



Ogletree
Deakins

EMPLOYERS AND LAWYERS,

WORKING TOGETHER

Best Lawyers®
LAW FIRM
OF THE YEAR

& WORLD REPORT
USNews

EMPLOYMENT LAW –
MANAGEMENT
2016

DOL's Persuader Regulations and NLRB Update

Rodolfo R. "Fito" Agraz (Dallas and Raleigh)*

*Admitted NC and GA Only

Update on NLRB - Roadmap

- USDOL Persuader Rule
- Revised Election Rules Update
 - Texas Effect
- Case Developments
 - You have all day?

Persuader Rule: Background

- Labor Management Reporting and Disclosure Act (LMRDA) requires reporting of agreements, and certain payments, with/to “persuaders”
 - Historically only covered direct contact with employees to convince them of course of action regarding unionization

Persuader Rule: Background

- “Advice exemption” exempted legal advice
- Advice that included persuasion not reportable if:
 - Employer free to accept/reject advice
 - Advisor did not directly interact with employees

Persuader Rule: What's Supposed to Change?

- Engagements (including with counsel) that were previously not reportable, would become reportable
 - DOL eliminating bright-line test for advice
- **New rule:** Advice with direct **or indirect** purpose of persuading employees is reportable, even if the “persuader” has no contact with employees

“Indirect” Persuasion

- **Planning, Directing, or Coordinating Supervisors or Managers**
- **Providing Persuader Materials**
- **Conducting a Seminar for Supervisors**
- **Developing or Implementing Personnel Policies or Actions**

DOL “Tweaks” the Rule

- Suspended LM-21 requirements to report “other labor relations” services provided
- Exemption of services provided pursuant to multi-year agreements commenced prior to July 1, 2016

Persuader Rule Enjoined

- *National Federation of Independent Business et al. v. Perez, et al.*
 - U.S. District Court for the N.D. Texas (Lubbock Division) granted Plaintiffs' Motion for a Preliminary Injunction

Revised Election Rules Update: The First Year

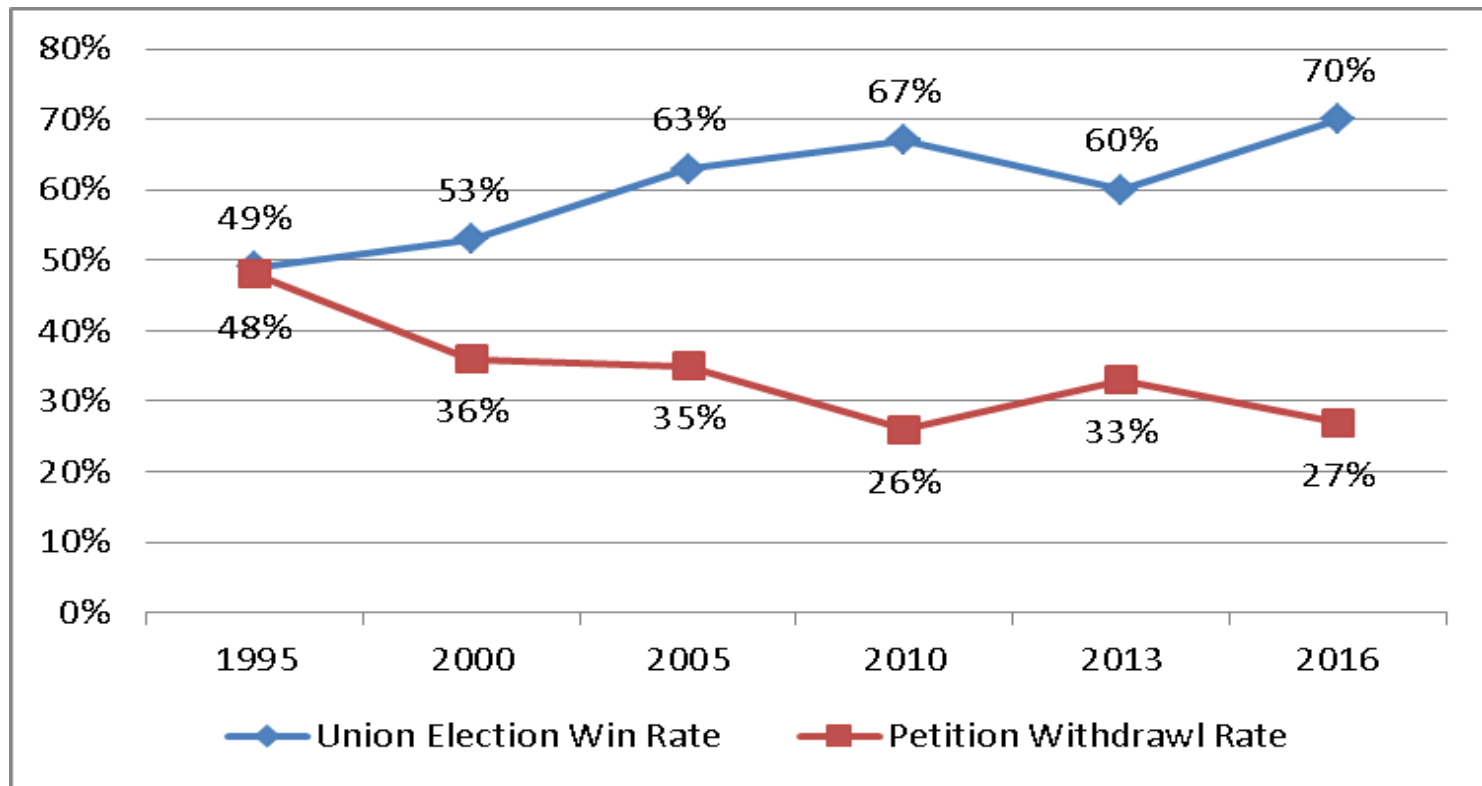
- 2,083 RC petitions filed (a 1.1% increase)
- 131,825 voters impacted
- Average unit size 63 (but largest unit is 6,300)

Revised Election Rules Update

- Average time to election
 - Down from 38 to 25 days
- Election Agreement or Hearing?
 - 6% of petitions have gone to hearing
- Who wins?
 - Unions – 70%
 - Management – 30%
 - Prior Year
 - Unions – 69%

Union Election Win / Petition Withdrawal Rates

■ *As Reported 1995 - 2016*



Most Petitions by Industry Code

- Healthcare (358 petitions)
... and everybody else:
- Transportation/Logistics (189 petitions)
- Construction, Engineering & Landscape (177 petitions)
- Manufacturing (145 petitions)
- Security (144 petitions)
- Retail (99 petitions)
- Energy, Oil & Utilities (80 petitions)
- Education and Childcare (79 petitions)
- Wholesalers (77 petitions)
- Hospitality (76 petitions)

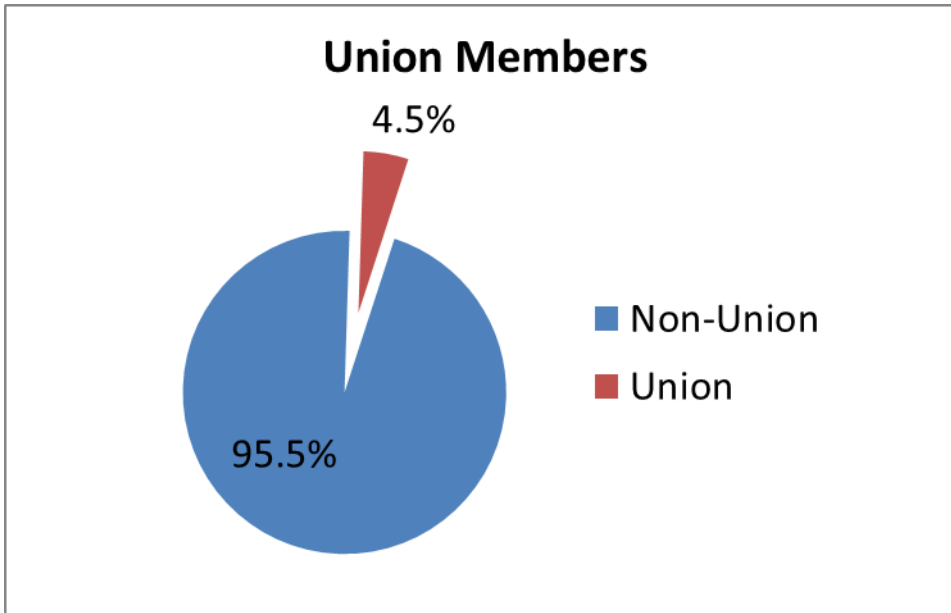
By State: Texas in The Top Ten

- New York (341 petitions)
- California (283 petitions)
- Illinois (125 petitions)
- New Jersey (121 petitions)
- Pennsylvania (120 petitions)
- Michigan (80 petitions)
- Massachusetts (65 petitions)
- Washington (64 petitions)
- Ohio (64 petitions)
- ***Texas (57 petitions)***



Texas Effect: Union Membership in Texas

Percentage of Employed Union Member Workers



Cases

- *Miller & Anderson, Inc.*
 - Overturns more than a decade of precedent
 - Returns to *M.B. Sturgis*
- *Browning-Ferris v. NLRB*
 - Joint employer test

Cases

- *Lewis v. Epic Systems Corporation*
(Seventh Circuit)
 - Latest on employee waivers of the right to pursue class or collective actions
- *American Baptist Homes of the West*
(NLRB)
 - Increasing impact of employer's motive in deciding whether permanent replacement of economic strikers is lawful

Questions???

