



Legal Alert: Board Publishes Ambush Election Rule

12/23/2011

Executive Summary: The National Labor Relations Board (NLRB) has published its final rule amending its election procedures, which will ultimately result in a shorter time period between the filing of an election petition and the date of the election. These new "ambush election rules" will give Big Labor what it wants – quicker elections that deny employers a meaningful opportunity to educate employees on the risks and disadvantages of union representation.

As discussed in our December 5, 2011 Legal Alert the Board, in a 2-1 vote, approved some, but not all, of the proposed amendments it published in June 2011. Because the Board will lose a quorum and, therefore, be unable to take any official action after the recess appointment of Member Craig Becker expires at the end of this year (barring any recess appointments by the President), the Chairman pushed for a vote on the scaled-back version of the proposed amendments in an apparent effort to ensure the quickie election procedures were approved. The amendments take effect April 30, 2012.

Amendments Included in the Final Rule

The final rule makes the following amendments to the Board's regulations governing representation case procedures:

- Explicitly states that the statutory purpose of a pre-election hearing is to determine whether a question of representation exists and gives hearing officers the authority to limit the presentation of evidence to that relevant to a question of representation. Consequently, issues such as the eligibility of voters will be decided after an election, which may result in more challenges to election results.
- Makes the filing of post-hearing briefs, including subjects to be addressed and time for filing, subject to the discretion of the hearing officer. Under the current rules post-hearing briefs are permitted and are not subject to the hearing officer's discretion.
- Eliminates the rights of the parties to file a pre-election request for review of a regional director's decision and direction of election, and instead defers all requests for Board review until after the election, when any such request can be consolidated with a request for review of any post-election rulings. The new rule also provides that a request for special permission to appeal to the Board will only be granted under extraordinary circumstances, when it appears that the issue will otherwise evade review.

- Eliminates the procedure of not scheduling a vote until 25 days after a direction of election to permit the Board to rule on any requests for review. This means a vote is likely to be scheduled much more quickly following direction of election than in the past.
- Creates a uniform procedure for resolving election objections and potentially outcome-determinative challenges in stipulated and directed election cases and provides that Board review of regional directors' resolution of such disputes is discretionary.
- Eliminates Part 101, Subset C, of its Statements of Procedure, which is redundant with Part 102 Subpart C of its Rules and Regulations.

The final rule can be accessed here or at <http://www.gpo.gov/fdsys/pkg/FR-2011-12-22/pdf/2011-32642.pdf>.

Amendments Not Included in the Final Rule

The Board did not include some of the more controversial amendments proposed in June 2011, including:

- permitting the electronic filing of petitions,
- requiring that a hearing be set for seven days after service of the notice of hearing,
- requiring that the employer file a statement of position no later than the date of the hearing and precluding the employer from raising any issues omitted from the position statement,
- requiring that e-mail addresses and telephone numbers be included on the voter list, and
- changing the period for filing the voter list from seven to two days.

The Board has stated, however, that the remaining proposed amendments will remain under consideration for further action.

Lawsuit Filed to Stop Implementation of Amended Rule

On December 20, 2011, the U.S. Chamber of Commerce and the Coalition for a Democratic Workplace filed a lawsuit to stop implementation of the amended rule, claiming it is contrary to the National Labor Relations Act and the First and Fifth Amendments to the U.S. Constitution. The lawsuit also claims the way the rule was enacted violates the Administrative Procedures Act and the Regulatory Flexibility Act. See *Chamber of Commerce v. National Labor Relations Board* (D. D.C. December 20, 2011).

Legislative Efforts to Reign In the NLRB

On November 30, 2011, the House passed the Workforce Democracy and Fairness Act (H.R. 3094), which would block implementation of many of the controversial provisions of the June 2011 proposed amendments. Additionally, Senator Mike Enzi, Ranking Member on the Senate Health, Education, Labor and Pensions (HELP) Committee has stated that he will use the Congressional Review Act to challenge the ambush election rules.

The Senator's comments are available at <http://help.senate.gov/newsroom/press/> (click on *Quickie "Union Election Ambush" Rule by NLRB to be Challenged*).

Employers' Bottom Line:

Absent judicial or legislative intervention, the Board's new rule will take effect April 30, 2012. The ambush election rule makes it more important than ever for employers to take steps now to become aware of and address any workplace issues that could result in employee unrest and make the employer vulnerable to union organizing attempts. Prudent employers will want to take steps in advance to determine what employee job classifications are likely to be included in an appropriate voting unit at a facility. It also will be more important than ever to train management team members on their key roles in maintaining positive employee relations and responding to unionization efforts in a lawful and effective manner. Ford & Harrison attorneys and F&H Solutions Group consultants can assist you in assessing your vulnerability and developing a plan of action to address any issues that may be causing employee dissatisfaction.

If you have any questions regarding this Alert or other labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work.