

# Big Labor's Back Door Agenda

NLRB's  
Employee Notification  
ruling  
delayed until  
**1/31/12!**

## Background

The current method for union formation is a two-step process (sign-up and election). The first step requires employees to sign a union petition or authorization card, and if at least 30% of the employees sign then the signatures are submitted to the National Labor Relations Board (NLRB) who then verifies and orders a secret ballot election. There are two exceptions:

- If over 50% of the employees sign an authorization card requesting a union, the employer can voluntarily choose to waive the secret ballot election process and recognize the union.
- The other exception allows the NLRB to order an employer to recognize a union if over 50% have signed cards, but the employer has engaged in unfair labor practices making a fair election unlikely.

Since 2005, NLRB has attempted **three times** to pass legislation passed to abolish secret ballot elections (2005, 2007, 2009). NCRMA, along with industry partners, has strongly opposed this legislation.

Since the defeat of the 2009 federal *Employee Free Choice Act (EFCA)*, the NLRB has tried to “work around” Congress to implement a “back door card check.” While the NLRB does not have the ability to implement card check legislation without Congress first passing it into law, the agency can utilize regulations and case decisions to: **shorten election times, reduce bargaining unit sizes, and increase union access** to tilt the organizing process in their favor.

## Where Are We Now?

The **US House of Representatives Small Business Committee** held a hearing on **Wednesday, October 5**, to examine the impact of “backdoor card-check” actions on small businesses. The focus of the hearing will be on NLRB's recent activity as well as efforts underway by the US Department of Labor. These two agencies' activities are seeking to implement many of the changes to union representation campaigns that were included in the card-check legislation defeated by Congress.

“It is clear from recent cases the NLRB has an activist agenda that favors unions, waters down competition and subjects small businesses to unwarranted federal intrusion. This must be curtailed. Small businesses are our nation's best job creators and our hope of economic recovery will be found in thriving small businesses, said House Small Business Committee Chairman Sam Graves (R-MO).

Since late August NLRB has issued rules and case decisions that are eerily similar to provisions in the defeated 2009 legislation.

- In the *Lamons Gasket* decision, **employees opposed** to forming a union can **no longer request a secret ballot election** after their fellow “pro-union” employees have signed union cards in a card check election. (Elimination of secret ballot elections was a key element in the 2007 legislation.) The end result is that employees may be effectively denied the right to a secret ballot for years.
- In another decision - *Specialty Healthcare*, **unions would be allowed to single out certain departments or groups** of employees within a company (i.e. the bakery department) rather than being **required** to have a unionization vote by all employees. The impact on employers, employees and the economy will be overwhelming with this potential explosion of “micro-unions” within an entire workforce or across multiple locations, effectively disenfranchising co-workers. For example a, “micro-union” within a grocery store will greatly limit an employer's ability to cross train and meet customer demands via lean, flexible staffing as employees will not be able to perform work assigned to another department (i.e. the bakery department employee could not fill-in at the check-out line or stock shelves).
- The third decision handed down **eliminates the ability of a new owner or existing employees of a recently purchased, but already-unionized company to challenge the union's existence**. Instead, the new owner would be required to wait a “reasonable period” and give the union a “fair chance.”

- Additionally, NLRB issued a final rule to **require employers** (both union and non-union) to provide **employee notification** of their rights under the National Labor Relations Act (NLRA). The ruling was initially to go into **effect on November 14, 2011**, but has been postponed for two months **until January 31, 2012**. Copies of the employee rights notice (11" x 17") should be posted where other workplace notices are typically posted. As a result of retail industry comments, employers will **not** be required to distribute the notice via e-mail, voice mail, text message or any other related electronic communications. [We have included a sample of the poster in the pocket of your board book and it is also available from the NLRB website at <https://www.nlr.gov/news-media/fact-sheets/final-rule-notification-employee-rights>.]

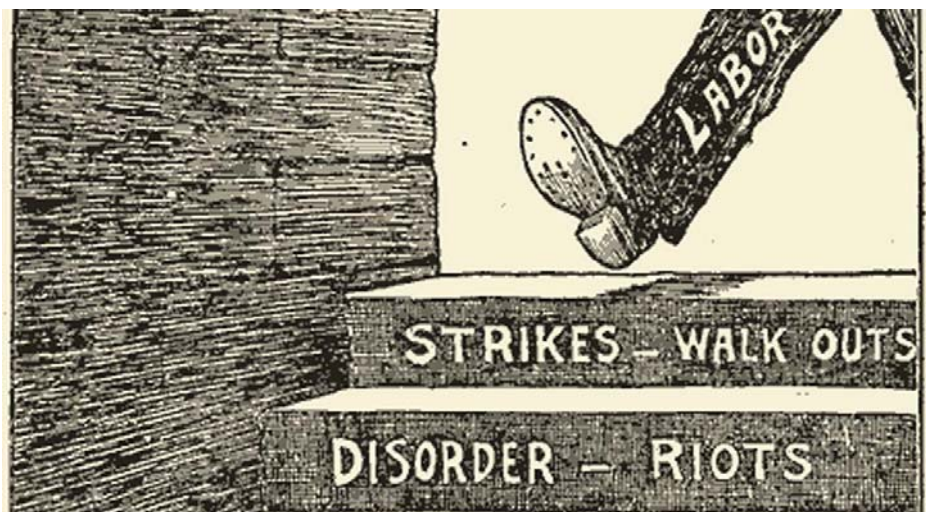
### “Quickie” Elections

NLRB continues working through additional proposed rules; of greatest **concern** to NCRMA is the **proposed rule on “quickie” elections**. NLRB is expected to issue its **final rule** on this issue in **late fall** or **early winter**. For more than 15 years, employers have had the opportunity to educate employees with materials prior to a union election. Among other things this ruling would **dramatically shorten the time frame for union elections** from an average of **38 days to between 10 – 21 days**. Unions, on the other hand, may meet with employees and campaign for months before an election petition is filed. There are number of reasons why this time frame will undermine retail employers. Currently, retailers notified of a pending union election take about two weeks to:

- Determine which employees are eligible to vote (more than 1/3 of retail workers are part-time and some are seasonal); and
- Educate themselves and their employees on the union’s proposal (most small retail business owners lack the resources and legal expertise to navigate and understand the union election process within such a short time frame).

If passed, the ruling will essentially **deny retailers** their **right** to make a **case against unionization** and leave **employees severely uneducated** on the issue.

NCRMA will keep you posted on this severe threat that will impede communication between employers and employees.



# Questions and Answers on Notification of Employee Rights to Organize



## **Does my company have to post the notice?**

The posting requirement applies to **all private-sector employers** (including labor unions) subject to the National Labor Relations Act, (excludes agricultural, railroad and airline employers). In response to comments received after the proposed rule was announced, the Board has agreed to exempt the US Postal Service for the time being because of that organization's unique rules under the Act.

## **Are small businesses required to post the notice?**

The rule applies to all employers subject to the Board's jurisdiction (other than the USPS). The Board has chosen not to assert its jurisdiction over very small employers whose annual volume of business is not large enough to have a more than a slight effect on interstate commerce. In the case of retail businesses, including home construction, the Board's jurisdiction covers any **employer** with a **gross annual volume** of business of **\$500,000 or more**.

## **Do I need to post a sign for non-English-speaking employees?**

Yes. The notice must be posted in English and in another language if at least 20% of employees are not proficient in English and speak the other language. The Board will provide translations of the notice, and of the required link to the Board's website, in the appropriate languages.

## **When will the notice posting be required?**

The final rule takes effect on **November 14, 2011**.

## **There is no union in my workplace; will I still have to post the notice?**

Yes. Because NLRA rights apply to both union and non-union workplaces, all employers subject to the Board's jurisdiction will be required to post the notice in a place where all other employee notices are posted.

## **How will I get the notice?**

The Board will provide copies of the notice on request at no cost to the employer. These can be obtained by contacting the NLRB at its headquarters or its regional, sub-regional, or resident offices. Employers can also download the notice from the Board's website and print it out in color or black-and-white on one 11-by-17-inch paper or two 8-by-11-inch papers taped together. Finally, employers can satisfy the rule by purchasing and posting a set of workplace posters from a commercial supplier.

## **What if I communicate with employees electronically?**

In addition to the physical posting, the rule requires every covered employer to post the notice on an **internet or intranet site** if personnel rules and policies are customarily posted there. Employers are not required to distribute the posting by email, Twitter or other electronic means.

## **Will I have to maintain records or submit reports under the Board's rule?**

No, the rule has no record-keeping or reporting requirements.

## **How will the Board enforce the rule?**

Failure to post the notice may be treated as an unfair labor practice under the National Labor Relations Act. The Board investigates allegations of unfair labor practices made by employees, unions, employers, or other persons, but does not initiate enforcement action on its own.

## **What will be the consequences for failing to post the notice?**

The Board expects that, in most cases, employers who fail to post the notice are unaware of the rule and will comply when requested by a Board agent. In such cases, the unfair labor practice case will typically be closed without further action. The Board also may extend the 6-month statute of limitations for filing a charge involving other unfair labor practice allegations against the employer. If an employer knowingly and willfully fails to post the notice, the failure may be considered evidence of unlawful motive in an unfair labor practice case involving other alleged violations of the NLRA.

## **Can an employer be fined for failing to post the notice?**

No, the Board does not have the authority to levy fines.

## **Was there a public comment period? What was the response?**

The Board received more than **7,000 public comments** after posting a notice of the proposed rule in the Federal Register. A detailed description of the comments and the Board's response to them, including responsive modifications to the rule, may be found in the [Preamble to the Final Rule](#). □