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NLRB EXPEDITED ELECTION RULES GO INTO EFFECT NEXT WEEK!

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The expedited election rules newly adopted by the National Labor Relations Board ("Board" or "NLRB") will take effect on April 14, 2015 and will significantly shift the playing field and make it far easier for unions to organize employees. The General Counsel recently issued a Guidance Memorandum on "Representation Case Procedure changes Effective April 14, 2015" (Memorandum GC 15-06, April 6, 2015), the key points of which are summarized below.

The New Rules

The newly approved rules include the following changes to existing representation case procedures:

- Shorter Time for Pre-Election Hearings. Pre-election hearings will normally be set to open eight days from the date of service of the notice of hearing.

- Employer Must Post a Notice of Petition for Election. An employer will be required to post this notice within 2 business days after service of the Notice of Hearing, and may have to distribute this notice electronically as well. This requirement is in addition to the requirement to post a Notice of Election at least 3 full working days prior to the day of the election and perhaps distribute electronically this notice as well.

- Employer Must Prepare and File a Position Statement to Identify Disputed Issues. An employer will ordinarily be required to prepare and file a comprehensive "statement of position," by noon on the business day preceding the date of the hearing. In that position statement, the employer must identify any issues regarding the composition of the proposed bargaining unit, day, time and place of the election, and other election-related matters. Any issues omitted by the employer from its statement are waived by the employer and may not be raised later.

- Employer Must File a Preliminary List of Voters as Part of the Required Position Statement. The employer must also provide a preliminary list of voters with names, work locations, shifts and job classifications in the proposed unit, but without contact information, to the petitioning union (and any other parties) and to the regional director. If the employer contends that the proposed unit is inappropriate, the employer shall separately list the names, work locations, shifts and job classifications of all individuals, if any, that it contends must be added to or excluded from the proposed unit to make it an appropriate unit.

- More Discretionary Authority to Regional Directors and Less Pre-Election Resolution of Disputes Concerning Unit Placement, Exclusions, and Eligibility. The regional director will decide the issues to be litigated in each case. The hearing officer may solicit offers of proof on any or all issues. If the regional director determines that the evidence described in the offer of proof is insufficient to sustain the proponent's position, the evidence shall not be received.

- No Right to File a Post-Hearing Brief. The regional director will have the authority to determine whether parties may file post-hearing briefs.

- New Excelsior List Requirements. Under the old rule, the union received an Excelsior list of eligible voters via the Board from the employer prior to the election containing the employees' full names and residence addresses but not their email addresses and telephone numbers. Under the new rules, an employer must file a preliminary list of voters as well as an Excelsior list. The latter list must be sent directly to all parties, and must contain the employees' available personal (non-business) email addresses and available telephone numbers (home and cell), work locations, shifts and job classifications. The rules also require that the list be produced in electronic form unless the employer lacks the capacity to do so.

- Earlier Submission of Excelsior List. The Excelsior list will generally be required to be given to the petitioning union (and the other parties, if any) within two business days after the approval of an election agreement or the issuance of a Direction of Election rather than the seven calendar days previously allowed.

- Earlier Elections. Current language that requires an election normally be conducted between the 25th and 30th days after the direction of the election will be eliminated, and replaced by language requiring that elections be set "for the earliest date practicable," thereby permitting elections to be held as early as only a few days after the Regional Director's decision (assuming non-employer parties waive their right to have the Excelsior list at least 10 days before the date of the election).

- No Right to NLRB Review of Post-Election Disputes. A party's right to have the NLRB review any decisions by a regional director or an administrative law judge regarding post-election disputes will be eliminated. NLRB review of post-election disputes will become discretionary.

- Electronic Filing of Petitions and Other Documents Permitted. Petitions and other documents will be permitted to be filed electronically rather than by hand or regular mail.

While the Board did not dictate any time frame for the conduct of an election during the first round of proposed rulemaking, NLRB regional personnel have indicated that the expedited election process could result in elections taking place between 13 and 25 days after the filing of a petition as contrasted with the current 38 to 45 day time frame. We believe most NLRB elections under these new election rules will take place within just a few weeks after the representation petition has been filed.

Potential Challenges

Legal challenges to the new NLRB election rules are pending in federal district courts in the District of Columbia and Texas. Such challenges seek a declaration that the rule is contrary to the National Labor Relations Act and the First and Fifth Amendments to the Constitution, but there is no indication that any court will enjoin the rule prior to April 14.

Consequences for Employers

The new rules shorten the time from petition to election to three weeks or less, creating, in the words of dissenting Board

members Philip Miscimarra and Harry Johnson, a "vote now, understand later" scheme and "advocat[ing] a 'cure' that is not rationally related to the disease."

There can be no doubt that these new rules will significantly benefit unions and their organizers. Indeed, the shorter the election process (13-25 days vs. 38-45 days), the less time that an employer and employees will have to express or formulate their views about the pros and cons of unionization and to communicate facts regarding union representation. For this reason, employers may wish to prepare certain draft communications in advance in the event a petition is ever filed.

The limited time to communicate with employees, however, is just one burden employers will face in opposing a union petition. With the representation hearing normally opening within eight days from the service of the notice of hearing by the regional director, and a detailed position statement setting forth all of the employer's positions as to the unit due no later than noon on the business day preceding the date of the hearing, an employer also will face difficulties in determining what position to take as to the appropriateness of a proposed unit as well as over which employee classifications should be included. An employer that has not determined, in advance, what bargaining unit(s) it would consider appropriate at each of its locations and which employees should be included and excluded from those units likely will miss issues and arguments that can or should be raised at hearing.

An employer may also find that the persons best capable of relaying its message, front-line supervisors, are in limbo as to whether they are or are not excluded from the unit as statutory supervisors. Such a situation could force an employer to operate during a campaign based on its best guess as to certain individuals' supervisory status, a risky proposition. For example, without the benefit of a stipulation or a finding on supervisory status, an employer that has purported supervisors assist in communicating the employer's position in an election campaign runs the risk of election objections and unfair labor practice charges that will invalidate the election if the NLRB ultimately finds that the individuals are not statutory supervisors. Likewise, an employer that fails to instruct employees, who are later found to be statutory supervisors, on the rules regarding lawful campaign communications and on the need to avoid attending union meetings runs the risk of election objections and unfair labor practice charges that will invalidate the election results.

One particularly frustrating aspect of the new rules is that while the time period between a petition to an election has undoubtedly been shortened, the overall time frame for processing election cases to conclusion may not be significantly impacted. 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 light of the proposed rules, an employer is best advised — as always — to maintain positive employee relations to minimize the risk of a union organizing petition being filed. Moreover, rather than wait until after a petition is filed, an employer may wish to prepare, well in advance, its position as to appropriate bargaining units and draft communications to employees on unionization.

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