Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

A Recent Case Study In Surviving 'Quickie Elections'

Law360, New York (June 8, 2015, 12:02 PM ET) --

Charlie E. Feuss

We have just completed this firm's first representation of a client involved in a union election under the National Labor Relations Board's new election rules. These rules, which went into effect on April 14, greatly reduce the period of time from the filing of an election petition until the actual vote. In addition, the new rules place increased information production burdens on the employer. The overall effect is that employers have less time to respond to a union petition while also having to deal with an increased administrative burden.

There are currently three separate lawsuits pending which variously attack the new rules as violating the National Labor Relations Act, Administrative Procedure Act and Constitution. We counseled with our client about challenging the petition itself on the basis of the new rules being unlawful. In the end, this employer chose not to challenge the new rules but to proceed with the case and run a "quickie campaign."

We are happy to report that 27 days after the initial filing of the petition (which of course came late in the day on a Friday), our client was victorious in the election with the employees voting against union representation by a vote of 51-44. The good news from this case is that our client won the election in spite of the new rules. The bad news is that the rules are as bad as predicted, the NLRB is not prepared for the new procedure itself and three weeks is not enough time to present a thoughtful campaign that addresses the realities of unionization to a group of uninformed employees. This is particularly true for employees whose only exposure to unions is from the recent one-sided union organizing blitz which resulted in the petition in the first place.

No doubt that both the NLRB and union supporters would point to this case as evidence that the new rules are not unfair and that employers still have the ability to run an effective campaign. Our message is different: Our experience in this case is that this employer was able to prevail because it is a sophisticated company which had done a lot of previous training and other preparation which the vast majority of employers have not done and likely will not do. For most cases, the new rules present an unreasonable challenge which is only made worse by the NLRB's own lack of familiarity with the new procedures.

The time is too short. Although the new rules do not contain a specific time frame for conducting elections, there is clear pressure to conduct them as quickly as possible. When asked to propose an election date, we proposed 28 days from the petition — four weeks out — on the theory that was as far out as the NLRB would likely go, and to ask for more might result in a much shorter time. At first, the NLRB agent seemed pleased with our position, and even said it sounded "reasonable." (Keep in mind that 28 days is still one-third less than the previous standard 42-day campaign.) The union, however, felt that 28 days was most unreasonable, and argued for an election 14 days after the petition date.

With pressure from the NLRB, we agreed to move up the election by one day. We entered into a stipulation for an election on the 27th day following the filing of the petition. Discounting the day the petition was filed, the intervening weekends and the day of the election, this left 13 days to run a campaign.

Our client had previously conducted labor relations training among supervisors, so they knew the rules of the road and how to avoid unfair labor practices. The supervisors were also aware of the basic issues around unionization, so they could talk intelligently with employees. The company's labor relations staff prepared daily messages to employees about various aspects of unionization, including union finances, the costs of belonging, how collective bargaining works and other realities of a unionized workplace. In addition, the company had weekly meetings with employees to raise issues and answer questions. Altogether, the company delivered four or five weeks of educational material to its employees in a period of 13 days.

The procedure is burdensome. In addition to having far less time to deliver its message, employers are faced with an increased administrative burden which distracts them from the message. The new rules require that employers prepare a written position statement regarding the petition, which is to be filed by noon the day before the scheduled pre-election hearing. In our case, that was the Friday following the petition date. The statement must declare the employer's position on the eligibility of all groups of employees and raise any other substantive or procedural issues. In addition, the employer must prepare an employee list to file with the statement. This process took a lot of effort and was a major distraction for a well-prepared employer.

We reached a stipulation which obviated the hearing, but the time period is so short that we had to prepare for the hearing anyway because we were not sure we would reach a stipulation in time. Because the union was waffling on certain job classifications, our stipulation was signed at exactly 11:59 a.m., one minute before our position statement and employee list were due to be filed.

Haste makes waste. Because of the time constraints, the process feels like a fire drill. The NLRB is not prepared for the new procedure any more than the parties. The day after our voter eligibility list was filed according to the new rules, we got a call from the NLRB agent handling the case suggesting that we had served the list on the wrong person — we served the union's attorney rather than the union business agent — and that we should now serve the agent. We pointed out that the attorney had signed the petition and the petition signature line states "person authorized to receive all papers in connection with this petition." When we pointed this out to the agent, and that fact that serving the union agent a day late would seem to admit we violated the rules and therefore result in an automatic rerun election, he stated that he thought we were wrong but he would check. Later that day we got a begrudging email that someone up the line said we were correct, that we had served the proper person.

In the end, our client won the election, and its employees remain union-free. We believe, however, that this case will be the rare exception. As stated, this client was exceptionally well-prepared. Most employers are not. Most employers will be caught flat-footed and totally unable to run a campaign in 13 days. The campaigns that are run will not be thoughtful, educational processes which allow employees to make informed decisions about unionization. Instead, employers will be forced to buy and present ill-fitting “campaigns in a box” which will likely confuse and frighten rather than educate. Even worse, untrained supervisors and managers run the risk of committing unfair labor practices simply because they do not know any better.

The NLRB has stated that its new rules are intended to “modernize and streamline” the election process. Unfortunately, our view from the trenches suggests otherwise. The new rules make it much less likely that employees will have the opportunity to make an informed decision about unionization. The process may be quick, but that does not mean it is good, and that does not mean that its results will be fair. Only where an employer has done much of the work ahead of time, as our client had in this case, is the possibility of surviving a “quickie election” reasonable.

—By John W. Alden and Charlie E. Feuss, Kilpatrick Townsend & Stockton LLP

John Alden is a partner in Kilpatrick Townsend & Stockton's Atlanta office.

Charlie Feuss is counsel in Kilpatrick Townsend & Stockton's Raleigh, North Carolina, and Atlanta offices. Feuss is a co-founder of the Twin Cities Labor Roundtable.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.
