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## labor and employment lawflash

May 15, 2012

### District Court Blocks New NLRB Election Procedures

*This highly anticipated decision strikes down the NLRB's new election procedures in their entirety, finding the Board did not act with the required three-member quorum when it approved the final rules in December 2011.*

The National Labor Relations Board's (NLRB's or Board's) new "quickie" representation election rules (Election Rules) took effect on April 30. Yesterday, however, the rules were struck down by Judge James Boasberg of the U.S. District Court for the District of Columbia. Judge Boasberg determined that only two members of the Board participated in approving the Election Rules, which did not satisfy the required three-member quorum under Section 3(b) of the National Labor Relations Act (NLRA or Act). Citing Woody Allen's famous quip that "eighty percent of life is just showing up," Judge Boasberg reasoned that "showing up" is even more important to meet the NLRA's quorum obligations—"it is the only thing that matters." At least three members must "show up" for the Board to legally act.

Judge Boasberg expressly held that "representative elections will have to continue under the old procedures." Thus, for the time being, it appears that the Election Rules cannot be enforced by the Board unless the Board seeks and obtains a stay pending an appeal to the D.C. Circuit.

Morgan Lewis handled this litigation on behalf of the U.S. Chamber of Commerce and the Coalition for a Democratic Workplace (CDW)—resulting in the D.C. district court decision.

#### Background

The NLRB announced the Election Rules on December 21, 2011, marking the culmination of a six-month process that included the issuance of a June 22, 2011, Notice of Proposed Rulemaking (NPRM), a public hearing, and an unprecedented public debate between the Board members. The NPRM outlined a massive regulatory overhaul to the NLRA election procedures designed to shorten the period of time between the filing of an election petition and the holding of the election.

With only three members then on the Board, and facing a drop to only two members upon expiration of Member Craig Becker's term at the end of 2011, the Board ultimately announced that it would draft a scaled-back final rule based on a subset of the procedural reforms contained in the NPRM. The Board did so in a resolution adopted by a 2-1 vote in a public meeting on November 30, 2011, with Member Brian Hayes dissenting. Only Chairman Mark Pearce and Member Becker voted to approve the Election Rules on December 16, 2011, with Member Hayes not participating in the vote in any way.

#### Challenge to the Election Rules

The U.S. Chamber of Commerce and the CDW immediately mounted a legal challenge to the Election Rules. Cross-motions for summary judgment were filed. In their briefs, the Chamber and CDW argued that Chairman Pearce and Member Becker lacked statutory authority to promulgate the final Election Rules without Member Hayes's participation in the vote to approve (or reject) the text of the final rules. Simply stated, a three-member quorum was required in order for the Board to issue the final Election Rules. Because Member Hayes did not participate in the ultimate decision of whether to adopt the final rules, the other two members lacked the authority to promulgate them.

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The plaintiffs also argued that the Election Rules conflict with Sections 9(c)(1) and 3(b) of the NLRA because the Election Rules authorize hearing officers to exclude all evidence regarding issues of voter eligibility or inclusion, while at the same time preventing employers from seeking pre-election review by the Board in order to stay an election. Finally, the plaintiffs argued that the Election Rules were issued in an arbitrary and capricious manner, including by overturning Board precedent on the proper scope of the pre-election hearing without three affirmative votes, contrary to the Board's long-standing practice.

## Judge Boasberg's Decision

Ultimately, yesterday's decision turned on only the plaintiffs' quorum argument. "At the end of the day, while the Court's decision may seem unduly technical, the quorum requirement, as the Supreme Court has made clear, is no trifle." Judge Boasberg rejected the two arguments made by the NLRB to count Member Hayes as part of the quorum. First, the judge ruled that Hayes's participation in two earlier decisions relating to the final rule's publication was not enough to satisfy the NLRA's quorum requirement: "[I]t is the final decision to adopt (or not to adopt) a given rule that transforms words on paper into binding law. That decision, which in this case took place on December 16, 2011, required a quorum." Second, he ruled that Member Hayes was not "present" for the December 16 vote: "The NLRB's suggestion that the quorum requirement was satisfied on the ground that three members held office when the rule was approved contradicts the clear pronouncements of the Supreme Court as well as common practice (and common sense). Something more than mere membership is necessary."

## Impact

The Board's recent forays into rulemaking, including the notice-posting requirement and the new "quickie" election rules, have run into judicial opposition and remain stymied in the courts. Based on yesterday's decision, employers should expect that the new election procedures—which initially took effect on April 30—will be suspended while the litigation proceeds. It is possible for the Board to seek a stay of the decision while an appeal is pending, but the probability of such a stay being issued is not likely.

While being very careful not to indicate at all an opinion about the merits of the Election Rule or the other substantive arguments raised by the plaintiffs, Judge Boasberg further notes in passing that the "ruling need not necessarily spell the end of the final rule for all time. . . . [N]othing appears to prevent a properly constituted quorum of the Board from voting to adopt the rule if it has the desire to do so." Whether the Board will attempt to reissue the "quickie" election rules with its current complement of three Democrats and two Republicans remains to be seen. Any attempt at new rulemaking will trigger renewed substantive and procedural challenges to election procedure changes. In the meantime, all of these issues may be considered by the D.C. Circuit if and when the Board appeals Judge Boasberg's decision.

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