

NLRB Proposes New Rules to Significantly Expedite the Union Election Process and Limit Employer Participation

June 22, 2011

On June 21, the National Labor Relations Board (NLRB or Board) announced new proposed rules that would substantially change—and speed up—the existing union election process, as well as limit employer participation in that process. This appears to be an effort by the Board to achieve, through rulemaking, portions of the failed Employee Free Choice Act (EFCA).

The proposed rules were printed in the June 22, 2011 edition of the *Federal Register*. The Board will accept comments on the proposed rules until early September 2011, and will hold a public hearing on the proposed rules in Washington, D.C. on July 18 and 19, 2011. Final rules likely will be issued sometime in the spring of 2012, barring congressional action or litigation (both of which are strong possibilities).

Background

The National Labor Relations Act (the NLRA or the Act) gives employees the right to “form, join, or assist” unions; to bargain collectively with their employer; or to refrain from engaging in such activities. The Board has long played a central role in the election process, overseeing most aspects of the pre- and post-election process. Since the NLRA was enacted, built into the pre-election process was a means by which employers could challenge the appropriateness of the petitioned-for unit of employees through an evidentiary hearing process, briefing, and Board review.

The Board also administers representation elections. For many years, it has had a fairly stringent and successful internal policy designed to schedule elections within approximately six weeks after the petition is filed. In 2010, initial elections were held in a median of 38 days, and more than 95% of initial elections were held within eight weeks of the filing of a petition. For all petitions filed, the average time to an election was 31 days.

The Board’s Proposed Rules

Although the Board has used its rulemaking power only sparingly, Section 6 of the NLRA authorizes it to make rules and regulations “necessary to carry out the provisions” of the Act. The Board believes that the Act itself, endorsed by the Supreme Court, requires the Board to adopt rules so that representation issues can be resolved “quickly and fairly.” The proposed rules would likely result in elections being held within a few weeks of the filing of a representation petition, and they also would substantially

reduce an employer's opportunity to challenge a petitioned-for unit of employees prior to an election. The proposed rules also would give unions access to the employees' names, addresses, phone numbers, and email addresses earlier in the process, thus enhancing the unions' chances of winning the NLRB election.

Specifically, the new rules would do the following:

- Require that all pre-election hearings take place seven days after the filing of a petition (absent special circumstances), eliminate all pre-election review by the Board, and require that the election date be set at "*the earliest date practicable.*"
- Require employers to provide unions, within seven days of the filing of a petition, with a list of employee names, work locations, shifts, and job classifications, and to provide, within two days of a direction of election, employee home addresses, telephone numbers, and, where available, email addresses.
- Require employers to file a "Statement of Position"—a new form—that must be filed no later than the hearing date. It must set forth the employer's position on a host of legal issues. Any issues not identified in the Statement would be forever waived.
- Significantly limit the scope of issues and the type of evidence that may be litigated before an election, including most questions regarding the eligibility of particular individuals or groups of potential voters, and dispense, for the most part, with post-hearing briefs.
- Permit the Board to decline to review many of the Regional Directors' decisions, substantially limiting the review options available to employers.
- Permit electronic filing of election petitions, and potentially allow the use of electronic signatures to support the "showing of interest"—in other words, possibly allowing employees to sign union authorization cards electronically via the Internet or email.

The proposed rules also suggest that the Board may in the future communicate directly through email or telephone with eligible voters regarding the election, or possibly other topics.

Likely Effects of the Proposed Rules

The most significant effect of the proposed rules would be to significantly expedite the election process, despite the fact that more than 95% of all elections already take place within eight weeks of a petition's being filed.

Board Member Brian Hayes, dissenting from the issuance of the proposed rules, wrote that it is "certain" that the proposed rules would "substantially shorten" the time period from petition filing to election date, suggesting that under the proposed rules elections would be held "in 10 to 21 days from the filing of the petition." By definition, this is a "quickie" election, as that term was used liberally throughout the EFCA debate.

Although the time periods for elections will likely be shortened, the *overall* timeframes for processing election cases to conclusion may not be significantly affected, because the elimination of many of the

pre-election procedures—particularly the opportunity to present evidence with respect to unit scope—may ultimately result in more post-election litigation and adjudication.

In addition, the proposed rules represent a significant encroachment into both an employer’s business and an employee’s privacy. Employers must now turn over to the government and a union the company email addresses and personal telephone numbers of potential bargaining unit members.

The cumulative effect of the proposed rules ultimately will be to minimize, perhaps substantially, the employer’s voice in expressing both its legitimate views regarding collective bargaining and its legal positions regarding the collective bargaining process.

Conclusion

The proposed rules represent the latest (but probably not the last) Obama-controlled Board action to make union organizational efforts easier and to improve unions’ chances of winning Board-supervised elections.

As we noted in our December 2010 LawFlash, “NLRB Proposes Rule to Require Employers to Post Notice Informing Employees of Their Right to Join a Union and Strike,” available online at http://www.morganlewis.com/pubs/LEPG-LF_NLRBProposesRuleReNoticeOfRightToStrike_23dec10.pdf, we expect the Obama Board to continue through rulemaking and adjudication to effect many of the changes contained in EFCA.

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