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Employment Alert
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NLRB re-proposes full version of so-called "ambush election" rules

On February 5, 2014, the National Labor Relations Board (NLRB or Board) voted 3-2 to reissue a notice of proposed rulemaking to amend its representation election procedures. This proposal, identical to the proposal made by the Board in June 2011, would speed up the union election process, while limiting employers' ability to participate in the process. If the rules are finally approved and promulgated, they may take effect as soon as this year. Therefore, employers must prepare now for faster elections with fewer procedural protections. Indeed, it is predicted that this proposal could shorten the time between the filing of a petition with the NLRB and an election from the 2013 median of 38 days to a mere 25 days.

A representation election conducted by the NLRB is the usual method by which a union can become the certified bargaining representative of a group of employees at a workplace. The process traditionally begins with a union filing an election petition with an NLRB Regional Director, and concludes with a secret ballot election. In June 2011, the Board proposed broad changes to its representation election procedures. Due to the controversy surrounding this proposed rule, and the fact that more than 65,000 comments were filed in response to it, NLRB Chairman Mark G. Pearce proposed a less ambitious version of the rule in November 2011. The modified version of the rule was purportedly approved in December 2011; however, following a legal challenge brought by the United States Chamber of Commerce, in May 2012, the D.C. District Court struck down that rule without reaching the merits. *Chamber of Commerce of the U.S. v. NLRB*, 879 F. Supp. 2d 18 (D.D.C. 2012). The court reasoned that the rule was invalid because it was approved without a quorum, as only two of the three then-current members of the Board had cast a vote using the Board's electronic voting procedures. The Board appealed the court's ruling to the D.C. Circuit, but it withdrew its appeal in

December 2013, likely so that it could attempt to quickly push through the broader version of the rules now that it has a full complement of members and a Democratic, pro-union majority.

Indeed, on February 5, 2014, the Board re-promulgated the initial proposed rule from June 2011, which suggests substantial changes to the Board's election procedures. The changes include the following:

- The employer must produce a preliminary voter list prior to a pre-election hearing (in contrast to the current rule, where a list is not provided until after the election has been directed).
- A pre-election hearing — held to determine such issues as the scope of the bargaining unit and NLRB jurisdiction — must occur within seven days after the employer receives a notice that the union seeks a representation election. A post-election hearing — used to resolve outstanding challenges to the propriety of the election — would be set to begin 14 days after ballots are tallied, or as soon thereafter as practicable. Previously, the rules did not require that the pre- or post- hearing be held within a certain number of days.
- Each party would be required to present, in a "statement of positions form," their position on the Board's jurisdiction to process the petition; the appropriateness of the petitioned-for unit; any proposed exclusions from the petitioned-for unit; the existence of any bar to the election; the type, dates, times, and location of the election; and any other issues the party seeks to raise at the pre-election hearing.
- Parties objecting to the voting eligibility of less than 20 percent of the bargaining unit would be forced to defer such objections until *after* the election. Currently, such objections can be heard before the election.
- Parties would be unable to seek Board review of Regional Director pre-election rulings before the election; rather, they will be forced to seek review of all such rulings through a post-election request.
- The employer has only two days (instead of seven) after the Regional Director issues a direction of election to provide a list of eligible voters to the union, and it must provide the voters' phone numbers and email addresses (in addition to home addresses, as currently required).
- Employers and unions may transmit a larger scope of information electronically rather than in hard copy, including election petitions, election notices, and voter lists.
- The Board's review of post-election disputes is discretionary, not mandatory.

The Board has provided for a 60-day comment period (ending April 7) within which interested parties may file comments to the proposal. Replies must be filed within seven days after the comment period ends (April 14). The Board has stated that it intends to hold a hearing on the proposal between April 7 and 14.

The two Republican members of the Board — Philip A. Miscimarra and Harry I. Johnson — dissented from the notice of proposed rulemaking. Although they stated that they did not necessarily oppose some changes to the elections procedures, they believe that the majority failed to articulate why a "wholesale rewrite" was warranted. The Republican members stated that changes should only occur to the "discrete minority of cases" where elections tend to be improperly delayed. The

dissenters complained that the notice of proposed rulemaking, as written, improperly shortened "the time needed for employees to understand relevant issues, compelling them to 'vote now, understand later,'" and thus curtailed "the right of employers, unions and employees to engage in protected speech."

It is virtually certain that the new rules will be subject to legal challenge. As noted above, after the last election's rules were promulgated, the U.S. Chamber of Commerce challenged the rules on the basis that they violated the National Labor Relations Act, exceeded the NLRB's statutory authority, and contravened the right to free speech under the First Amendment and the right to due process under the Fifth Amendment. The District Court did not rule on any of those arguments when striking down the rules due to the failure of Member Hayes to vote; accordingly, it is likely a challenger will resurrect those and similar arguments in an effort to invalidate the newly proposed rules if they are finalized and approved.

Despite the fact that the new rules will likely face legal challenges, employers should nonetheless prepare now for faster elections during which they will have less time to react to union organization efforts. Employers should consider actions such as:

- Creating a "campaign-in-a-box" in advance of any union organizing efforts, including defining potential vulnerabilities and planning a response to address such vulnerabilities. Employers should consider themes to raise during the election, themes the union could raise, and how to respond to the union's themes.
- Improving employee-relations programs to ensure that employees have a clear line of communication to management, including creating or updating "open door" policies or grievance or other dispute resolution procedures.
- Updating employee handbooks and policies to ensure fair treatment and eliminate unneeded controversial policies, while restricting employees from taking disruptive actions.
- Proactively monitoring employee satisfaction.
- Training supervisors regarding lawful and unlawful actions and statements in the event that organizing efforts begin in the workplace.

The proposed rules can be found here.

Additionally, because the time allowed to file a statement of position is limited to no more than seven days, employers should consider pre-drafting responses for the statement of positions form on likely potential disputes in advance, by considering issues such as Board jurisdiction, appropriateness of the bargaining unit, and proposed exclusions from the unit. Employers should also attempt to gather facts to support their positions in advance of a union's filing of an election petition, again because the employer must be prepared to present evidence within seven days of the petition.

Employers must keep apprised of changes in the NLRB's elections rules, as well as other changes in the rapidly evolving labor law landscape. For more information about the new proposed elections rule other labor law developments, or any other legal issues in the workplace, contact the authors or the Hogan Lovells lawyer with whom you work.