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NLRB Adopts Expedited Election Rules, Effective April 15, 2015

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After a series of false starts, on December 12, 2014, the National Labor Relations Board ("NLRB" or "Board") adopted a 733-page final rule ("Final Rule") that will significantly change the Board's longstanding union election procedures and eliminate many of the steps that employers have relied on to protect their rights and the rights of employees who may not want a union. Cumulatively, the amendments in the Final Rule, which will take effect on April 15, 2015, will tilt the scales of a union election in labor's favor by expediting the election process. Among the most important changes contained in the Final Rule are the following:

- Representation hearings will take place within eight days of the filing of the petition.

- Employers will have to provide the NLRB and any union that files a petition with a list of the employees' names, job classifications, shifts, and work locations before the hearing.

- Employers will have to submit detailed position statements before the hearing date identifying any and all issues that they believe exist with respect to the petition—this will include issues concerning eligibility, inclusion or exclusion from the unit, supervisory and managerial status, and whether the unit that the union seeks is appropriate. If an issue is not raised in a position statement, it will be deemed to have been waived.

- Employers will no longer have the right to a hearing on all such issues—the Regional Office will generally deny employers the right to have important questions concerning eligibility and supervisory status resolved before an election.

- Employers will no longer have the right to file post-hearing briefs on issues that are litigated at a representation hearing; instead, parties will be limited to arguing their positions in closing statements unless the Regional Director decides that briefs are necessary.

- Employers will no longer have the right to appeal a Regional Director's decision before an election is conducted.

- Employers will be required to provide unions with employees' telephone numbers and email addresses as part of the "Excelsior list"—until now, that list was limited to names and addresses. The list will now be due in two days rather than seven days.

- The Board's review of a Regional Director's legal findings and conclusions will be severely limited.

- Most important, there will no longer be a minimum time period for the pre-election campaign because the Final Rule eliminates the minimum 25-day waiting period between a direction of election and the election. Rather, the Regional Director "shall schedule the election for the earliest date practicable"—which could be as early as 14 days after the petition is filed.

By and large, the amendments run roughshod over an employer's right to dispute the propriety of the proposed bargaining unit before the election occurs and saddles the employer with new pre-election obligations. In effect, the NLRB has endeavored to speed up the election process so that an employer is unable to investigate and present a campaign against the union or fully consider the applicable legal questions. While the NLRB argues that the amendments "remove unnecessary barriers" to a union election, in reality, what was removed were those checks and balances preventing a union ambush and ensuring that an employer's right under the National Labor Relations Act ("Act") to express and communicate its position under Section 9(c), the "employer free speech" provision, has meaning. To put it bluntly, organized labor and the Board hope for, and the rest of us should expect, more union elections, in a shorter period of time, and more victories by unions trying to organize.

While the NLRB characterizes the amendments as necessary to "modernize the representation case process," there is little in the Final Rule that merits such a claim. The amendments seem little more than window dressing to obscure the Board's intended goal of helping unions win elections.

Amendments Create New Obligations for Employers

Among the many changes enacted, the Final Rule requires that, as soon as an election petition is served, which will now be done by email, employers will be required to post *and* distribute a notice from the NLRB informing their employees that a representation petition has been filed and that an election may follow. Once the election notices are provided by the Board, those employers that communicate with their employees electronically will also be required to distribute such notices via email to each employee.

Until now, an employer did not have any obligation to provide a union that files a petition with a list of the names of its employees until seven days after an election was either agreed to by the employer and the union or directed by the NLRB. Under the Final Rule, employers will be required to provide the union with a list of the employees' names and classifications, as well as their shifts and work locations, by the day before the

hearing—in other words, within seven days of the filing of the petition. In addition, if the employer believes that employees in additional classifications and/or at additional locations should also be included in the unit, the employer will be required to provide the union and the NLRB with the names, classifications, shifts, and work locations of all such employees as well.

Moreover, once an election has been ordered or agreed to, in addition to their home addresses, employers will now also be required to provide the union with their employees' personal phone numbers *and* personal email addresses (to the extent that they have one or both). Previously, employers had seven days from the date that the decision and direction of election was issued to produce this information and deliver it to the Board. The Board has reduced that time period to two days and will require employers to send the information directly to the union as well.

Amendments Change the Scope and Timing of Pre-Election Hearings

In a change from historical practice, the Final Rule requires employers to prepare and submit written statements no later than the day before the hearing (that is, no later than seven days after the petition is filed, and potentially earlier), identifying all disputed issues and setting forth the employers' positions in advance of the hearing. Failure to do so results in a waiver of those arguments.

While requiring employers to provide their arguments in advance of hearing will, in and of itself, give the union a leg up in any pre-election hearing, the opportunity to even identify all of the disputed issues will be hampered by the shortened length of time between the filing of the petition and the date of the hearing, which the Board has set at eight days. Should an employer, in its haste to respond, misstate an argument in its pre-hearing submission or fail to raise an issue that it has not yet identified, it appears that the employer will be out of luck, because the Final Rule prohibits parties from litigating positions that are inconsistent with their pre-hearing statement.

Moreover, to the extent that the employer maintains that additional classifications of workers should be included in the proposed unit in addition to those claimed by the union, the employer will be required to provide a list of the additional employees' names, their shifts and work locations, as well as their classifications to the union and the NLRB.

Significantly, the amendments grant the Regional Director discretion to determine what issues an employer will be permitted to litigate in a representation hearing and whether the parties will be permitted to submit post-hearing briefs. The very idea that an employer may not be permitted to present arguments in a written submission that is based upon the record testimony raises serious concerns about whether conclusions will be reached as a result of a good-faith examination of the entire record, including consideration of the parties' legal arguments applying Board precedents to the facts developed at the hearing, rather than just the facts that a party may have expected to be introduced based on pre-hearing statements.

Expect More and Faster Elections and More Union Organizing

Until now, the NLRB's goal has been to ensure that elections take place within 45 days of the filing of a representation petition. The Board's goal in amending its rules is to shorten that period as much as possible without amendments to the Act, which would require Congressional action.

When measuring their likely impact, the changes in the election rules should not be viewed in isolation. Rather, they need to be looked at in light of the Board's ruling in *Specialty Healthcare* and subsequent cases. In that line of cases, the Board made clear that it will find smaller, easier-to-organize units sought by unions to be appropriate and will direct elections accordingly, even though under prior Board decisions such units would have been found to be too small under the rule that units are not to be based on the extent of organizing.

The Final Rule should also be viewed in the context of the Board's recent *Purple Communications* decision, which held that, if employees are allowed to use their employer's email system for any nonwork-related purpose, they will be presumptively allowed to use their employer's email system for union organizing and other matters relating to terms and conditions of employment.

While elections generally have been scheduled to take place between 25 to 30 days after the Regional Director issues a decision and direction of election, employers should expect that time period to be reduced substantially. While the Board has not specifically stated how long after the decision an election should be scheduled, the amendments require that it be scheduled at the earliest date practicable. This requirement is likely to cause additional tension between the parties and the region, partly because the Final Rule further requires the employer and union to reach an agreement regarding the date, time, and place of the election *before* the pre-election hearing even takes place. Previously, this conversation did not occur until after the decision and direction had been issued by the region. If the employer and the union are unable to agree on the dates, times, and locations for the voting, they will be decided by the Regional Director. How this will play out is difficult to say, though it is likely a fair assumption that the outcome will leave many employers unhappy since the NLRB can be expected to give great weight to the petitioning union's preferences in setting the election.

What Employers Should Do Now

Under the Final Rule, unions will be further encouraged to conduct "stealth" or "underground" campaigns to increase the chances of catching employers unprepared and denying them the opportunity to counter union promises made to employees. As a result, many commentators noted when these amendments were proposed that a major effect of the amendments, if adopted, would be essentially to create a continuous organizing drive and campaign state of mind at many companies where the possibility of union organizing was, until now, theoretical or remote.

There are steps that employers may want to consider taking in advance of April 2015 to adapt to the new reality of ambush elections:

- Examine your workforce for potential vulnerability to union organizing, including wage and hour violations or uncompetitive wages or benefits.

- Review and update workplace policies that become relevant during union organizing, such as solicitation/distribution, electronic communications, and social media policies.

- Assess your workforce for potential bargaining unit issues, such as identifying supervisors and which employees share a "community of interest."

- Train your managers and supervisors to recognize the early warning signs of union organizing and on how to respond lawfully to union campaigns.

- Contact legal counsel with any questions or for any assistance to ensure that you are prepared to respond to an organizing campaign consistent with the Final Rule.

For more information about this Advisory, please contact:

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