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Management Alert

NLRB Issues Proposed Expedited Election Rules

By John J. Toner and Ronald J. Kramer

Déjà vu all over again. On Wednesday, February 5, 2014, the National Labor Relations Board ("Board" or "NLRB") announced new proposed rules to expedite the union election process. If this sounds familiar, it is because in June 2011 the Board proposed, in substance, the same expedited election rules and in December 2011 decided to approve and implement certain of the new rules -- but that decision was invalidated by a district court over a quorum issue. If all or even some of these new proposed rules are properly adopted, however, they will significantly shift the playing field and make it far easier for unions to organize employees.

The Back Story

The NLRB first announced proposed expedited election rules in June 2011. The Board ultimately approved a subset of the rules which were released in December 2011. The Chamber of Commerce of the United States of America and the Coalition for a Democratic Workplace then filed suit challenging the rule. Among other things, the plaintiffs asked for a declaration that the rule was contrary to the National Labor Relations Act and the First and Fifth Amendments to the Constitution, and that it violated the Administrative Procedures Act and the Regulatory Flexibility Act.

On May 14, 2012, the United States District Court for the District of Columbia ruled that the expedited election rules were invalid. The court did not rule on the merits, however, but instead held that the NLRB lacked the authority to issue the rules because they were not, as required, adopted by a three member quorum of the NLRB Members. At the time the rule was adopted, the Board had three Members, but when the new rules were voted on via the Board's electronic voting procedures, Member Hayes did not vote, nor was his presence verified at the "meeting" at which the voting took place. The court found Hayes did not "attend" the meeting, and hence there was no quorum of three Members present for the vote.

The NLRB promptly appealed to the D.C. Circuit Court of Appeals. On February 19, 2013, the court held the case in abeyance given the pendency of *Noel Canning*, which challenged the propriety of the President's recess appointments. (*Noel Canning* is currently before the Supreme Court, where a decision is anticipated shortly.)

In July, the Senate confirmed a full complement of Board Members, ending, at least going forward, any *Noel Canning* recess appointment or proper quorum issues. This led to some speculation that the Board might drop the expedited election litigation and instead lawfully adopt and re-issue new expedited election rules. On December 9, 2013, the Board agreed to dismiss the appeal, paving the way for the re-issuance of the new rules.

The New Proposed Rules

The proposed rules announced today are reported to include, in substance, all the rules originally proposed in June 2011, including those that were approved in December 2011 but invalidated on a procedural basis. The actual Notice of Proposed Rulemaking containing the new proposed rules will appear in the Federal Register tomorrow. The rules that were approved before and now apparently have been proposed again include the following:

- Providing an NLRB hearing officer with the ability to limit the evidence that can be introduced at a representation hearing to genuine issues of material fact concerning whether there is a question concerning representation. In particular, the resolution of disputes concerning the eligibility or inclusion of individual employees would not be necessary in order to determine if a question concerning representation exists and, therefore, such disputes generally would be resolved, if necessary, post-election. The Board proposes a bright line rule that questions concerning eligibility or inclusion of individuals constituting no more than twenty percent of potential votes be litigated post-election. Moreover, no evidence on an issue would be taken unless a party shows by an offer of proof that there is a genuine issue of material fact concerning a disputed issue.
- Providing the hearing officer with the authority to deny a party the right to file a post-hearing brief.
- Eliminating a party's right to have the NLRB review a decision by a regional director that directs an election.
- Eliminating current language that requires an election to be conducted within 25-30 days after the direction of the election, thereby permitting elections to be held as early as 10 days after the Regional Director's decision.
- Eliminating a party's right to have the NLRB review any decisions by a regional director or an administrative law judge regarding post-election disputes. NLRB review of post-election disputes will now be discretionary.

Also apparently included in the newly announced proposed rules are the other proposed rules that had yet to be approved. These proposed rules include the following:

- Representation hearings would have to be held within seven days of the filing of a union's representation petition.
- Petitions and other documents may be filed electronically rather than by hand or regular mail.
- An employer would be obligated to prepare and file a comprehensive "statement of position" on the union's election petition, which would be due no later than 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 would be waived by the employer and may not be raised later.
- Currently, the union receives 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 proposed rules, an employer would send the list directly, and would also have to provide on the list the employees' email addresses and telephone numbers, work locations, shifts and classifications. The proposed rules also require that the list be produced in electronic form unless the employer lacks the capacity to do so.
- The *Excelsior* list must be given to the union within two work days of the Direction of Election instead of the current rule allowing seven work days.

While the Board did not dictate a timeline for the conduct of an election, during the first round of proposed rulemaking then Member Brian Hayes indicated that the expedited election process would result in elections taking place between 10 and 21 days after the filing of that petition as contrasted with the current 42 to 45 day timeline.

Next Steps

The actual Notice of Proposed Rulemaking containing the new proposed rules will appear in the Federal Register tomorrow. Given the Board has said the new proposed rules are "in substance" the same as the prior proposed rules addressed above, there may be slight changes.

The public has been invited to comment on the proposed rules. The deadline for comments is April 7, 2014. A public hearing also been scheduled during the week of April 7th as well. Last time, some sixty-five thousand comments were filed. We would anticipate a similar level of comments this time from employers, employees, unions, and employer associations.

Consequences for Employers

The first time the proposed rules were addressed, then Member Hayes asserted that the proposed rules were merely a transparent attempt to limit both an employer's ability to contest union election issues and its legitimate opportunity to communicate its own views about unionization with employees. Regardless of whether he is correct as to the intent, the shorter the election process, the less time that an employer and other employees will have to express or formulate their views about the pros and cons of unionization. If 42-45 days truly becomes 10-21 days, something that may not be practical in a government bureaucracy, an employer that is not aware of organizing going on until receipt of the petition will have very little time to communicate its opinions. 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 campaigning against a union. An employer may 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 supervisors. An employer that treats them as supervisors in terms of having them assist in any communications of the employer's position in an election campaign runs the risk of election objections and unfair labor practice charges that will invalidate the election results in the event the NLRB ultimately determines that they are not supervisors.

With the representation hearing beginning within seven days of the filing of the petition, and a detailed position statement setting forth all of the employer's positions as to the unit due not later than 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 whom 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.

In light of the proposed rules announced today, 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.

The new rules, assuming some or all are adopted, will not take effect until sometime after the public comment period and the hearing. If some or all of the proposed rules are approved, no doubt challenges will be made to them on substantive grounds and perhaps procedural ones as well. Please follow our *Employer Labor Relations Blog* for future developments on the new expedited election rules.

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