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Management Alert

NLRB Again Approves Expedited Election Rules

By Kenneth R. Dolin, David L. Streck and John J. Toner

Here we go again. The National Labor Relations Board ("Board" or "NLRB") has adopted its expedited election rules that have been previously proposed twice and approved in part once, only to be ruled invalid by the United States District Court for the District of Columbia on procedural grounds. The rule will be published in the Federal Register on December 15, 2014. Absent another successful challenge, these rules will take effect on April 14, 2015 and will significantly shift the playing field and make it far easier for unions to organize employees.

Background

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 2012. 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. In July, 2013 the Senate confirmed a full complement of Board Members, ending, at least going forward, any *Noel Canning* recess appointment or proper quorum issues. On December 9, 2013, the Board agreed to dismiss the appeal and, instead of continuing the legal fight, on February 5, 2014, the Board again announced the proposed election rules, including all the rules originally proposed in June 2011. The public was invited to comment on the proposed rules and the deadline for comments was April 7, 2014. In total, over 74,000 thousand comments were received in connection with the expedited election rules.

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 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 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 a petition as contrasted with the current 38 to 45 day time frame.

Next Steps/Potential Challenges

More legal challenges to the new rules are anticipated and it appears likely that the Chamber of Commerce and the Coalition

for a Democratic Workplace, among others, will again file suit. Such challenges will likely seek a declaration that the rule is contrary to the National Labor Relations Act and the First and Fifth Amendments to the Constitution.

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 (10-21 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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