



# **LABOR LAW UPDATE 2015**

Spring 2015 – Ambush, Email, and more...



[www.lrionline.com](http://www.lrionline.com)



# Agenda

- Ambush Election Rulemaking Update
- *Purple Communications*
- Supervisor Interviews
- Micro-Units (*Bergdorf- Goodman, Macy's*)
- Joint Employer (*McDonald's*)
- Property access (*Roundy's*)
- Handbook Rules
- Supervisor Statue
- Other Issues?
- Silver lining?

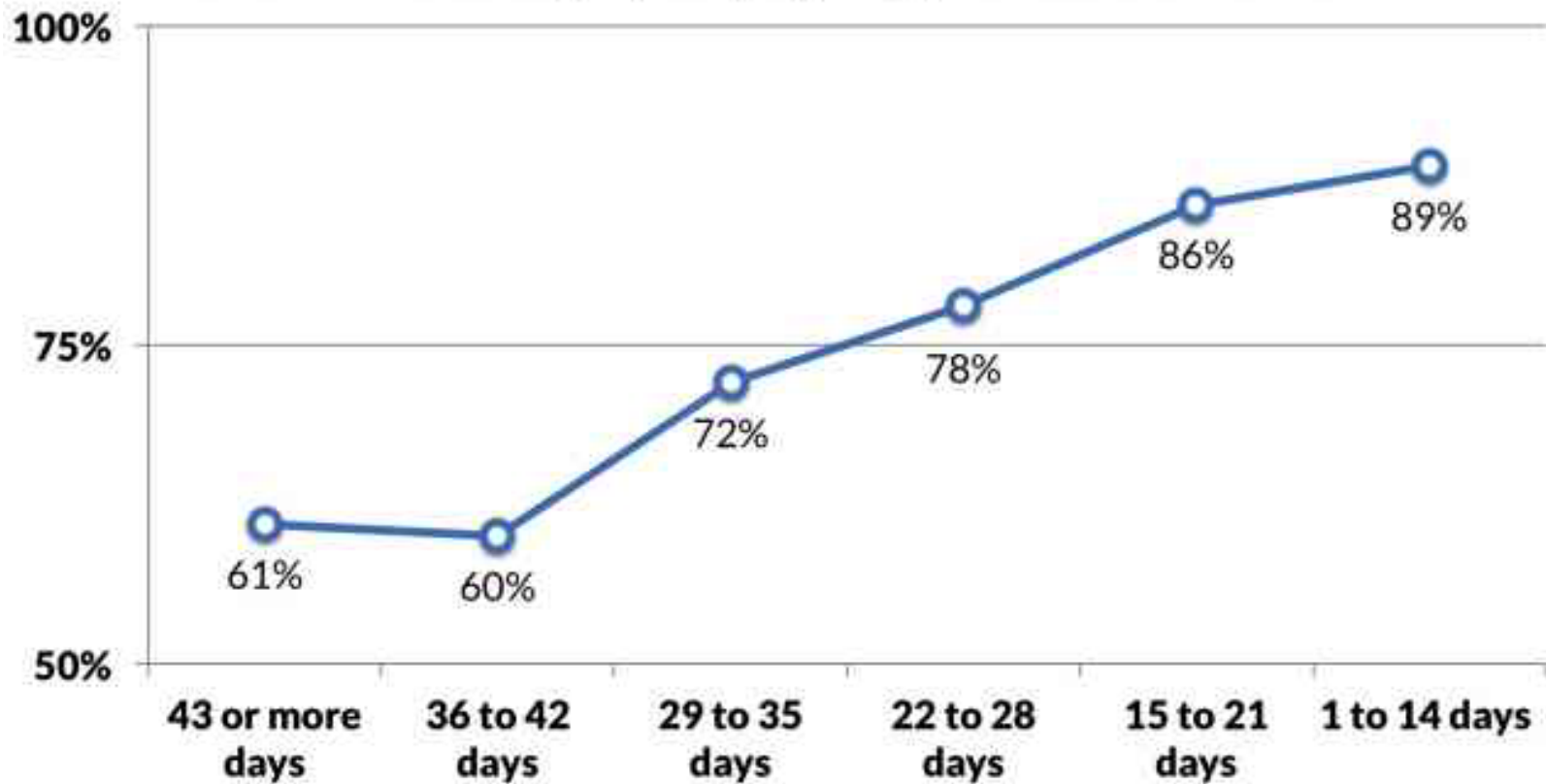


"Send lawyers, guns and money to get me out of this." Warren Zevon

Get the ambush election  
Spotify playlist at:  
<http://links.lrim.com/ambush>



**Union Win Percentage By Campaign Days, RC Elections 2004-2014**

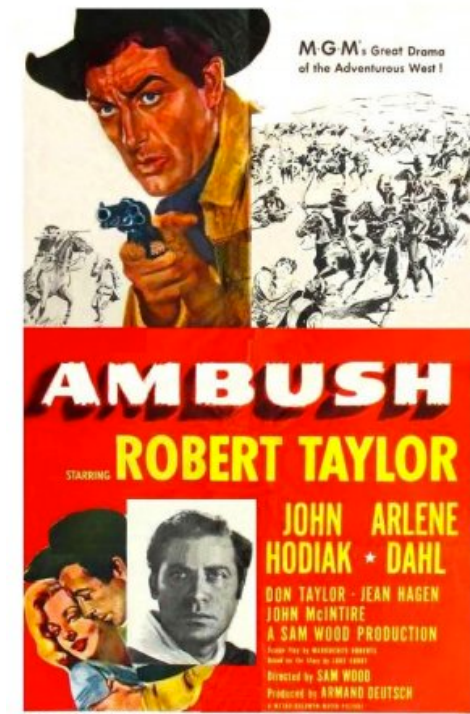


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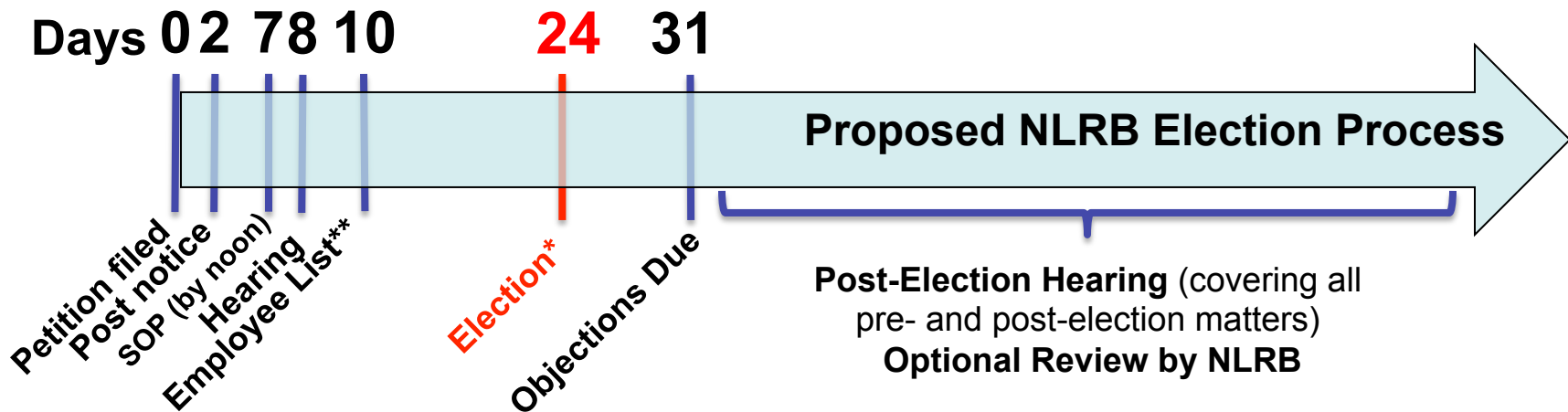
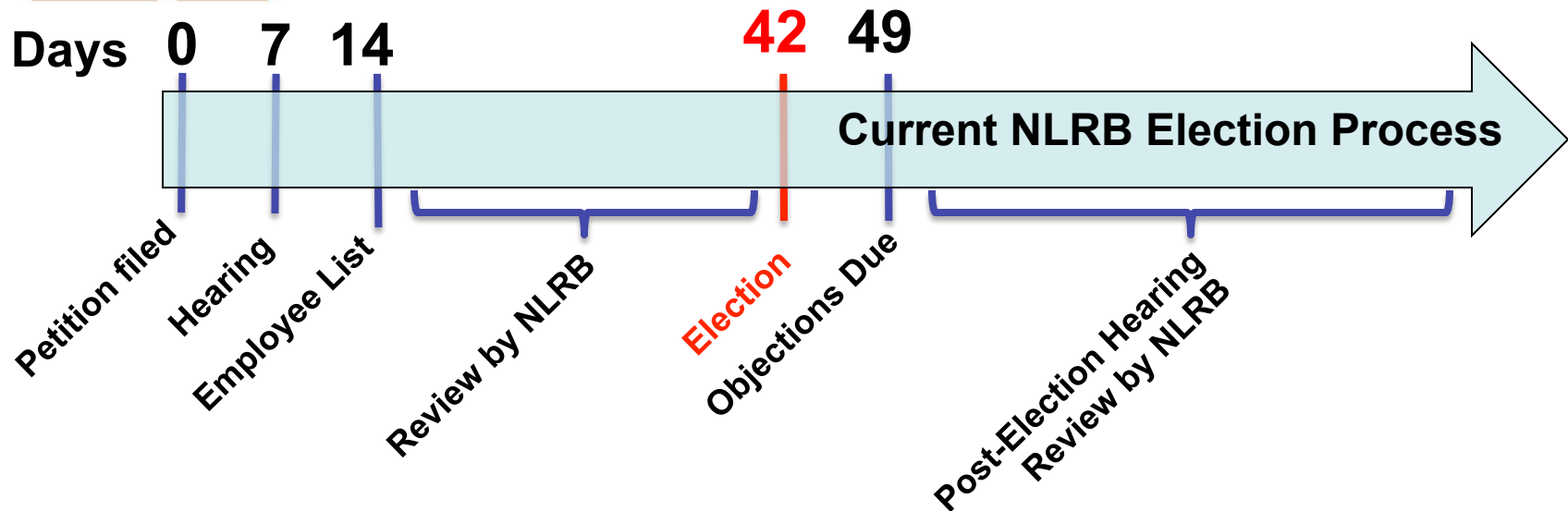


# Ambush Election Rule

- Goes into effect on 4/14
- Will not be enjoined
  - Summary judgment?
  - CRA opposing... veto?
- Main arguments:
  - Eliminates "appropriate" hearing 9(c)(1)
  - Free speech 8(c) arguments (1st and 5th amendment)
  - Arbitrary and capricious APA
  - Privacy concerns



"It's a shootout at the plantation."  
Leon Russell



\* **Note: Election period can be shorter if union waives 10-day rule on voter list.** Rulemaking does not mandate new targets, only makes them possible

\*\* Employee list due two days after decision and direction of election OR election agreement; list includes home phone numbers, personal email if employer has access





# Ambush Election Rule

- Key points in new rule
  - Notice posting (2 days, electronic)
  - SOP process (strict pleading)
  - No 20% rule on unit questions
    - revert to historic 10% rule?
  - No briefs – offers of proof (read brief as your closing?)
  - Employee list – due 2 days after decision or agreement



"That don't kill me can only make me stronger. I need you to hurry up now, I can't wait much longer." Kanye West



- Full Name
- Address
- Plus following if employer has "access"
  - Job class
  - Shift
  - Work location
  - Personal phone
  - Personal email
- May eventually include work phone, email (p. 118 of rule)

# Employee List



"Has the world changed or have I changed?"  
The Smiths



# What Should You Do Now?

- Bargaining unit analysis
- Update Toolkit (CitC)
- SOP prep, offers of proof
- Excelsior List drills
- Tripwire™ Training
- Approachable Leadership™ Training



"I got a four leaf clover, and it ain't done one single lick of good." The Old 97s

"It's just a matter of trust" Billy Joel





# Purple Communications

- *Purple Communications Inc.*  
*361 NLRB No. 126,*  
*12/11/14*
  - Email only (not applied to other electronic communication)
  - Only where employer already provides email access
  - Can subject email to "reasonable" restrictions (non-work time, no oversized attachments)
  - May monitor email use so long as nondiscriminatory, not designed to stop PCA



"Purple rain, purple rain." Prince



- *Grand Canyon Education, Inc.*,  
362 NLRB No. 13
  - HR interviews employee about supervisor performance
  - Employee volunteers that other employees also complained about supervisor
  - HR rep asks who else complained
  - Board finds that asking for names of other employees violates Act

## Employee Interview Meetings



"Oh, I think I know what you like, at least think I know what you might." Menomona



- *Nestle-Dreyer's*
  - Asks 4th Cir. to overrule *Specialty Healthcare*
  - On remand to NLRB (*Noel Canning*)
- *Bergdorf Goodman*
  - Salon and Contemporary shoe depts combined not appropriate
  - No common supervision, interchange, contact, shared training
- *Macy's*
  - Cosmetics and Fragrance employees are appropriate unit
  - Appealed to NLRB

# Micro Units



"Was it something I said, or was it something you read that's making me think that I never should have come here... My shoe box, shoe box of lies" Barenaked Ladies



# Joint Employer

- GC has issued complaints under the McDonalds memo
  - Alleges “joint employer” with franchisee
  - Analysis from *Browning-Ferris*
    - GC wants “direct or indirect control” standard
- CNN America, 361 NLRB No. 47
  - Contract technical crews are joint employees of CNN and TVS
  - Hiring, supervision, and work hours



“Gonna raise hell at the union hall... Rip this joint, gonna save your soul, round and round and round we go” Rolling Stones



# Property Access

- *Roundy's* decision expected anytime
  - Non-employee access rights to physical property, email
- *Lytton Rancheria*, 361 NLRB No. 148
  - Restates rule in *St. Johns* – if you allow access for any reason you cannot discriminate against union communication
  - Consider rule that limits off-duty access to particular physical areas of facility (i.e. HR and break room)



"When I am king you will be first against the wall, with your opinion which is of no consequence at all." Radiohead



# Employee Rules

- Solicitation/distribution *Conagra Foods* 361 NLRB No. 113
  - Solicitation = asking to take an action (i.e. sign a card)
  - Mere discussion that doesn't stop work *not* solicitation
- Confidentiality *Battle's Transportation* 362 NLRB No. 17
  - Disclose “human resources related information” and “investigations of outside agencies” protected
- Employee Conduct *Lytton Rancheria*, 361 NLRB No. 148



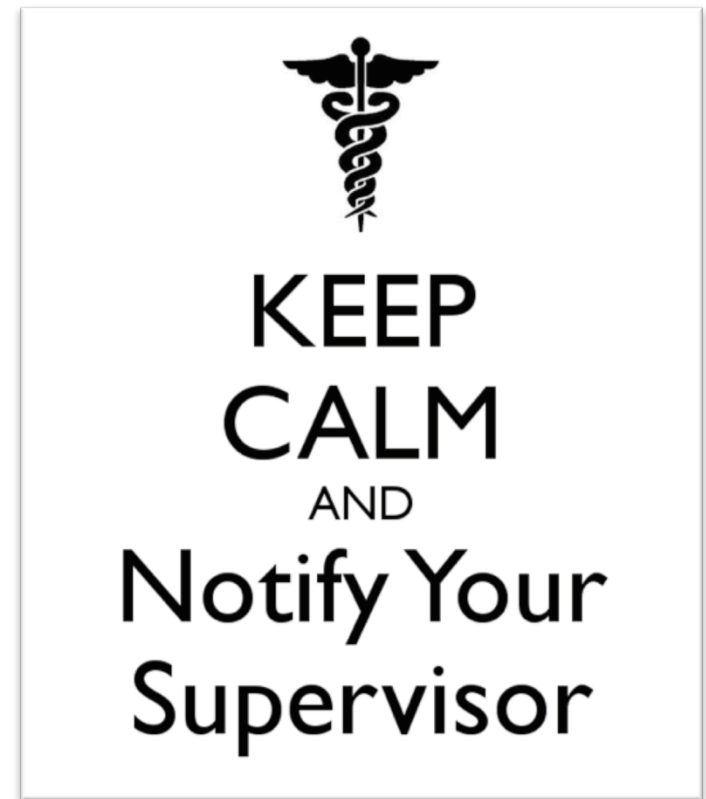
“The men who rule high places must be the ones to start.” Rush





# Supervisor Status

- *Modesto Radiology, 361 NLRB No. 84*
  - Team leads are supervisors in this case
  - Key facts: Create and adjust schedules; evaluate and recommend wage increases; grant overtime; reassign employees
  - Independent judgment the key
  - What do they actually do (versus what we say they do or what they can do)
  - DOL looking at 51% "bright line" for exempt status – Board go same way?
  - Ambush rule makes even more complicated



"Your friends they don't sympathize, maybe I don't need them too." Queens of the Stone Age



- Members-Only / Minority Bargaining
  - Coming up again and again as the savior to labor movement
  - Combining with Volkswagen/ Works Council idea
- Employee Witness (*Epilepsy Foundation*)
- International "hooks"
  - Human trafficking, supplier network, etc.

## Other Issues Coming?



"Ain't no rest for the wicked until we close our eyes for good." Cage the Elephant



# Silver Lining?

- Right to work serious possibility in ~~Wisconsin~~, Missouri, New Hampshire
- Kentucky Right to Work "ordinance" ideas
- Decertification activity
- Counterweight to local minimum wage victories



"I'm Mr. Brightside." The Killers



## Next Actions

- Schedule a demonstration of Campaign in the Cloud toolbox: 800-888-9115
- Watch the Approachable Leadership™ keynote: [ApproachableLeadership.com](http://ApproachableLeadership.com)
- Download free Tripwire Sample (Under Hot Topics on [LRIONline.com](http://LRIONline.com))