## HISTORY OF AMBUSH ELECTIONS

An overly aggressive National Labor Relations Board, which exists solely to administer the National Labor Relations Act, created law in 2011 by implementing new rules that dramatically assist labor unions in organizing workers. Together, these rules are commonly called "quickie" or "ambush" elections. Despite vigorous public outcry regarding whether the Board could create rules (instead of simply administer the rules already in effect), the Board steadfastly implemented its ambush election rules.

Immediately upon implementation, the U.S. Chamber of Commerce filed a lawsuit alleging among other things that the Board did not have a quorum to approve the new rules. Specifically, the Board only had three Members (instead of its usual five) at the time it voted on these rules, and only two of those three Members voted – two out of five is not a quorum. Incidentally, the two voting Board Members were both attorneys for labor unions. The Chamber won and the Board appealed.

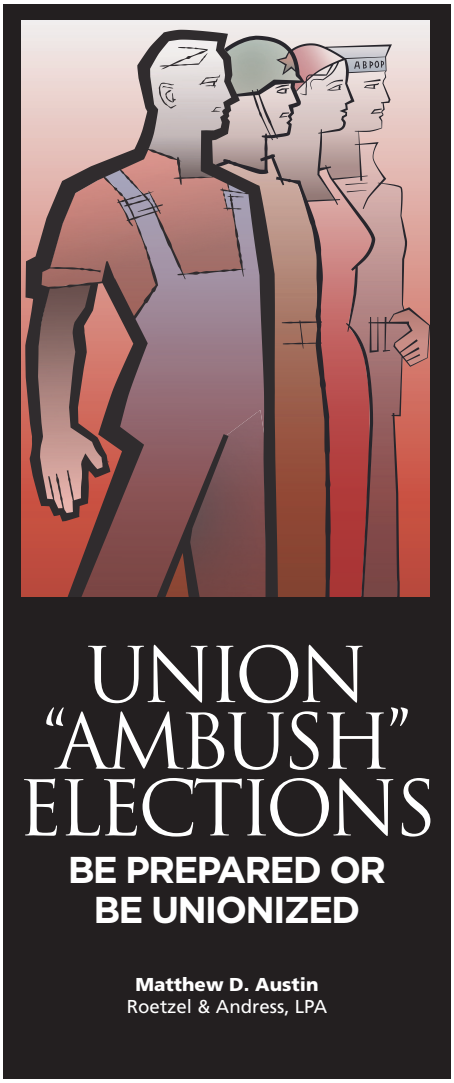
While on appeal, additional Board Members were appointed resulting in a fully functioning Board consisting of three pro-union and two pro-business Members. Rather than wait for the appeal process to conclude, the Board withdrew its appeal and re-issued the same ambush election rules in early 2014. The three pro-union Members made a quorum and voted in favor of the rules.

## DRASTICALLY DECREASED CAMPAIGN PERIOD

Overwhelming statistical evidence proves that the longer an employer has to campaign against a labor union the higher the likelihood the company will prevail in a union election. Historically, the time between when a union files a petition with the NLRB seeking an election to the time when the election is held averages between 35-40 days. Ambush elections will decrease this time to as few as 11-15 days. This decrease is a monumental hurdle employers must overcome to remain union-free. Prudent employers cannot wait until after receiving an election notice to establish positive employee relations and regularly conduct union avoidance training.

## PRE-ELECTION HEARINGS

Pre-election hearings are held for many different reasons. One reason is that the bargaining unit proposed by the union in its petition to the NLRB for an election erroneously contains employees who are not eligible to vote or does not contain employees who should be eligible to vote in the election. A hearing is held where both witnesses testify and evidence is introduced to determine the scope of an appropriate bargaining unit, and thus who should vote. This hearing is usually held at a reasonable time after the petition is filed and on a date agreed to by all parties.




Ambush election rules require that hearings (except for those that define the scope of the bargaining unit) be held seven calendar days after the petition is filed and any issue not presented at the election is forever barred from being litigated in the future. Shockingly, whether the proposed bargaining unit is appropriate is not litigated until after the election is held. Companies are thus left not knowing who is lawfully eligible to vote in the upcoming election and if they erroneously treat some workers as supervisors (who are ineligible to vote) or wrongly treat supervisors as eligible voters, companies will unknowingly commit unfair labor practices.

Based on the seven-day timeline, a petition could be filed on Friday at 6 p.m. By the time management learns about it on Monday morning, three of those seven days have passed. The Company calls me – its labor attorney – on Tuesday and we meet the next day. By now the Company and its counsel only have one day to identify the issues, gather evidence, and prepare witnesses for an incredibly important hearing.

## COMPULSORY DISCLOSURE OF PRIVATE E-MAIL AND PHONE NUMBERS

Currently, unions are entitled to the names and home addresses of workers who will vote in a union election. Ambush elections mandate that unions will also receive workers' private e-mail addresses and telephone numbers.

No restrictions are placed on what a union can do with employees' personal information, i.e. sell it to third-party marketing companies or continuously leave harassing messages for the recipients. There is also no relief for employers who provide wrong e-mail addresses, even if employees themselves enter their addresses into the company's Human Resource Information System (HRIS) system. With current email addresses often containing strings of numbers, nicknames, and odd word phrases, the likelihood of errors and typos is high.

Overall, ambush election rules erode employer rights and employee privacy in the workplace. They steeply slant the playing field in favor of organized labor. I have written and spoken several times over the last few years on these issues and how companies can get ahead of these changes. I even personally lobbied Congress to enact legislation overruling ambush elections on behalf of the Ohio Grocers Association. Unless an eleventh hour miracle happens, ambush election rules will become law later this year and unsuspecting employers will become unionized. Union-free companies must take the time now to prepare for these impending changes.

*Mr. Austin is a labor lawyer at Roetzel & Andress LPA who represents companies against unions nationwide. He trains managers on the latest, multi-faceted union avoidance strategies and guides employers through union campaigns, elections, negotiations, grievances, arbitrations, strikes, and the decertification and withdrawal of recognition processes. Mr. Austin can be reached at maustin@ralaw.com or 614-723-2010.*