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NLRB and Union Election Regulations: Here We Go Again

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Employers and unions alike are awaiting the National Labor Relations Board's final regulations that would hasten the union election process and which, by most accounts, would make it more difficult for employers to challenge a union organizing drive. You may recall that the NLRB issued similar rules in 2011, which a federal court struck down as invalid because the Board did not have a quorum at the time it issued the rules. The 2014 effort essentially reissues the prior rules, this time by a properly-constituted Board. On February 5, 2014 the NLRB proposed the so-called "quickie" election rules, with a public comment period that closed on April 7th. Now, employer and unions are in a holding pattern until the final regulations emerge, which is expected to happen by the end of this year.

Currently, most representation elections occur within eight weeks of the filing of a petition with the NLRB. Over the last six years, unions have won over 60% of these elections. The proposed rules would likely shorten the election period considerably, and lead to even higher union win rates.

The proposed rules would require that all pre-election hearings take place seven days after the filing of a petition (absent special circumstances), and require that the election date be set at "the earliest date practicable." In addition, employers would have to provide to the NLRB (which would then provide to the union) a list of the full names, home addresses, telephone numbers, e-mail addresses, work locations, shifts, and job classifications of all employees who are eligible to vote in the election. The employer would be required to produce this list within two days of the Regional Director's approval of an election agreement or direction of an election.

The rules contain process changes designed to eliminate or reduce the number of pre-election hearings that occur. Employers would be required to file a "Statement of Position"—a new requirement—that must be filed no later than the hearing date. It must set forth the employer's position on a host of legal issues, and it would include a list of the names, work locations, shifts, and job classifications of all individuals in the proposed unit. Any issues not identified in the statement would be deemed waived. The proposed rules would significantly limit the issues that may be litigated before an election, including questions regarding the eligibility of particular individuals or groups of potential voters. They would dispense with post-hearing briefs unless "special permission" is granted by the hearing officer. Also, employers would no longer have a right to request pre-election review of the Regional Director's decision. Such requests would need to occur after the election is held. Finally, the NLRB would permit electronic

filing of election petitions, and potentially allow the use of electronic signatures to support the "showing of interest." This would allow employees to sign union authorization cards electronically via the Internet or email.

These changes would expedite the election process significantly. The time from the filing of the petition to the election would likely be no more than 21 days, leaving the employer little time to educate employees regarding the union choice (which the dissenting NLRB members have described as "vote now, understand later"). Experts also predict that the time to process an election will actually increase, because an employer will need to challenge employee eligibility issues after the election occurs. Election outcomes will be in legal limbo pending these legal challenges.

These developments reinforce the need for employers to adopt preventive measures in the areas of employee engagement, communication, supervisory training, compensation and benefits that would lessen the interest of employees to seek union representation in the first place. Employee opinion (or attitude) surveys are also effective tools for diagnosing problem areas that employers should address before a union enters the scene. The bottom line: Employers are ill-advised to wait until a petition is filed to address these issues, given the NLRB's proposed shortened timeframe for responding to union representation petitions.

Matt Lynch is a shareholder with Sebris Busto James. Matt represents private and public sector health care and other employers in all aspects of labor relations, including in collective bargaining, grievances and labor arbitrations. He has handled many cases in front of the NLRB and PERC, and also advises employers on day-to-day and strategic employee relations issues, including discipline and discharge, employee leaves, employment agreements, policy development, handbooks, wage and hour and discrimination. Contact Matt at mlynch@sebrisbusto.com or 425-450-3387.

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