Insights: Alerts

New NLRB Rules on Union Elections Take Effect April 14

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As reported in our Legal Alert dated December 15, 2014, the National Labor Relations Board's new rules concerning union elections are scheduled to go into effect on Tuesday, April 14. Lawsuits challenging the legality of the new rules filed by the U.S. Chamber of Commerce and other business groups could delay the effective date or strike down the rules altogether, but employers should be prepared for the rules to take effect as scheduled.

The rules, which govern the process by which employees vote for or against union representation, are the culmination of a lengthy and contentious process that began in 2011. Following several attempts to launch new election rules which were frustrated by intense opposition, including litigation by business groups, the NLRB published these final rules last December. Even within the NLRB itself, the rules are controversial, with the approval of the final rules resulting from a three to two vote among the five Board Members, and with the two Republican Members publishing a 100-page dissent objecting to the rules. The rules, which remain largely unchanged from the rules originally proposed in 2011, will have the effect of greatly reducing the time period from the filing of a petition for an election until the election itself. While business groups and Republican politicians have referred to the rules as allowing for "ambush elections," the NLRB majority claims that the rules are simply an effort to "streamline and modernize" an election procedure that has been in place for 75 years.

Under the new rules, the period from petition to election (commonly referred to as the "campaign period") will likely be reduced from the current average of 38 days under existing practice to somewhere between 14 and 21 days. Although the new rules contain no specific timeframe for the holding of the election, the various process changes in the election procedure will necessarily result in a much shorter campaign period. Among the changes that will shorten the campaign period are the following: petitions may now be filed electronically, which will save two to three days; hearings will be scheduled for eight days after a petition rather than after two weeks or more; and parties will no longer be allowed to file post-hearing briefs, which typically add a week or more to the process; employers must provide the NLRB and the union with an employee list (*Excelsior* list) within two days of a Direction of Election rather than seven days; and, there will no longer be a 25 to 30 day waiting period from a Direction of Election until the vote. Altogether, these changes should reduce campaign periods by two to three weeks.

In addition to the reduced campaign period, the new rules place new burdens on employers to furnish information. Employers will now be required to provide the NLRB and the union with an alphabetized list of employees in the voting unit by job classification, shift and location within one week of the petition's filing. At the same time, employers will be required to file a written statement of position concerning any issues related to the voting unit or the petition itself. This requirement is intended to minimize the number of issues to be litigated at the hearing, allowing only those issues deemed to have a "substantial impact" on election results to be litigated. All other issues can only be raised on appeal after the election. Finally, *Excelsior* lists must now include telephone numbers and email addresses in addition to the previous requirement of home mailing addresses.

What all this means for employers is that winning union elections will be much more difficult under the new rules. There will be significantly less time in which to educate employees about the realities of unionization. In addition, the busy-work required of employers by the rules, including the preparation of a formal position statement and more burdensome employee lists, will distract from efforts to run a campaign. Critics of the rules claim this is precisely the purpose – to make elections harder for employers to win.

Given the realities of the election process under the new rules, employers must take steps well in advance of a petition being filed in order to prevail in an election. First and foremost, employers must train supervisors and managers about unions and the election process in advance. Because union campaigns are all about effective communications, employers should establish campaign-specific communications networks and processes in advance, including identifying key communicators and setting up email lists and campaign-specific websites. Employers should consider legal issues, such as the supervisory status of individuals and the appropriate unit configuration, in order to prepare a form position statement to be filed in the event of a petition. In connection with this, employers should prepare drafts of the employee lists that would be required in a campaign. Finally, employers should consider what issues would likely be raised in a union campaign, in order to prepare for a campaign that could be delivered in 21 days or less.

Critics of the new rules claim unions will use the shortened campaign period to ambush employers, catch them flat-footed, and run a winning campaign before the employers have a chance to respond. We believe that by taking significant and appropriate steps NOW, employers will be able to run a winning campaign in response to a union election petition.

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