NLRB's Election Rules Overhaul Sounds Alarms for Employers

In a one-two punch combination for employers, the National Labor Relations Board (NLRB) issued on Dec. 12, 2014, its final expedited election rules. Supporters colloquially call them "quickie" election rules while opponents call them "ambush" election rules.

The rules follow on the heels of the NLRB's decision on Dec. 11, 2014, in *Purple Communications*. (For more information on *Purple Communications*, see our client alert.) In *Purple Communications*, the NLRB reversed established precedent to hold that employers must make corporate email systems available to workers who wish to use them in trying to organize a union, or when, in any other way, trying to further their wages, hours or working conditions. One question we noted in our client alert that was left unanswered in the board's decision was whether employers would have to make employee contact lists available. These rules clearly answer that question. When these rules take effect, the board will require employers to turn over not only employee names, but email addresses, and that will need to include even personal email addresses, plus phone numbers, again including personal phone numbers. The obvious concerns over the disclosure of private information is just one of the things making these new rules so controversial.

The new election rules take their name –"quickie" or "ambush" rules—from the most controversial feature of the new rules. These new rules will overhaul the current election processes. Elections will take place at an extremely expedited pace. Instead of elections occurring within 30 days of the that when a union files its petition with NLRB seeking to represent workers, under these new rules, elections will occur within two weeks. Legally employers have a right to express their opinions during such a campaign, but commentators have noted that these new rules so shorten the election period that they will not allow sufficient time for employers to speak in any meaningful way. Commentators argue this effectively strips employers of their speech rights. Remember that unions will wait to file their petition until they are prepared to win an election. Employers have no control over the date the petition is filed, and often do not even expect one. Once a petition is filed, the employer will have to immediately prepare for a hearing to be held within one week, and submit a list of employees who might constitute an appropriate bargaining unit for the union to represent, and file a statement of position on election issues, all before a hearing to be held approximately one week following the petition's filing. Worse, the employer will have no right to file post-hearing briefs and faces limited appeal rights. Within days following the hearing, or "as soon as practicable," the board will hold the union's election. Because unions will be prepared for all of that before they file their petition, commentators have argued that these rules effectively give an employer so little time they will have no practical ability to assert their legal speech rights. Thus, supporters see a "quickie" set of election rules, whereas opponents see only the potential for "ambush."

Indeed, the controversy surrounding these rules is so deep that lawsuits have been promised already by various employer groups and chambers of commerce.

Unless stayed by the courts, the NLRB has announced its rules will take effect on April 14, 2015.

In the interim, Congress will see significant changes following the recent elections. It remains to be seen how these new rules, building on numerous recent board decisions like *Purple Communications* will be greeted by the new Congress.

410 17th Street, Suite 2200
Denver, Colorado 80202

Employers should immediately review their email systems policies, as well as their policies on solicitation, bulletin boards, access, social media, confidentiality, uniforms, Section 7 disclaimers and at-will employment and arbitration. Companies need to be sure their policies are reviewed right now against the latest developments in board law.

Additionally, employers who anticipate potential union organizing should immediately contact legal counsel to discuss their legal rights, including the need, now, before any organizing even begins to undertake appropriate educational efforts within their workforce. Once these rules take effect, there may not be sufficient time once a petition is filed for an employer to communicate with workers effectively.

This document is intended to provide you with general information regarding the NLRB's expedited election rules. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorney listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

Bill C. Berger
Shareholder
bberger@bhfs.com
303.223.1178