

labor and employment lawflash

February 6, 2014

NLRB Issues New Proposed “Quickie” Election Rules

After an unsuccessful effort to implement new election rules in 2011, the NLRB has issued proposed election rules that would substantially speed up the existing union election process.

The National Labor Relations Board (NLRB or Board) announced on February 5 that it will issue new proposed election rules that would substantially change—and speed up—the existing union election process.¹ The NLRB stated that these proposed rules are identical in substance to those proposed by the Board in June 2011. Some of the 2011 proposed rules were implemented for a short time in April 2012, but they were struck down in May 2012 by the U.S. District Court for the District of Columbia because the Board lacked a quorum when it decided to adopt them. The district court’s decision left open the issue of whether the Board could have issued the election rules with a Board quorum.²

The new proposed rules have been printed in the February 6, 2014 edition of the *Federal Register*. The Board will accept comments on the proposed rules until April 7, 2014 and will hold a public hearing on the proposed rules in Washington, D.C., during the week of April 7, 2014.

The Proposed Rules

Although the Board has used its rulemaking power only sparingly, Section 6 of the National Labor Relations Act authorizes the Board to make rules and regulations “necessary to carry out the provisions” of the Act. The Board believes that the Act itself, endorsed by the U.S. 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 would substantially reduce an employer’s opportunity to litigate whether employees are eligible to vote prior to an election. The proposed rules also would give unions access to employees’ names, addresses, phone numbers, and email addresses earlier in the process, thus enhancing unions’ chances of winning NLRB elections.

Specifically, the proposed election rules would do the following:

- Require that all pre-election hearings take place seven days after the filing of a petition (absent special circumstances), and require that the election date be set at “the earliest date practicable.”
- Require an employer to provide a list of the full names, home addresses, telephone numbers, email addresses, work locations, shifts, and job classifications of all employees who are eligible to vote in the election. The employer would be required to produce this list within two days of the Regional Director’s approval of an election agreement or direction of an election.
- Require an employer to file a “Statement of Position”—a new requirement—that must be filed no later than the hearing date. It must set forth the employer’s position on a host of legal issues, and it would include a list of the names, work locations, shifts, and job classifications of all individuals in the proposed unit. Any issues not identified in the statement would be deemed waived.

1. View the proposed rules at http://www.ofr.gov/OFRUpload/OFRData/2014-02128_PI.pdf.

2. See *Chamber of Commerce v. NLRB*, 879 F. Supp. 2d 18 (D.D.C. 2012). Morgan Lewis represented the U.S. Chamber of Commerce and the Coalition for a Democratic Workplace in this litigation.

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- Significantly limit the issues that may be litigated before an election, including questions regarding the eligibility of particular individuals or groups of potential voters, and dispense with post-hearing briefs unless “special permission” is granted by the hearing officer.
- Eliminate an employer’s right to request pre-election review of the Regional Director’s decision, leaving any issues to post-election review (if at all).
- 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 notable 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 being filed. The proposed rules could shorten the time from petition to election to three weeks or less. NLRB Members Philip Miscimarra and Harry Johnson, dissenting from the issuance of the proposed rule, wrote that the proposed rule would create a “vote now, understand later” scheme and that it “advocates a ‘cure’ that is not rationally related to the disease.”

Although the time periods for elections will likely be shortened, the overall time frames 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 voter eligibility or inclusion—may ultimately result in more post-election litigation and adjudication.

In addition, the proposed rules would impose burdens on the employer and encroach on employees’ privacy. Under the proposed rules, employers would be required turn over to the government and a union the company email addresses and personal telephone numbers of potential bargaining unit members.

Conclusion

The proposed rules represent significant changes to the Board’s long-standing election procedures. Moreover, there are legal questions as to the Board’s authority to implement these changes and whether they are consistent with congressional intent. Employers should anticipate that a final rule will be issued before the end of 2014, with its implementation subject to legal challenge.

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