

Employment Law Legal Update

Roanoke Valley SHRM

January 26, 2016



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Recent Developments at EEOC

FY '15 Information Expected Feb. '16

EEOC Charge Filing Statistics

Trends: FY '94 to '14

CHARGE	FY 1994	FY 2014	UP / DOWN
Retaliation-All Statutes	17.4%	43%	Up
Retaliation – Title VII	15.8%	34.7%	Up
Disability	20.7%	29%	Up
Age	21.5%	23%	Up
National Origin	8.1%	11%	Up
Religion	1.7%	4%	Up
Color	0.5%	3%	Up
Race	34.8%	35%	Even
Sex	28.4%	29%	Even
Genetics (GINA)	***GINA statistics first tracked in 2010; 0.2%***	0.4%	

Source: EEOC.gov

4Q 2015 EEOC Developments

- The U.S. Government does not take holidays...
- More than 25 suits filed Oct. 1, 2015 – Dec. 31, 2015
 - Disability
 - Retaliation, incl. sex, age & sexual harassment
 - Age
 - Pay
 - GINA
 - National Origin
 - Race
 - Discrimination



Religion

EEOC Issues Statement on Workplace Discrimination / Muslim or Middle Eastern

Dec. 23, 2015

- Urges ERs and EEs to be mindful of harassment, intimidation, or discrimination against vulnerable communities
- Offers resource documents for both ERs and EEs
- Full news release found at: <http://1.usa.gov/1ZpXNeV>

Religious Garb and Grooming: General Rule

- Must make exceptions to rules to permit EEs to follow religious dress/grooming practices
- With exception of religious organization, preferences not defense
 - ER preferences
 - Customer preferences
 - Co-worker preferences
 - Client preferences
 - “Image” preferences

EEOC Sues Triangle Catering for Religious Discrimination

January 13, 2015

- Practicing Rastafarian for 15+ years
- EE holds sincere religious belief that he must keep head covered to “**prevent spiritual energy from escaping into atmosphere**”
- EE wears small cap ("crown") to cover head
- Required to remove head covering while working as driver
- Fired for refusing to remove head covering

Abercrombie Religious Discrimination

S. Ct. Rules in Favor of EEOC

June 1, 2015

- 8-1 Decision
- Applicant with headscarf, no accommodation requested
- Court held employer may not refuse to hire applicant if motivated by avoiding need to accommodate religion
- EEOC GC: “At its root, this case is about defending the quintessentially American principles of religious freedom and tolerance. This decision is a victory for our increasingly diverse society”

EEOC Sues UPS for Religious Discrimination

July 15, 2015

- Class action involving applicants and employees around country whose religious practices conflicted with UPS uniform and appearance policy
 - Beards, hair length standards
 - Muslims and Rastafarians
- “God would understand” if employee shaved beard to get a job



Pregnancy Issues

S. Ct. Sets New Rules for Pregnancy Discrimination Claims

March 25, 2015

- Young v. UPS
- Pregnant driver told not to lift 20+ lbs during first part of pregnancy, 10+ lbs in latter stage
- 70+ pound lifting policy for drivers
- Refused to accommodate, but had accommodated others under ADA
- Sued over failure to accommodate light duty

EEOC: Updated Pregnancy Discrimination Guidance

June 25, 2015

- Issued in light of Young v. UPS
- Much of guidance is similar to EEOC's previous July 2014 Enforcement Guidance on Pregnancy Discrimination and Related Issues

Shefa Wellness Center

EEOC Sues for Pregnancy Discrimination

Dec. 2, 2015

- EE fired 2 days after informing cosmetic company she was pregnant
- Worked for company only 2 weeks
- Told she had “deceived” ER by not disclosing pregnancy during hiring process
- Shefa will pay \$37,000 settlement to EE
- “Firing a woman simply because she is pregnant is against the law,” says EEOC’s Atlanta district attorney.



Disability and Genetics

EEOC Celebrates 25th Anniversary of ADA

July 15, 2015

- Commemorated jointly by EEOC and DOJ
- Jointly published a MOU designed to strengthen EEOC and DOJ enforcement of ADA and GINA
- Keep in mind ADAAA
 - Definition of “disability” broadened

Oakland Children's Hospital EEOC Disability Discrimination Suit

February 11, 2015

- \$300,000 settlement for EE with breast cancer
- Fired due to inflexible leave policy
- She needed leave exceeding ER's six-month policy

ValleyLife

EEOC Sues for Disability Discrimination

February 26, 2015

- ValleyLife is a disability services company
- Valley Life fired disabled EEs rather than provide reasonable accommodations
- Inflexible leave policy
- Policy compelled termination of EEs who had exhausted paid time off and/or any unpaid leave under FMLA

EEOC sues Bedford Weaving

GINA and ADA Violations

August 13, 2015

- Located in Bedford, VA
- Bedford Weaving's employment application asked questions:
 - Family medical history, disability-related information, applicants personal medical history
 - Applicant disclosed she had COPD and asthma, told no vacancies and not hired...even though 2 positions existed and were still being advertised
 - BW also failed to retain applications for 1 yr. as required
 - Suit pending US Dist. Ct for WD of VA (Lynchburg)

Joy Mining Machinery Settles EEOC GINA Lawsuit

Jan. 7, 2016

- After conditional job offers, Joy required a “post-offer” medical examination
- Joy requested family medical history on its pre-placement medical history form
- EEOC prohibited Joy from violating GINA and unlawful retaliation
- Joy must train all mgmt and HR on GINA
- EEOC will monitor compliance



LGBT Issues

HR Magazine

SEPTEMBER 2015

SHRM.ORG

\$9.95

The New Face of Diversity

Transgender employee policies are gaining support. Are you ready?

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GBT Protection

Current State of the Law

- No federal legislation
- July 2014 E.O. bans sexual orientation and gender identity discrimination by federal contractors
- 28 states do not prohibit sexual orientation discrimination
- 31 states lack gender identity protections

Southeastern Oklahoma State Univ.

DOJ Suit Alleging Transgender Discrimination

March 30, 2015

- 2004: Mr. Tudor began Asst. Prof. as man
- 2007: Tudor began to present as woman
- 2009: Ms. Tudor applied for tenured Associate Professor
- SE OSU denied application, overruling recommendations of dept. chair and other tenured faculty
- Tudor terminated for failure to obtain tenure
- EEOC found cause and referred to DOJ
- Collaborative effort by U.S. govt.

Lakeland Eye Clinic to Pay \$150,000 to Resolve Transgender Lawsuit

April 13, 2015

- One of first transgender lawsuits by EEOC
- “[S]olidifies EEOC's commitment to enforcing the rights of transgender EEs secured by Title VII.”

Agencies Release Guide

June 3, 2015

- LGBT Discrimination Protections for Federal Workers



**Addressing Sexual Orientation and Gender Identity
Discrimination in Federal Civilian Employment**

A Guide to Employment Rights, Protections, and Responsibilities

EEOC Sues **Deluxe Financial** for Transgender Discrimination

June 5, 2015

- Third lawsuit filed as part of EEOC's ongoing efforts to implement its Strategic Enforcement Plan
- EEOC "has made clear through its federal sector decisions that transgender individuals are protected under Title VII," said EEOC GC David Lopez.

Comprehensive Bill to Ban LGBT Bias

July 23, 2015

- Democrats have introduced bills in House and Senate (“The Equality Act”)
- Would ban sexual orientation and gender identity discrimination in the areas of employment, housing, public accommodations, public education, federal funding, credit, and the jury system



Transracial / Racial Identity?

One in 14 Americans are multiracial and numbers likely to keep growing



June 2015



“Rachel Dolezal in Center of Storm, Is Defiant: ‘I Identify as Black’”

New York Times June 16, 2015



Rachel Dolezal - Spokane NAACP



Kate Hewitt/K Swartz

@katehewitt1

Follow

Hmm interesting article about [#racheldolezal](#). If she identifies as black, can she be transracial?



RETWEETS

3

FAVORITES

4



4:43 AM - 12 Jun 2015



Alfred Young Man @Idiotwinz · 2h

@katehewitt1 ...Native Americans call such people "wannabes" as in "I wanna be this, I wanna be that...!"



Rachel Dolezal – Spokane NAACP

OPINION

The Inquisitr June 17, 2015

JUNE 17, 2015

**THE RACHEL DOLEZAL ISSUE: WHY BEING
'TRANSRACIAL' IS NOT THE SAME AS BEING
TRANSGENDER**

CHANEL ADAMS



Recent Developments at DOL

Wage-Hour Division

S. Ct. Upholds DOL's 2010 Mortgage Loan Officer Interpretation

March 9, 2015

- 2010 Admin. Interpretation - MLOs do not satisfy Administrative Exemption because primary duty is to engage in sales
- “Production” versus “administrative” dichotomy
- S.Ct. upheld DOL’s ability to revise interpretations of regulations in *Perez v. Mortgage Bankers Association*

DOL Updates FMLA's Definition of "Spouse"

February 23, 2015

- Eligible EE in legal same-sex marriage may take FMLA leave for spouse regardless of where EE resides
- Previously, "spouse" did not cover EE who resided in state that did not recognize same-sex marriage
- Now, eligibility is based on "place of celebration"

NPRM to Update FLSA Regulations on “White Collar” Exemptions

July 6, 2015

- Updates salary levels for white collar exemptions
 - Sets salary level at 40th percentile of weekly earnings for FT salaried workers to \$921/week; \$47,892/year
 - currently \$455/week; \$23,660/year
 - Sets total comp for highly compensated test at 90th percentile - \$122,148
 - currently \$100,000
 - Establishes mechanism for automatically updating these levels

New Guidance on Joint Employers

January 20, 2016

- Subcontracting, outsourcing, and the use of staffing agencies scrutinized
- Horizontal and Vertical relationships need to be reviewed.
- Control or potential control over EEs is focus of the analysis.



Recent Developments at NLRB

U.S. Private Section Union Membership 1955-2014

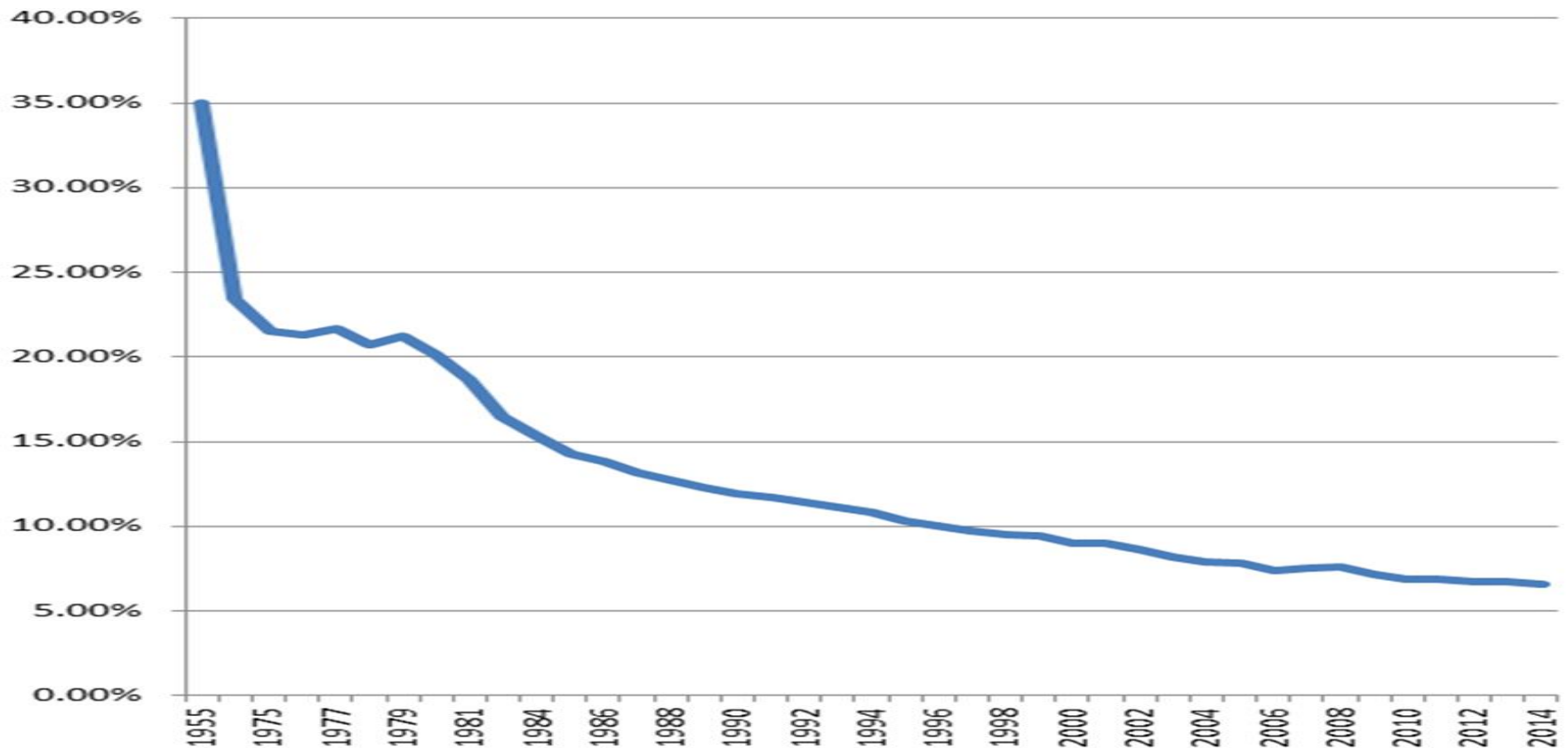


Power Through Information

POWER**SOURCE**

April 2015

U.S. Private Sector Union Membership 1955 – 2014, Percentage of Workers



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PTI Labor Research (PTI) is the premier provider of research intelligence pertaining to private sector organized labor activities. Since 1978, corporate leadership, labor relations practitioners and the legal community have come to rely on PTI's expertise and professionalism. Thousands of clients have benefited from PTI's extensive research database and state-of-the-art multimedia studio where they custom design communications tools in forms of print medium, web-based technology and video production.

For more information visit www.ptilaborresearch.com

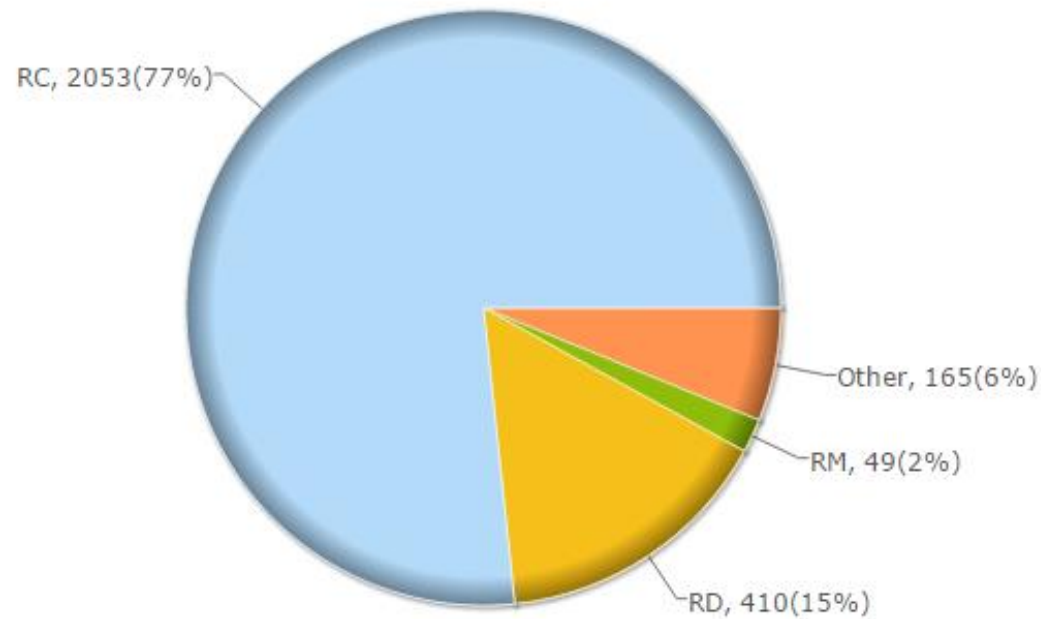
Number of Petitions Filed in FY14

Number of Petitions Filed in FY14

RC - Employee-petitioned representation election

RD - Decertification elections

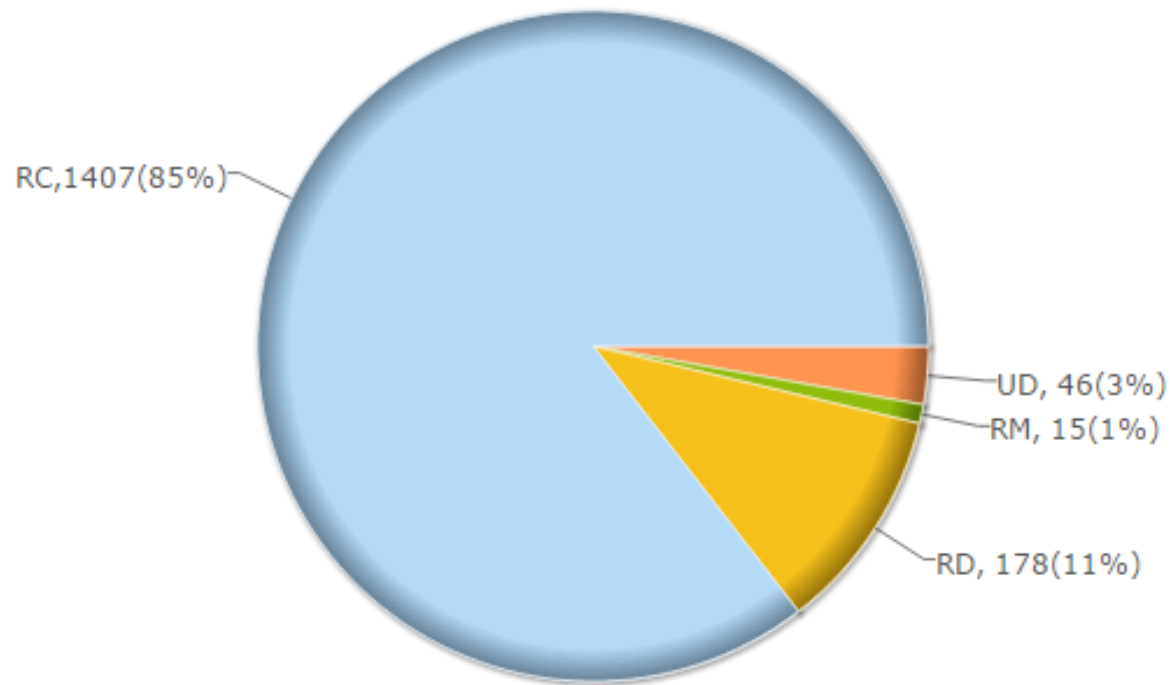
RM - Employer-petitioned representation election



RC	RD	RM	Other	Total
2053	410	49	165	2677

Number of Elections Held in FY14

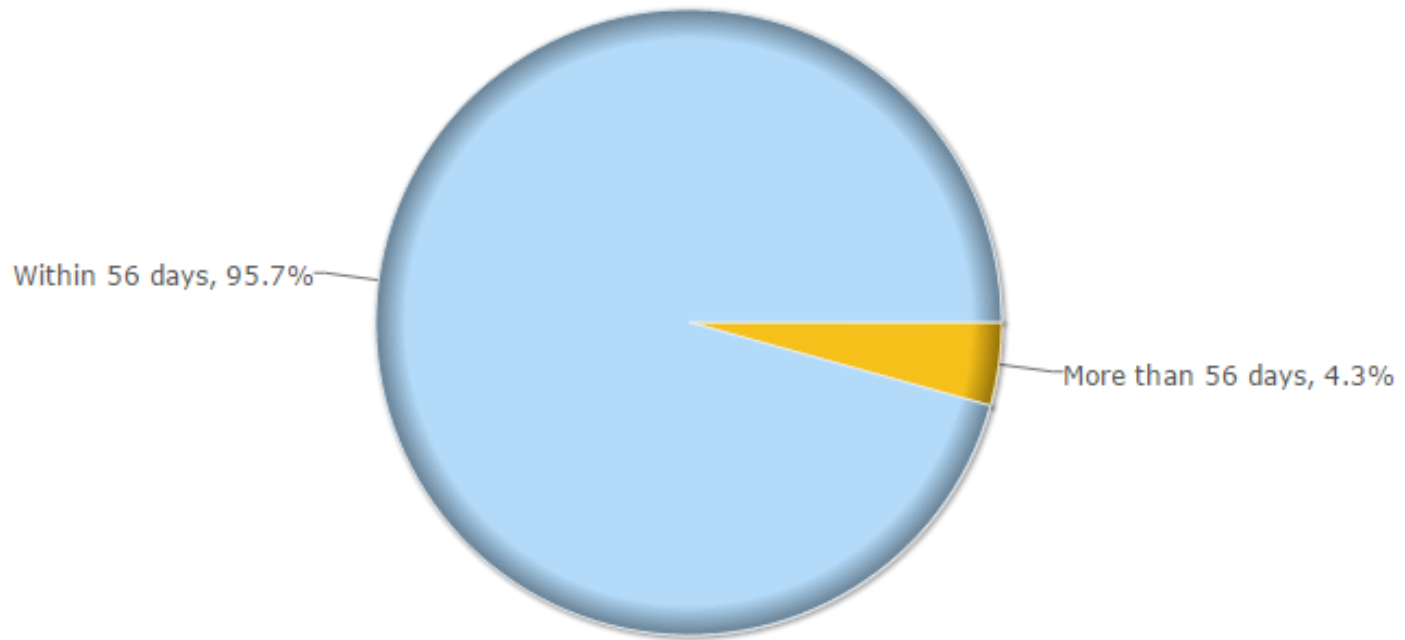
Number of Elections Held in FY14



RC	RD	RM	UD	Total
1407	178	15	46	1646

Percentage of Elections Conducted in 56 Days in FY14

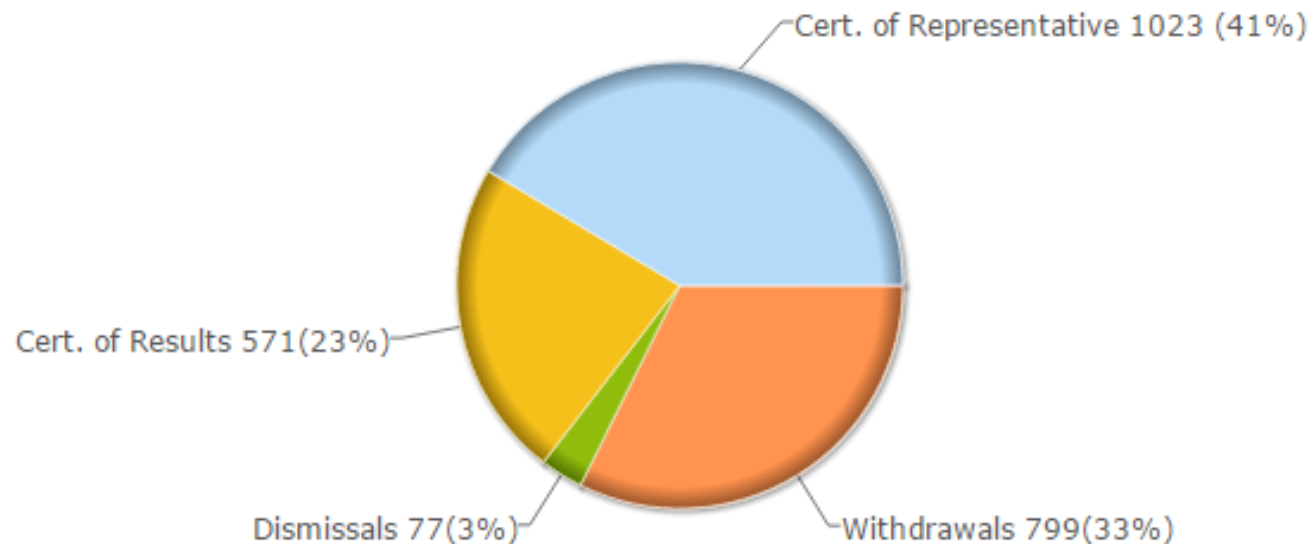
Percentage of Elections Conducted in 56 Days in
FY14



Within 56 days (%)	More than 56 days (%)
95.7	4.3

Disposition of Election Petitions Closed in FY14

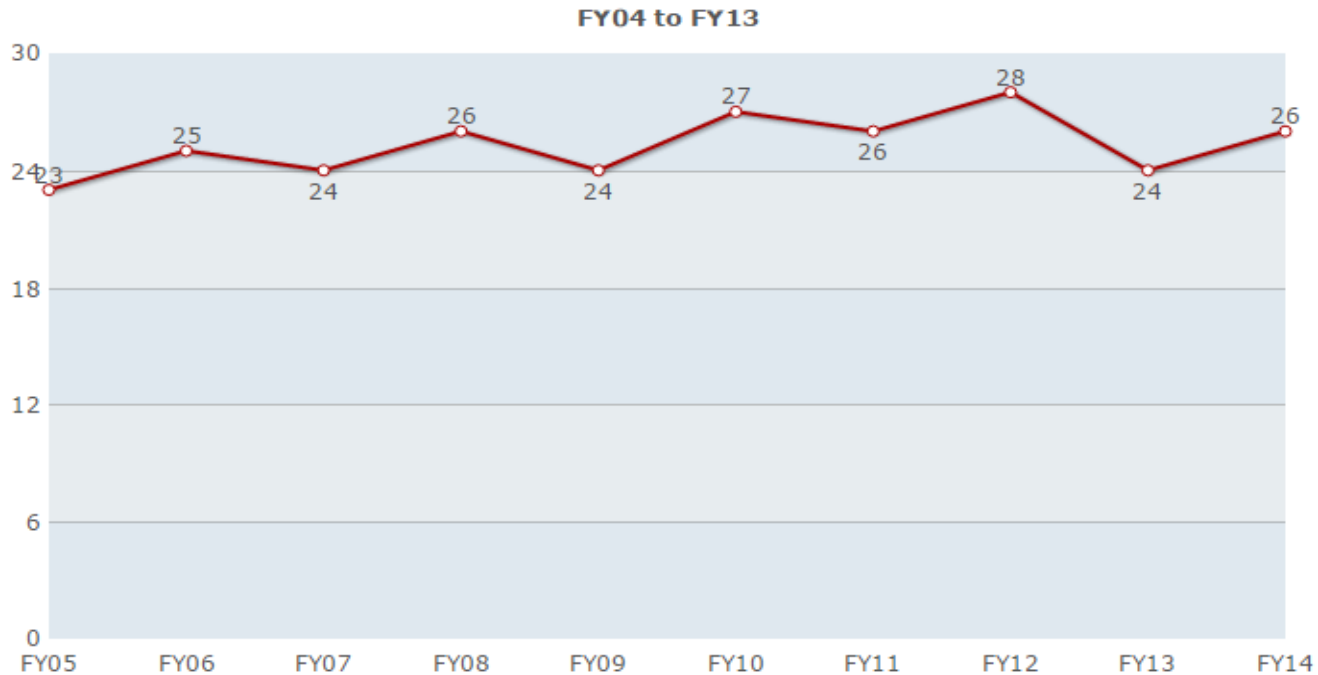
Disposition of Election Petitions Closed in FY14



Cert. of Representative	Cert. of Results	Dismissals	Withdrawals
1023	571	77	799

Median Size of Bargaining Units in Elections

Median Size of Bargaining Units in Elections



Median Size	
FY05	23
FY06	25
FY07	24
FY08	26
FY09	24
FY10	27
FY11	26
FY12	28
FY13	24
FY14	26

NLRB GC Guidance for Representation Case Rule Implementation

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 15-06

Date: April 6, 2015

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Richard F. Griffin, Jr., General Counsel



SUBJECT: Guidance Memorandum on Representation Case Procedure Changes
Effective April 14, 2015

RC Case Rule Implementation

- Electronic filing and transmission of petitions and other documents;
- Ensures that EEs, ERs, and unions receive timely information to understand/participate in RC process;
- Reduces unnecessary litigation, duplication and delay;
- Adopts uniform procedures across regions;
- Requires additional contact information (**personal telephone numbers and email addresses**) in voter lists, to extent that is available to ER;
- Allows parties to consolidate all election-related appeals to Board into single appeals process

NLRB GC Issues Report Concerning Employer Rules

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 15- 04

March 18, 2015

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Richard F. Griffin, Jr., General Counsel



SUBJECT: Report of the General Counsel
Concerning Employer Rules

- New report provides overview of NLRB's views on legality of certain employer rules – interplay with Section 7

<http://www.nlr.gov/reports-guidance/general-counsel-memos>

NLRB Report Concerning Employer Rules

- Confidentiality
- EE Conduct Toward Company and Supervisors
- Conduct Toward Fellow EEs
- Interactions with 3rd Parties
- Use of Logos, Copyrights and Trademarks
- Restrictions on Photography, Recording, PED
- Leaving Work
- Conflict of Interest
- Non-Disparagement
- Social Media

Summary

- **Federal agencies becoming more aggressive**
 - EEOC expanding scope of protections
 - DOL proposing dramatic changes to exemptions
 - NLRB making it easier to organize and more difficult to manage
- **Key takeaways:**
 - Law is evolving rapidly
 - Imperative to train managers

Thank You!

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