The National Labor Relations Board Proposes Rules to Reform Pre-Election and Post-Election Procedures

By: Dennis B. Cook

The National Labor Relations Board recently announced a proposal for sweeping new changes to the rules that have governed and protected secret ballot elections for more than 75 years. When adopted, these revisions to the Board's rules will make it much easier for unions to organize, while at the same time making it more difficult for employers to wage an effective campaign to state their point of view.

Under the pretext of reducing unnecessary litigation, streamlining the pre- and post-election procedures, and fixing flaws in the Board's current procedures, the Board has announced the following proposed changes.

- The Parties must submit a "statement of position form" identifying the issues that they want to raise at the pre-election hearing.

- The pre-election hearing will begin no later than 7 days after a hearing notice is served.

- All voter eligibility issues are deferred to after the election unless the issue affects at least 20% of the bargaining unit.

- Employers will be required to provide a list of all potential voters by the opening of the pre-election hearing.

- The right to appeal the Regional Director's pre-election rulings would be eliminated. All requests for review are deferred until after the election.

- The Regional Director's post-election rulings are final and there would be no right to obtain Board review, although the Board could exercise discretion to accept review of post-election rulings.

- The voter eligibility list must be provided within 2 working days, shortened from 7 days under current Board rules.

- Voter eligibility lists must contain telephone numbers and e-mail addresses as well as home addresses.

These are the major proposed changes. These potential new rules, along with other modifications to the secret ballot election process, can be found at: http://www.nlrb.gov/news/board-proposes-rules-reform-pre-and-post-election-representation-case-procedures

The Current System

Labor organizations often start union campaigns quietly by contacting a few employees and getting them to sign cards authorizing the union to represent them in negotiating with their employer. Once a few employees show interest, these employees in turn contact their co-workers with the same message – sign authorization cards. Many times employees are told that signing an authorization card merely means that they agree they want a secret ballot election even though authorization cards actually state that the employees are choosing the union to represent them by signing the card.

Typically, the union seeks authorization cards from at least 50% of the employees at which point it will attempt to show these cards to the employer and demand "voluntary" recognition. Most employers refuse voluntary recognition for good reason – they have had no opportunity to talk to their workers and explain their point of view regarding unionization. Although not part of the proposed rule changes, many believe that the current Board is looking for the right case to require employers to agree to voluntary recognition, called a "card check." Congress recently refused to pass the misnamed Employee Free Choice Act which in part would have required voluntary recognition, an oxymoron not lost on the opponents to EFCA.

Almost all representation cases are initiated by labor organizations seeking to represent a group of the employer's workers, called an "appropriate unit for bargaining." For 75 years, the NLRB has built in safeguards to the representation process to ensure that employees can vote in a free and fair election. These safeguards include protecting the employees' privacy by not disclosing their names and confidential information unless the Parties voluntarily agreed to an election or the Regional Director ordered an election after a pre-election hearing. In addition, employers' right to state "any views, argument, or opinion, or the dissemination thereof, . . . if such expression contains no threat of reprisal or force or promise of benefit" guaranteed under Section 8(c) of the Act was given full expression by permitting an adequate amount of time between filing the petition and the election for an employer to campaign and make known its views on unionization and its possible affect on the workforce.

The Proposed New System

Under the guise of "justice delayed is justice denied," the proposed rule changes attempt to expedite secret ballot elections, but in so doing the Board undermines employee privacy and employer due process. Unions will continue to campaign in the same manner as in the past. Union representatives may make statements about an employer or its terms and conditions of employment which the employer cannot refute because it does not know the campaign has begun. Often, the first time that an employer finds out about union organizing efforts is when the union demands voluntary recognition or files a representation petition with the Board.

Instead of planning and carrying out an effective communication strategy in a reasonable time period, the proposed rules shortened all relevant time periods thereby limiting an employer's ability to communicate with its employees. A "statement of position" must be prepared immediately, possibly before the employer has had an adequate amount of time to evaluate the situation and determine its response. Instead of assessing the workplace issues which influenced employees to sign authorization cards, the employer must prepare for a pre-election hearing to take place within 7 days of service of the notice of hearing. The employer must prepare and turn over a preliminary list of employees to the union at the pre-election hearing. The proposed rules do not limit the union's use of these names for continued campaigning during the pre-election process.

Most importantly, because of the proposed limits on litigating voter eligibility issues, pre-election hearings will probably become defunct in all except the most unusual circumstances. Thus, it is likely that most secret ballot elections will take place within one to two weeks after the representation petition if filed. Under these proposed changes, unions will be allowed to campaign indefinitely before filing a representation petition, develop its election campaign before filing a representation petition, and implement its campaign immediately without being concerned with pre-election issues as they are deferred until after the election. On the other hand, employers will be at a significant disadvantage because they will be unprepared for union organizing, will frantically try to play "catch up," will develop a hasty response without adequate time, and will implement their campaigns in a very short time frame. Even seeking review of representational issues will be short-circuited under the proposed rules by deferring review until after the election and limiting review of the Regional Director's ruling to the discretion of the Board.

Coupled with the NLRB General Counsel's recent announcements to seek injunctive relief in federal court, require employers to read an official Board notice to its employees, provide employees' names and addresses to the union, and give the union access to the employer's bulletin boards and possibly e-mail in union organizing cases, it is clear that the Board and General Counsel are seeking ways to facilitate union representation efforts. Employers and other interested parties may submit written comments to the tendered rule changes within 60 days of the Board proposed rule-making and may participate in a public Board hearing scheduled for July 18 (remarkably providing less than 30 days' notice to attend the hearing). Assuming these changes go through, employers are well-advised to re-visit their employment practices and to institute a regular schedule to discuss their views on unionization with their employees.

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