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Labor and Employment Law Bulletin

NLRB Approves Significant Changes to Representation Election Procedures

In June 2011, the National Labor Relations Board issued a Notice of Proposed Rulemaking that sought to significantly change the procedures for representation elections under the National Labor Relations Act. The purpose of the Proposed Rulemaking was to limit the time that an employer has to express its views to employees regarding unionization during a campaign. The NLRB held two days of hearings in July 2011 regarding the proposed rule and received over 65,000 written comments.

At a public meeting on November 30, 2011, by a 2-1 party-line vote, the NLRB voted in favor of a resolution to adopt many provisions of the rule proposed in June. While some of the more controversial provisions were not included, the amendments that the NLRB approved in its November 30 resolution will quicken the election process.

That said, the Board still must draft a final rule and vote on it. However, with the recess appointment of Board Member Craig Becker expiring on December 31, 2011, the Board will lose its three-member quorum and therefore will be unable to adopt rules or otherwise conduct business in any significant manner after that date. Senate Republicans have announced that they will remain in session between now and the 2012 elections, depriving President Obama of the ability to make any additional recess appointments to the NLRB. As a result, employers should expect that the Board will move quickly to prepare and vote on a final rule within the next few weeks.

The resolution that the Board adopted on November 30 contains six procedural amendments to be included in the final rule regarding changes to the election process:

1. The final rule would amend the existing rule regarding the purpose of pre-election hearings, making them for the sole purpose of determining "whether a question concerning representation exists that should be resolved by an election." The primary effect of this rule is to preclude litigation about most voter-eligibility issues, such as supervisory status, during pre-election hearings. It is unclear whether this would preclude parties from litigating the overall appropriateness of the petitioned-for bargaining unit. The resolution appears to be *more restrictive* than the rule proposed by the Board in June 2011, which would have allowed the parties to litigate eligibility issues in a pre-election hearing if those issues involved at least 20 percent of the proposed voting unit.
2. Under current rules, parties may file post-hearing briefs as a matter of right. The amended rule leaves to the discretion of the hearing officer whether post-hearing briefs will be permitted. In most cases, the parties will be allowed to make closing arguments at the end of the hearing, and briefs will be permitted only where unique or complicated issues are involved.
3. Current rules require parties to file separate appeals to seek Board review regarding pre-election and post-election

issues. The amended rules eliminate all pre-election review by the Board, and will consolidate all issues for review, including election objections, in a single, post-election appeal. According to Chairman Pearce, this will avoid appeals of issues "that become moot as a result of the election."

4. The fourth amendment eliminates the 25- to 30-day waiting period between issuance of a Regional Director's Decision and Direction of Election and the scheduling of an election. The purpose of this waiting period is to allow parties to request review of the Regional Director's decision by the Board, a process that is eliminated by the third amendment.
5. The fifth amendment would limit to "extraordinary circumstances" occasions when requests for special permission to appeal to the Board would be granted. Under this standard, the Board would entertain pre-election appeals only when the issue would "otherwise evade review."
6. Currently the Board must consider any post-election requests for review. The sixth amendment would make Board review of post-election appeals discretionary, permitting the Board to summarily dispose of appeals "that do not present a serious issue for review." This is the same standard that currently exists for pre-election reviews.

Several components of the rule proposed in June were *not* included in the Board's resolution adopted on November 30. Those are (i) inclusion of employee e-mail address and telephone number on voter-eligibility lists provided to the union before the election, (ii) reducing the time that an employer has to provide the voter eligibility list to the union from seven to two days, (iii) requiring parties to state their positions regarding pre-election issues prior to the hearing and (iv) requiring an employer to provide a "preliminary voter list" before the pre-election hearing. However, on November 30, the Board reserved its right to continue considering these elements of the June rulemaking session.

As NLRB Member Brian Hayes noted at the November 30 public meeting during which the Board voted to adopt the resolution, the median time between the filing of a petition and an election in 2010 was 38 days, and about 95 percent of all elections occur within 56 days. The time target in most cases is for an election to occur within 42 days of the filing of a petition. The amendments approved in the Board's resolution may have little effect on elections in which the parties agree about the composition of the voting unit and other details without a hearing. However, where there is a dispute over the eligibility of certain voters, elections will occur much more quickly than in the past. In addition, the amendments may increase uncertainty for employers during campaigns. Issues of supervisory status will not be resolved until after an election is over. As a result, employers may be placed at increased risk of unfair labor practice allegations for the conduct of individuals who were not deemed supervisors until long after a campaign concluded.

As a result of these rules that the NLRB is soon to adopt, employers should review their contingency plans for organizing drives and give serious thought to the content of condensed campaigns. Shorter election campaigns may soon be a reality.

If you have questions about these or other issues, please contact **J. Kevin Hennessy** at +1 (312) 609 7868, **Kenneth F. Sparks** at +1 (312) 609 7877, **Mark L. Stolzenburg** at +1 (312) 609 7512 or **Lyle S. Zuckerman** at +1 (212) 407 6964. ■

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