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labor and employment lawflash alert

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NLRB Implements Extraordinary Regulatory Overhaul to Election Procedures

Employers covered by the NLRA should prepare for the possibility of organizing campaigns with expedited representation election procedures that provide extremely limited pre-election hearings and restrictive appeal options; elections will be held much more quickly than the current median of 38 days after the petition is filed.

December 21, 2011

Today, the National Labor Relations Board (NLRB or the Board) announced final rule changes to decades-old election procedures, marking the culmination of a six-month process following the Board's issuance of a June 22, 2011 Notice of Proposed Rulemaking (NPRM) in the *Federal Register*. The proposed rule outlined a massive regulatory overhaul to National Labor Relations Act (NLRA or the Act) election procedures designed to significantly shorten the period of time between the filing of an election petition and the holding of the election. The final rule implements a modified version of the proposed rule, outlined by the Board in a resolution adopted by a 2–1 vote in a public meeting on November 30, 2011, with Member Brian Hayes dissenting.

The final rule is scheduled to take effect on April 30, 2012. The Board stated that it delayed the effective date of the final rule so that Member Hayes would have 90 days to write a dissent and have it published before the final rule becomes effective. The U.S. Chamber of Commerce and the Coalition for a Democratic Workplace, both represented by Morgan Lewis, have already filed a complaint in the U.S. District Court for the District of Columbia seeking to block implementation of the new rules. View the complaint and final rule at http://www.chamberlitigation.com/chamber-commerce-et-al-v-national-labor-relations-board. Because the Board will likely be reduced to only two members at the end of this year when Member Craig Becker's recess appointment concludes, thus losing its three-member quorum, the Board may be powerless to take any further action after the Senate adjourns for the year sometime in the next month (ending Member Becker's recess appointment) and for the foreseeable future.

Background

The NLRA gives employees the right to "form, join, or assist" unions; to bargain collectively with their employers; or to refrain from engaging in such activities. The Board has long played a central role in union elections, overseeing most aspects of the pre- and post-election process. Since the NLRA was enacted, employers have had the ability to challenge either the appropriateness of the petitioned-for unit of employees or individual voter eligibility through a pre-election evidentiary hearing process, briefing, and Board review.

For many years, the Board has had a fairly stringent and successful internal policy designed to schedule elections within approximately six weeks after a petition is filed. In 2010, even with the pre-election hearing and review procedures truncated or eliminated by the final rule, initial representation elections were held within a median of 38 days after the petition was filed, with more than 95% of initial elections being held within eight weeks of the filing of a petition.

The Board's Final Rule

Although the Board has used its rulemaking power only sparingly, Section 6 of the NLRA authorizes it to make rules and regulations "necessary to carry out the provisions" of the Act. The June 22 NPRM resulted in a massive public response. At public hearings on July 18 and 19, 2011, the Board heard testimony from 66 witnesses, including Morgan Lewis's Chuck Cohen, a former Board member, who testified against the proposed changes. Morgan Lewis also submitted detailed comments in opposition to the proposed rule on behalf of the Coalition for a Democratic Workplace, a coalition that included the U.S. Chamber of Commerce, the National Association of Manufacturers, the Retail Leaders Industry Association, and 275 other associations. The Board received more than 65,000 other sets of written comments regarding the proposed changes. Since the close of the comment period in September, the Board attempted to analyze those comments at a hurried pace.

The final rule announced today will result in elections being held at a faster pace in many cases, and it also will substantially reduce an employer's opportunity to litigate issues of voter eligibility or inclusion prior to an election. The changes would also reduce the information available to employees, prior to any election, regarding who would be represented by the union if the union prevails in the election.

The final rule mirrors the Board's November 30 resolution and contains eight amendments to the Board's existing rules for processing representation petitions. Generally, the adopted amendments reflect a commitment to speeding up the process and removing pre-election litigation and appeals, but without specific timetables embodied in the regulatory language. The changes are as follows:

> **Amendment #1** – Construes Section 9(c) of the Act to state that the purpose of a pre-election hearing is only to determine if a question concerning representation exists.
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> **Amendment #2** – Authorizes hearing officers presiding over pre-election hearings to limit the presentation of evidence on issues of supervisory status or other issues of voter eligibility or inclusion, if the hearing officers do not believe that such issues are "relevant to the existence of a question concerning representation."
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> **Amendment #3** – Will allow post-hearing briefs only in certain cases. Briefing would be limited at the discretion of the hearing officers.
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> **Amendment #4** – Will eliminate the right to seek pre-election review by the Board. Almost all appeals, including appeals related to election conduct, will be consolidated in one appeal after the election is conducted. The stated purpose of this amendment is to eliminate the need for appeals concerning issues that were "mooted by the results of the election."
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> **Amendment #5** – Will eliminate the 25-day waiting period to conduct elections in cases where a party has filed a pre-election request for review. Such a request for review will not be allowed under Amendment #4.

Amendment #6 – Will require "special permission" for pre-election review based only on "extraordinary circumstances" (i.e., where post-election review could not adequately resolve the issue).

Amendment #7 – Will make Board review of any remaining post-election disputes discretionary and enable the Board to reject any appeal that does not "present a serious issue for review." This aligns the post-election standard for appeals with the current standard for pre-election requests for review, which are discretionary.

Amendment #8 – Eliminates certain portions of the Board's regulations, which are deemed to be redundant.

The proposals from June 22 that were not included in the final rule—but that remain pending further consideration by the Board at a future date—include the following items, among others:

- Requirement that any pre-election hearing be held seven days after service of the notice of hearing.
- Requirement that an employer file a written statement of position prior to the hearing or else waive any substantive arguments not advanced by that date.
- Requirement that voter (*Excelsior*) lists supplied to the union include employee telephone numbers and, where available, employee email addresses.
- Requirement that the voter list be supplied within two days after the direction of election, rather than the seven days currently called for.
- Permission for unions to file representation petitions and related documents electronically.

Again, these proposals are subject to further consideration by this Board or a future Board.

Likely Effects of the Final Rule

As predicted, the most significant effect of the final rule will be to speed up the election process. Stipulated elections, whereby an employer does not seek to challenge unit appropriateness or voter eligibility issues, may ultimately not be impacted by the adopted changes. However, it is likely that regional offices will push for faster elections even in stipulated cases, following the effective date of the final rule. It remains to be seen how quickly elections may occur under the new rule. *Employers should prepare for the possibility that elections may take place within 20–30 days after a petition is filed, perhaps sooner*.

The Board's accelerated election process will also cause greater uncertainty regarding fundamental questions affecting who will be represented by any union, who can vote in the election, and who qualifies as statutory "supervisors" (and, therefore, can lawfully act on behalf of the employer during the election itself). Obviously, the shortened election period will diminish the information employers can provide to employees and decrease the time and information that employees have to decide whether they support or oppose union representation.

Although the time periods for elections will likely be shortened, the *overall* time frames for processing election cases to conclusion may not be significantly affected because the elimination of many of the pre-election procedures—particularly the opportunity to present evidence with respect to unit composition and voter eligibility—could result in more post-election litigation and adjudication. Member Hayes has explained that—based on pre-election uncertainty about which employees are

statutory supervisors—alleged supervisors and their employers could inadvertently engage in conduct that gives rise to additional unfair labor practice litigation. The cumulative effect of the final rule will be to reduce the amount of information available to employees prior to an election, reduce the time available for employees to make an informed choice, and reduce an employer's ability to educate the employees and to express legitimate views regarding the collective bargaining process. It will also deprive employees of enough time to become fully educated on the issues before having to cast their vote on such an important matter.

Conclusion

The final rule announced by the Board represents a culmination of years of effort by organized labor to achieve union-friendly reforms to the nation's federal labor laws. Although pro-labor groups did not succeed in passing the Employee Free Choice Act following President Obama's election, the NLRB has succeeded, at least for now, in finalizing new regulations that achieve the goal of speeding up elections and restricting an employer's ability to communicate with employees during the shortened pre-election period. Litigation challenges to the new regulations are already underway, raising uncertainty as to when the final rule will take effect.

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