

One Minute Memo[®]



THE NATIONAL LABOR RELATIONS BOARD: NEW EXPEDITED ELECTION RULES AND POSSIBLE NEW MEMBERS

New Expedited Election Rules

With only days left in the term of National Labor Relations Board (“NLRB” or “Board”) Member Craig Becker, and just a few days before the Christmas holiday, the Board announced that it adopted final rules that will significantly expedite the processing of election petitions filed by unions. The new rules will:

1. Provide an NLRB hearing officer with the ability to limit the evidence that can be introduced at a representation case hearing.
2. Provide the hearing officer with the authority to deny a party the right to file a post-hearing brief.
3. Eliminate a party’s right to have the NLRB review a decision by a regional director that directs an election.
4. Eliminate current language that requires an election to be conducted within 25-30 days, thereby permitting elections to be held before the 25-day period.
5. Eliminate a party’s right to have the NLRB review any decisions by a regional director or an administrative law judge regarding post-election disputes.

One of the unstated reasons for the Board making these changes is that many unions and even NLRB personnel claim that employers have abused the current process by litigating issues merely to delay an election. In their view, many employers, rather than resolving the election issues such as eligibility of the voters and stipulating to the election, often litigate minor issues simply to gain additional time to counter the union’s organizing efforts.

Under current NLRB case processing goals, if the parties stipulate to an election it will be held in a median of 38 days from the date of the filing of the petition, but if a hearing is necessary the median is approximately 56 days. The new rules will reduce the time for processing representation cases that require a hearing by approximately 14 days, which means that elections will be held in roughly the same time as if the parties had stipulated to an election.

In addition to having a quicker election, the new rules will limit an employer’s ability to raise issues and, as a consequence, may inhibit the ability to preserve them for judicial review. Although the implementing guidance has not been announced, the new rules give NLRB regional directors and hearing officers significant discretion in determining the issues that can be raised in pre-election hearings. They also give the Board more discretion in deciding what cases to review on appeal.

Although the new rules will not become effective until April 30, 2012, the National Chamber Litigation Center, in conjunction with the Coalition for a Democratic Workplace, filed a lawsuit seeking to enjoin the implementation of the rules. With additional lawsuits potentially on the horizon, it is important for employers to begin reviewing their policies and strategies

regarding resisting union organizing with the new rules in mind.

Click [here](#) to read the final rule and introduction, and [here](#) to read a description of the amendments.

Possible New Board Members

In addition to the new rules, it is anticipated that President Obama will make recess appointments to the NLRB. Absent new appointments, the NLRB would be unable to issue decisions after Member Becker's term expires at the end of this year because it would not have the three members necessary to constitute a quorum.

Therefore, it is noteworthy that President Obama, on December 15, 2011, announced his intent to nominate Sharon Block and Richard Griffin to be members of the NLRB. Ms. Block is currently the Deputy Assistant Secretary for Congressional Affairs at the U.S. Department of Labor, but prior to that appointment worked for Senator Ted Kennedy as Senior Labor and Employment Counsel for the Senate HELP Committee. Mr. Griffin is currently General Counsel to the International Union of Operating Engineers (IUOE).

It would appear that the December 15 announcement is a step toward making the anticipated recess appointments because a person must first be nominated in order to be given a recess appointment. Because the authority of the President to make recess appointments has rarely been challenged, there is little established law regarding exactly under what conditions the President has such authority. While 47 Republican Senators recently wrote the President announcing their intent to oppose any recess appointments to the NLRB, it is expected that "new" law may soon be in the making.

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