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The NLRB Issues its Long-Anticipated “Quickie Election” Rule, Making Union Organizing Faster and Easier

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On December 15, 2014, the National Labor Relations Board (“NLRB”) published its long-anticipated Final Rule on “quickie elections.” The Final Rule, which is scheduled to go into effect on April 14, 2015, significantly tilts the NLRB’s election procedures in favor of unions.

Under the Final Rule, it will be easier for unions to organize unrepresented employees because a shorter period of time between a union’s filing of a representation petition and the holding of an election makes it harder for employers to present their arguments against union representation. Through the Final Rule, the NLRB delivers the accelerated election process unions have been seeking for years.

Although the NLRB states in the Final Rule that it is “maintain[ing] the current practice of not setting either a maximum or minimum number of days between petition and election via its rules,” the significant changes in the procedures used to process representation petitions may lead to elections being held in as few as **13 days** from the filing of the petition. Furthermore, the NLRB attempts to distance itself from critics of quickie elections by saying that it is within its General Counsel’s purview, not the NLRB’s, to establish the time targets currently pressed by the Regional Directors throughout the country (with some Regions mandating elections in fewer than 35 days). In this vein, the NLRB states it “will continue to leave the matter within the General Counsel’s discretion.”

This article will analyze the Final Rule’s significant changes to the representation procedures and describe steps employers may lawfully take in anticipation of the Final Rule’s coming into effect next spring.

Significant Changes in the Representation Rules¹

Changes in Filing the Petition. Under the Final Rule, a union can electronically file its Petition with the NLRB and must also serve a copy of the Petition on the employer. At the time the union files its Petition, it must also submit to the NLRB its showing of interest (its proof of support

¹ Although this ASAP focuses on representation procedures, the Final Rule impacts other petitions including decertification petitions (RD), deauthorization petitions (UD), unit clarification petitions (RM), Employer Petitions (RM), and Amendment of Certification petitions (AC).

from at least 30% of the employees in the petitioned-for unit). The union also is required to set forth in the Petition details about the election it seeks: type of election (mail v. manual), date(s), location(s), and time(s).

These changes accelerate the process by permitting electronic filing and requiring the union to provide its alleged employee support at the time of petitioning, not within 48 hours, as is currently required. Also, by requiring the union to serve the employer, the employer is placed on notice earlier than if the NLRB served the employer.

Mandatory Pre-Election Posting is Required. The Final Rule requires the employer to post at its location(s) at issue a Notice of Petition for Election to advise employees about topics such as the filing of the Petition, their rights under the National Labor Relations Act (“Act”), election procedures, and rules governing campaign conduct. The Notice must be posted within two business days after the service of the Petition and the accompanying Notice on the employer by the NLRB. If the employer uses email to communicate with employees, it must distribute this Notice electronically. Failure to post and/or distribute the Notice within the required two business days will be grounds to set aside an election.

Under the current rules, there is no such mandatory posting. Unwary employers may inadvertently miss the short two-day posting requirement. Furthermore, because this Notice is to set forth parameters of campaign conduct, it may lead to more unfair labor practice charges being filed against employers as union supporters may seek to trap unaware supervisors into making questionable statements.

Statement of Position is Required. If the employer chooses to proceed to a pre-election hearing on the appropriateness of the petitioned-for unit, the employer is required to file with the NLRB and serve on the union its Statement of Position within seven days after the NLRB serves a Notice of Hearing on the employer (which generally will accompany the Petition). The Statement of Position must set forth whether and why the petitioned-for unit is appropriate and, if deemed inappropriate, identify employee classifications, locations or other employee groupings to be added or excluded from the unit. An employer’s failure to raise issues in the Statement of Position will preclude the employer from raising such issues at the pre-election hearing. The Statement of Position also must include the employer’s position on issues of individual eligibility and election details (date, time, place, and eligibility cut-off). Significantly, the Statement of Position must include information about the employer’s employees (discussed below as Initial Employee List). The union must reply to the employer’s Statement of Position at the hearing.

The Final Rule states that the purpose of the Statement of Position is to force the parties to share information and narrow the issues for a hearing. What this requirement really does is place the onus on employers to proactively identify unit issues and commit to such issues in writing or lose the chance to raise them. Presumably, if the parties enter into a Stipulated Election Agreement before the Statement of Position is due, the employer need not submit a Statement of Position.

Initial Employee List to Union is Required. If the employer chooses to proceed to hearing, along with its Statement of Position, the employer must provide the full names, work location(s), shift(s) and job classification(s) of all employees in the petitioned-for unit and all employees the employer may seek to add to or exclude from the petitioned-for unit. For example, if the union petitions for a single facility and the employer believes a single facility unit is not appropriate and the unit should also include employees working in a second facility, the employer is required to provide the identifying information for employees working in the first and second facilities. Personal contact information for the employees is not required for this Initial Employee List.

Employers may have difficulty assembling the needed information in the short time allowed. Furthermore, the Initial Employee List can assist unions in advancing their larger scale or longer term organizing goals. Thus, a union can file a Petition with 30% of employee support in an inappropriately small unit, after which the employer would be required to provide the Initial Employee list for 100% of the employees in the larger unit it deems appropriate. The union then can withdraw its initial Petition and use the information provided by the employer to attempt to organize the larger unit.

Pre-Election Hearing is Limited. Pre-election hearings are to be held in eight days from the NLRB’s service of the Notice of Hearing on the employer, unless the Regional Director determines the case is complex. The Regional Director has discretion to grant adjournment requests up to four days based on the circumstances. Issues for the hearing are limited to whether there is a question concerning representation (*i.e.*, whether the Petition seeks an appropriate unit for the purposes of collective bargaining). The hearing will not delve into areas of individual employee eligibility to vote or inclusion in a unit, as such eligibility and inclusion issues will be delayed to the post-election challenge procedure.

Precluding the employer from litigating the supervisory status of individuals at this time prevents the employer from knowing which individuals it may lawfully use as company spokespersons in the campaign.

The employer's positions/arguments will be limited to issues contained in its Statement of Position, unless the union's position changes. Once the union responds to the issues raised in the employer's Statement of Position, the hearing officer will exercise his/her discretion on seeking offers of proof or proceeding with testimony. The hearing officer will also solicit the positions of the parties with respect to the type of election (mail vs. manual), date(s), time(s), location(s) and eligibility period for the election. This will permit the Regional Director to set the election details in the Decision and Direction of Election ("DDE") and expedite the holding of the election.

A party's request for special permission to appeal a hearing officer's ruling will not stay the proceedings. The hearing will continue for consecutive days until complete. Oral argument will be used for summation unless the Regional Director permits the filing of post-hearing briefs.

These changes are all aimed at shortening the hearing process, including removing the currently applicable seven days to file post-hearing briefs. The changes also will make it more difficult for the employer to present a full argument on the petitioned-for unit and what it believes is an appropriate unit.

The 25-Day Waiting Period after the DDE Issues is Eliminated. The Final Rule eliminates the current 25-day waiting period between the issuance of the DDE and the holding of the election. The final rule also states that ballots will no longer be automatically impounded while a party's request for review of a DDE is pending before the NLRB. This permits the Regional Director to schedule an election more quickly, based on the positions the parties take at the hearing, and prevents an election from going forward pending an appeal to the NLRB.

Providing Employees' Personal Information is Required. Within two business days after the issuance of the DDE or the approval of a Stipulated Election Agreement (in which the parties agree to the election terms), the employer is required to electronically file with the NLRB and serve on the union a list of all eligible voters, called the *Excelsior* list. The information required by the *Excelsior* list rule has been broadened under the Final Rule to mandate disclosure of the employee's name, address, *available* personal cell and home telephone numbers and personal email addresses, work location, shift, and job classification. Business phone numbers and email addresses need not be turned over. Voters who will be voting subject to challenge are to be set apart on the list.

These changes will make it easier for a union to contact employees for organizing or other reasons, and will adversely affect employees' privacy. The Final Rule leaves intact the requirement that, unless waived by the union, the *Excelsior* must be in the hands of the union for at least 10 days before an election is held. On this point, it should be expected unions will often be inclined to waive the 10-day period, based upon their having received the initial employee list days earlier or because they had knowledge of the identity of the employees in the unit prior to filing a petition.

Review of Post-Election Issues under Stipulated Election Agreements is Limited. For employers that choose to enter into Stipulated Election Agreements, instead of proceeding to hearing, the Final Rule provides that post-election disputes are to be heard by the Regional Director, not the NLRB. NLRB review will be discretionary in cases where the parties have not addressed the matter in the election agreement. A party seeking review must identify significant, prejudicial error by the Regional Director or some other compelling reason for the NLRB to grant review.

This change places much more discretion in Regional Directors and effectively limits review of Regional Directors' decisions by the NLRB.

Post-Election Objections are Expedited. The Final Rule requires a party that files Objections to an election to do so within seven days of the tally of ballots and to submit evidence in support of the Objections at the same time. If a hearing is required on Objections (or challenges), the hearing will be 21 days from the tally of ballots.

This change is significant in that employers currently have an additional seven days to investigate and file evidence in support of their objections. Under current practice, post-election hearings often are not scheduled for two to three months.

Elections Can be Held in as Few as 13 Days from the Filing of the Petition

Under the Final Rule, it is possible – as a worst case scenario for employers – for an election to be scheduled and held within 13 days of the filing of the petition:

Day 0 – Petition filed and served same day along with Notice of Hearing

Day 7 – Statement of Position due

Day 8 – Hearing held (eight days from service of Notice of Hearing)

Day 9 – DDE issued and Notices of Election served

Day 11 – *Excelsior* list due

Day 12 – Notice of Election posting period ends (commenced on Day 10)

Day 13 – Election held (if union waives the 10 days for having the *Excelsior* list)

Day 22 – Election held (if union does not waive the 10 days for the *Excelsior* list)

The above chronology is an example and can, of course, vary to the extent the Region takes an additional day or so to serve the Notice of Hearing or issue its DDE and serve the formal Notices of Election. That said, even without a union's waiving its right to the *Excelsior* list for 10 days, elections can be held in 22 days.

Lawful Steps Employers May Take Now

Employers have only four months to prepare for the new rules. Here are steps employers may lawfully take:

Provide Effective Training. All levels of the company's management team should receive initial or supplemental training on the importance of positive employee relations and the potential impact of unionization. Of primary importance is the ability of local management and front line supervision to be able to effectively communicate that message to employees. The positive employee relations aspects of the training should include discussion regarding the supervisor's role relative to employees, how to effectively communicate with employees, and how to counsel/discipline employees. The union-related aspects of the training should include: providing facts about unionization in the country, local area, and industry; identifying causes of a negative work environment; identifying signs of union organizing; explaining how unions organize; teaching what supervisors can and cannot say and do under the Act through pro-active discussions; and role-playing through common scenarios management may face during organizing. The training programs should be tailored to fit the company's workforce and culture. Companies should also consider providing training to their workforces about unionization, but only after assessing whether such discussion may incite organizing.

Assess the Company's Supervisors. The company should assess whether its employees designated as "supervisors" or lead employees will be deemed Section 2(11) supervisors under the Act and excluded from organizing. This step is crucial for a company to know who can attend management meetings and subsequently communicate the company's messaging in response to an organizing drive. Moreover, too frequently, supervisors are promoted from the rank-and-file due to their solid work performance, but they lack the interpersonal skills, experience, and training to effectively supervise. Also, companies often fail to address managers/supervisors who are poor communicators so long as they are good at driving production or achieving other related goals. An early assessment of the company's managers and supervisors is crucial because they are the local face of the company. This assessment will also help identify potential witnesses who can effectively testify for the company at a future representation hearing.

Perform a Vulnerability Audit. An attorney-client privileged union vulnerability audit should be conducted. The goals of the audit are to learn about potential issues in the workplace while assessing the effectiveness of the managers/supervisors who are interviewed. In an audit, managers/supervisors participate in extensive one-on-one questioning and, at times, focus groups, to answer questions by the interviewer/facilitator to surface potential issues. Topics usually include the interviewee's perception of communication methods, training, management styles, employee recognition programs, disciplinary systems, work rules, working conditions, employment terms and conditions, opportunities for advancement, employee morale, safety rules, job security, employee empowerment and incentives, and employee interest and involvement in union activity. By obtaining information from a cross-section of supervisors, the company can compare what is reported by the various managers/supervisors. Counsel should also review data on turnover, hiring practices, changes in wages and benefits, industry pressures, operational issues, etc. before preparing a report summarizing the potential vulnerability of the location(s) or department(s) at issue.

Analyze the Potential Bargaining Unit Issues. Given the requirement to submit a Statement of Position and proceed to hearing in eight days, the company should assess the scope and composition issues for potential bargaining units in advance of an organizing threat. The impact of *Specialty Healthcare*, which permits unions to organize smaller groups of employees in micro-units, further warrants this advance assessment. As to scope (*i.e.*, which locations are involved), this entails looking into whether there are certain locations that are so integrated that they should be included with a petitioned-for unit. As to composition (*i.e.*, job classifications), this entails determining which classifications share a community of interest warranting their inclusion in/exclusion from the petitioned-for unit. If the company wants to prepare for the

inclusion/exclusion of certain locations and/or job classifications in the event of an organizing effort, it can restructure its operations and/or job classifications now to bolster its position in the future. Information obtained by counsel during the vulnerability audit will assist in this bargaining unit assessment.

Select and Develop a Response Team. An employer's success in countering an organizing effort often depends on who communicates to employees on its behalf. Responding to an active organizing drive requires trained supervision, constant reassessment of strategy in light of ever-changing circumstances, and decisive action. A company that does not have complete confidence in its local management team's ability to effectively communicate should designate highly motivated, well-spoken members of its management team to participate on its Response Team. Ideally, the Response Team should consist of representatives from various areas within the company, including senior/regional management, legal, security, human resources, media relations and front-line supervisors. Once the Response Team is established, it should be provided with informational and experiential training. To ensure maximum preparedness in case deployment to a vulnerable site is needed, the Response Team should be regularly updated about employee issues and relevant developments in labor law.

Collect Data. It is beneficial for a company to do its homework in advance by compiling as much information as it can about its workforce. Employee demographics for the database may include employee names, addresses, work locations, job classifications, personal email addresses, home and cell phone numbers, primary language spoken, relatives in the workforce, disciplinary history, date of hire, date and amount of last pay increase, and personal favors extended to the employee. (To the extent the company does not use personal employee email addresses, home or cell phone numbers, it should not retain such information, as the company would not then be required to turn it over to a union during the representation process.) By gathering this information now, it will be easier for the company to assess the appropriateness of the petitioned-for unit and its support or lack thereof among the employees in the petitioned-for unit, prepare its Statement of Position, and present its case at the pre-election hearing. Some of this information will be included in the *Excelsior* list and will help the management team assess which employees may be more inclined to support the company's position during a campaign. Similarly, the company should prepare a summary of its current benefits, as well as a comparison of those benefits to those provided at other company locations or other employers (unionized and non-union) within the industry and/or geographic area.

Review Company Policies. Employer policies have come under attack by the NLRB over the past few years under the theory that overbroad policy language violates Section 7 of the Act by chilling employee rights to engage in union or other protected concerted activity. The mere maintenance of a policy/rule that the NLRB may construe as interfering with employee rights under the NLRA — even without enforcement — can be used to set aside an election victory of an employer. Also, during an organizing drive, certain policies are brought to the forefront: no-solicitation/no-distribution, off-duty access, and wearing of union buttons. All company policies should be reviewed for legal compliance. All policies should also be reviewed to assess: whether they make practical sense; whether they are enforced and, if so, consistently; how they are perceived by employees; and how they compare to policies at related or other entities in the industry. Someone familiar with current NLRB case law (and willing to stay abreast of future developments) should perform this review.

Evaluate and Improve the Company's Communications Plan. Organizing drives often are precipitated in part by poor communications with employees. This means it is important to assess whether communications are effective from the top down, all the way from corporate management to regional management, to local management, to supervisors, and finally to employees. For example, is open enrollment handled effectively? Does the company effectively communicate with employees in languages other than English where needed? Are issues that impact employees addressed head-on or are they communicated through the rumor mill? How does the facility manager interact with employees — is he/she in his/her office all day or does he/she walk the floor to see employees engaged in their daily work activities? The company may also evaluate and consider how technology (email, social media, and blogs) could be used for the company's employee communications now and in the event of an organizing drive.

Prepare for an Organizing Drive and Election Campaign. To prepare for the pre-election hearing, the company should draft in advance its outline of the required Statement of Position (except for the unknown areas about the petitioned-for unit). The company also should identify potential witnesses who can speak to the company's basic operation(s), and the duties performed by the employees working in all job classifications at the location(s), as well as a human resources representative who can speak to employee terms and conditions of employment. Preparing testimony outlines and training the witnesses how to testify will go a long way given the minimal period of time afforded employers under the Final Rule to prepare for a pre-election hearing. To prepare for the ensuing election campaign, the company should assess how it will communicate with employees and prepare the more common campaign messaging (e.g., messaging regarding union contract negotiations)

which can later be slightly tailored to use during a campaign. Many other efforts can be undertaken in advance, such as gathering pro-company video testimonials, preparing social media sites, and meeting with in-house or external media and/or government relations personnel.

Surface and Understand Employee Concerns. To ensure the company has its pulse on employee morale, conducting focus group meetings is an important tool. The meetings should be facilitated by someone who does not work in the facility at issue and to whom the employees will feel comfortable opening up and sharing information. Once elicited, the information will assist the company in assessing the effectiveness of the local management team. For example, if performed around the same time as the Vulnerability Audit, the company can compare the information elicited from the focus groups to the information elicited from managers/supervisors during the Vulnerability Audit. Moreover, the success of the focus groups will depend on how effectively the meetings are announced and facilitated, and the follow-up provided to the employees. Holding focus group meetings also reinforces the company's investment in fostering positive employee relations. Lastly, employers should not wait to conduct focus groups until there is organizing activity underway because it may be considered unlawful solicitation of grievances.

While a legal challenge to the Final Rule may ensue in the near term, employers do not have the luxury of time to await the outcome of such litigation. Taking some or all of the above recommended steps will benefit employers by leading to a better understanding of workplace issues, improving employee morale, and reducing the threat of unionization. Regular consultation with experienced labor counsel is further recommended.

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