

TESTIMONY BEFORE THE UNITED STATES CONGRESS  
ON BEHALF OF THE  
NATIONAL FEDERATION OF INDEPENDENT BUSINESS

**NFIB**  
The Voice of Small Business.®

**Testimony by Elizabeth Milito**  
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**United States Senate**  
**Committee on Health, Education, Labor, and Pensions**

**on the date of February 11, 2015**

*on the subject of*

*Ambushed: How the NLRB's New Election Rule Harms Employers & Employees*

Dear Chairman Alexander, Ranking Member Murray and members of the committee:

Thank you for inviting me to testify today regarding the impact on small business of the National Labor Relations Board (NLRB) new union election rule. My name is Elizabeth Milito and I am Senior Executive Counsel for the National Federation of Independent Business (NFIB) Small Business Legal Center.

NFIB is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 350,000 independent business owners who are located throughout the United States and in virtually all of the industries potentially affected by these rules and decisions.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

NFIB's national membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about \$500,000 a year. Roughly 15 percent of NFIB members employ 10-20 people and approximately 28 percent have 10 or more employees.<sup>1</sup> The NFIB membership is a reflection of American small business, and I am here today on their behalf to share a small business perspective with the Committee.

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<sup>1</sup> <http://www.nfib.com/about-nfib/what-is-nfib-/who-nfib-represents> (last visited February 9, 2015).

Currently, small businesses in this country employ nearly half of all private-sector employees.<sup>2</sup> Small businesses pay 42 percent of total U.S. private payroll.<sup>3</sup> And small businesses generated 63 percent of net new jobs over the past 10 years.<sup>4</sup> Small businesses are America's largest private employer.

Today, small business owners contend with antidiscrimination laws, family, medical and other protected leave laws, wage and hour laws, privacy laws, workplace safety laws and labor laws. They often struggle to decipher the mysteries of overlapping, sometimes even conflicting, federal, state and local laws. These laws and regulations also are expensive; according to the Small Business Administration, workplace compliance costs small business nearly 36 percent more, per employee, than it costs large businesses.<sup>5</sup>

The problem is compounded by the fact that small businesses often cannot afford human resources or legal departments to give them advice on the laws. Small business owners work hard to do what is right, but their informal and unstructured nature and more limited financial resources means that they sometimes require greater flexibility in creating policies and solutions. While changes to the Board's current rules on election procedures would affect businesses of all sizes, NFIB is primarily concerned about the impact on the country's smallest employers – those like the typical NFIB member who employs 10 people. When it comes to labor issues, NFIB's constituency is very unique as compared to most businesses represented by other trade and business associations:

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<sup>2</sup> [https://www.sba.gov/sites/default/files/FAQ\\_March\\_2014\\_0.pdf](https://www.sba.gov/sites/default/files/FAQ_March_2014_0.pdf) (last visited February 9, 2015).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Impact of Regulatory Costs on Small Firms,

[https://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20\(Full\).pdf](https://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20(Full).pdf) (last visited February 9, 2015).

- Very few NFIB members have a dedicated human resources professional;
- Even fewer, if any, NFIB members have a dedicated labor relations expert or in-house counsel;
- Typically all employment and labor matters are the direct responsibility of the small business owner.

Imagine, then, the challenge facing America's small businesses – the backbone of our economy – when it comes to understanding and complying with labor law. Suffice it to say that labor law is particularly difficult for a small business owner to understand. The current NLRB is changing the law by reversing precedential decisions, promulgating new rules, and expanding enforcement through increased penalties. And this is not new or unique to the current NLRB; with each new administration comes new direction at the NLRB. Even experienced labor lawyers struggle to keep up with an ever-changing legal landscape. It is doubly difficult for small business owners to understand the quirks and nuances of labor law, which sometimes can seem illogical and counterintuitive.

Today I will discuss how the NLRB's new election rule will impact small businesses. I will attempt to provide insight into how small businesses handle labor matters, and highlight some of the differences between how small business owners and large corporations operate.

### **The Ambush Election Rule**

NFIB has 350,000 members across the country. They are honorable and fair employers, and they are troubled, confused, and scared by the decisions and rules coming out of the NLRB. Small businesses around the country cannot understand why the NLRB is trying to pass a wish list drawn up by organized labor. As I will discuss more below, few small businesses employ in-house counsel – leaving them to decipher complicated labor

laws on their own. Holding a union election in as little as 14 days makes absolutely no sense unless the goal is to complicate the process and reduce an employee's chance to make an informed decision.

For this reason, NFIB has stood up for small businesses to challenge the actions of the NLRB. The Board's new ambush election rule will significantly undermine an employer's opportunity to learn of and respond to union organization by reducing the so-called "critical period", from petition filing to election, from the current median of 38 days to as few as 14 days. NFIB objected to the first version of this ambush election rule when it was issued in 2011. The 2011 rule was subsequently struck down by a federal court, which noted the current election process allows enough time for unions to make their case and for employers to make theirs, after which employees have the information they need to make an informed decision. By issuing the identical rule again last year, NLRB completely abandoned its role as a neutral arbiter between employer and employee – and instead created a rule that makes unionization easier with a devastating cost to America's job-creators.

Our nation's labor law was conceived for the purpose of protecting the free flow of commerce by encouraging collective bargaining to avoid disruptions. Under the 76-year-old National Labor Relations Act (NLRA), bargaining about employees' terms and conditions of employment can only occur between employers and labor organizations chosen by employees to be their representatives. The starting point for representation is employee choice. Choice is the act of selecting freely following consideration of options. Section 8(c) of the NLRA encourages "free debate on issues dividing labor and management." For an employer to engage, it must first become aware. As Canadian experience proves covert union campaigning results in significantly higher rates of union representation over an open

exchange of views by both the union and the employer to inform employees and respond to issues raised.<sup>6</sup>

In its written comments in both 2011 and 2014, NFIB requested that the Board consider small business' lack of experience, knowledge, and resources to defend their interests regarding labor law process and procedures. The Board ignored NFIB's comments and proceeded with its rule. As a result, employee informed choice and due process notice and hearing required by the NLRA's Section 9 will be compromised, particularly in small businesses that lack labor relations expertise and in-house legal departments.

For a small business owner, nothing is a substitute for more time. Small-business owners are legally bound to follow, and therefore to know and understand, every rule and regulation that impacts them. That includes the differing requirements promulgated by every jurisdiction in which they operate. As a practical matter, this presumption is fiction. No small-business owner, let alone a reasonably large staff of experts, can recognize, understand, and implement the thousands of pages of rules that they must obey. Further, this continuing task must be undertaken while operating a business well enough to make its continuation worthwhile.

Despite a legal presumption that is impossible, most small business owners make a good faith effort to comply with all regulations and laws. So without in-house expertise, small firms will need outside help but finding help can take time. Because of the time it might take to find counsel, it is imperative that small businesses be able to request a postponement of the pre-election hearing and maintain the status quo with regards to the election timeframe.

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<sup>6</sup> Chris Riddell, "Union Certification Success Under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978-1998" 57 ILR Rev. No. 4. (2004), p. 498.

Unfortunately, the abbreviated schedule in the new election rule will make compliance with pre-election procedures – including the labor intensive project of producing a preliminary voter list with detailed information about each voter – exceedingly difficult for the small business owner who will likely need to drop all other business duties to meet NLRB deadlines. And the short timeframe will lead to more errors in election procedures by all parties and make it more likely that objections will be filed and elections set aside. As crafted, the NLRB's rule deprives employees of making an informed choice, strips small businesses of due process, and compromises employee rights as set forth in the NLRA. In contrast, the current union election process takes a median of 38 days — generally enough time for unions to make their case and for employers to make theirs, and for employees to have the information they need to make a fully informed decision.

The new rule does not properly balance the rights of employees, employers, and labor unions in the pre-election period, and the shortened timeframes deprives employers of their due process rights under the Act. For those employers receiving petitions, the new rules would be virtually impossible to navigate without hiring specialized legal counsel on an emergency basis. Between preparation of a Statement of Position, dealing with required notice posting and managing the tasks necessary to prepare for an election, small entities will be running up significant legal fees at an alarming rate. Despite the NLRB's repeated contention the rule would reduce litigation, its lack of clarity, compressed time frame, and shifting of administrative burdens to employers is much more likely to increase litigation and, therefore, expense.

This short timeframe will also not provide small business owners with adequate time in which to obtain legal assistance and lawfully inform their employees of the consequences of choosing union representation. Communication with employees is a

protected right of employers, and NFIB is very concerned that the rule will prevent employers from effectively communicating with employees about the unionization process.

NFIB is also very concerned about the new rule requiring employers to disclose confidential information about employees to union organizers, including phone numbers and email addresses. Even assuming that the employer has this information, employees might have provided their employer with a personal email address, unlisted home phone number, or a personal cell phone number, for emergency-contact purposes only. 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 business where the owner is often responsible for keeping personnel records and other information, which the employee deems confidential.

NFIB also objected in its written comments to the NLRB's decision to limit the scope of pre-election hearing issues. The new rule will limit the pre-election hearing to determine only whether a question concerning representation exists. This means that many issues of voter eligibility, including supervisor status, would be deferred to post-election procedures. As a result, employees would 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.

To ensure due process in representation case matters, Congress amended Section 9 requiring the Board to investigate each petition, provide an appropriate hearing upon due notice, and decide the unit appropriate. With the Board's new election rule, NFIB believes



that employee informed choice and due process notice and hearing required by Section 9 of the NLRA will be compromised, particularly for small businesses that lack labor relations expertise and in-house legal departments.

### **Conclusion**

Today, the union election process takes a median of 38 days — generally enough time for unions to make their case and for employers to make theirs, and for employees to have the information they need to make a fully informed decision. By issuing this ambush election rule twice, the NLRB has, on two occasions now, failed to demonstrate any need for change. The new rule will accomplish nothing more than the holding of elections at lightning speed, while reducing employees' chances of making informed decisions about the issues. For all these reasons, NFIB has repeatedly objected to the rule and has now challenged the issuance of the rule in federal court.

NFIB looks forward to working with the Committee on this and other workplace issues important to small business and thanks the members for their time today.

Sincerely,



Elizabeth Milito, Esq.  
NFIB Small Business Legal Center

# CORE VALUES

We believe deeply that:

Small business is essential to America.

Free enterprise is essential to the start-up and expansion of small business.

Small business is threatened by government intervention.

An informed, educated, concerned, and involved public  
is the ultimate safeguard for small business.

Members determine the public policy positions of the organization.

Our employees and members, collectively and individually, determine the success of  
the NFIB's endeavors, and each person has a valued contribution to make.

Honesty, integrity, and respect for human and spiritual values are important  
in all aspects of life, and are essential to a sustaining work environment.

## NFIB

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