before their vote, and employers’ due process rights will be violated. Kaplan cautioned, “One is left to wonder how much the voters will actually benefit from the requirements that elections be held as quickly as possible when they find themselves exercising this right without fully understanding the arguments concerning representation and the ways in which their vote may affect them.” The Board also chose not to use the formal notice-and-comment process before making these changes, giving the regulated community no opportunity to weigh in on these critical changes.

Additionally, Democrats in Congress are trying to codify the Board’s 2014 rule into law via the Protecting the Right to Organize (PRO) Act ([H.R. 20, S.567](#)). The PRO Act, which was introduced on February 28, 2023, would make the ambush elections rule the law of the land, infringing on worker and employer rights. If either the Direct Final Rule is implemented or the PRO Act is passed, the time between a union filing a petition and the election would be shortened to as few as 14 days, effectively limiting employers’ ability to communicate with employees and encouraging “back door” organizing by unions.

### **EFFORTS TO UNDO THE DAMAGE**

In order to undo the damages caused by this rulemaking, the Trump-era NLRB issued its [Representation Case Procedures Final Rule](#) in December 2019. The 2019 Final Rule included “clarifications to procedures prior to an election that better ensure the opportunity for litigation and resolution of unit scope and voter eligibility issues” and “permit[ted] parties additional time to comply with the various pre-election requirements instituted in 2014.” CDW supported the changes made by the Final Rule and submitted [comments](#) on the Board’s initial [Request for Information](#). While five provisions of the 2019 rule were [blocked by the US District Court](#) in May 2020, the court allowed the Board to [move forward with implementing the majority of the rule’s changes](#).

Republicans in Congress are also working to prevent implementation of the rule. In the 115th Congress, they introduced the Workforce Democracy and Fairness Act ([H.R. 2776, S.1350](#)) and the Employee Privacy Protection Act ([H.R. 2775](#)). We strongly encourage Congress to quickly reintroduce and pass these or similar bills into law while halting any efforts to impose the PRO Act on workers, employers, and the American economy.