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# Non-Union Employers Beware: The NLRB Re-Issues Its Proposed Rulemaking to Foster Unionization

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Three years ago, during the summer of 2011, the National Labor Relations Board ("NLRB" or "Board") undertook two initiatives to promote unionization among private sector workers. First, in June 2011, the NLRB issued a notice of proposed rulemaking to expedite representation elections. (After only two days of hearing in late-July, the NLRB issued its final rule for expedited elections in December 2011.) Second, in August 2011, the NLRB issued a final rule requiring private sector employers to post notices advising employees of their rights under the National Labor Relations Act ("Act"). Both of these initiatives were stymied by federal courts of appeal upon litigation commenced by various employer groups.

In response to these two NLRB initiatives, many employers turned their attention to improving workplace morale by more effectively communicating with employees, assessing wage/benefit packages, and taking other pro-active measures to counter the NLRB's initiatives. In the almost three years that have passed since the NLRB's failed initiatives, however, many employers have shelved their pro-active efforts for other pressing business demands.

On February 6, 2014, the NLRB issued a notice of proposed rulemaking that mirrors the rule it proposed in June 2011. Despite being branded as the quickie, ambush or expedited election rule, or even as EFCA-light, all employers—even those not presently in the heat of an organizing drive—need to refocus and pay close attention. Some version of the newly proposed rule will eventually be implemented as a final rule. The final rule will hinder an employer's rights under the Act to participate in the representation process before the NLRB and to lawfully communicate with its employees on the important issue of union representation. To make matters more difficult for them, employers may be further restricted in their ability to advise employees on unionization under the anticipated changes to the Department of Labor's persuader regulations, which are expected to be issued this spring.[1] Now is the time for employers to dust off their playbooks and re-commence pro-active measures.

1 *See* Ilyse Schuman and Michael J. Lotito, *Workplace Policy Institute: A Look Ahead to Legislative and Regulatory Changes in 2014*, Littler Insight (Jan. 16, 2014), *available at* http://www.littler.com/publication-press/publication/workplace-policy-institute-look-ahead-legislative-and-regulatory-chang.

## The NLRB's 2011 Rulemaking

The June 2011 proposed rule included many significant changes to the election procedures that, when viewed in the cumulative, severely limited an employer's ability to take lawful steps to counter unionization efforts. As summarized in Littler's June 2011 ASAP on the same proposed rule, the significant changes the NLRB seeks include:

- **Pre-election hearing is to be held seven days from the filing of the petition**. The proposal seeks to end the current practice of scheduling pre-election hearings within 14 days from the petition filing. Forcing a pre-election hearing more quickly, however, would cut into an employer's time to assess the scope and composition of the petitioned-for unit and other voter eligibility issues.
- **Voter eligibility issues are to be deferred to post-election challenges instead of being addressed at a pre-election hearing**. Eligibility issues involving less than 20% of the bargaining unit would automatically be deferred until after the election. Delaying voter eligibility issues until post-election may have facial appeal if the only goal is to expedite the election, but the failure to define the proper bargaining unit pre-election could, in actuality, disenfranchise voters. Voters should be certain that their vote will count or they may choose not to participate. In short, if the bargaining unit for which voters cast their ballots is defined post-election, the voters have been denied their right to make an informed decision. This concern is of greater consequence when the disputed voters are statutory supervisors and there is a question whether or not the individual meets the definition of "supervisor." Also, the employer should have the right to know who is a supervisor prior to an election so that it can properly conduct a campaign. Otherwise, an employer may inadvertently violate the law through communications that would be proper to a supervisor but improper to a member of the voting unit.
- **Parties are required to complete "Statement of Position Forms" and state their position on the unit issues before evidence is heard at a pre-election hearing**. Employers and unions must complete a Statement of Position Form to identify the issues for hearing and the basis for taking such positions. Then, at the start of the hearing, before any evidence is heard, the parties must formally state their position on the scope (*e.g.*, multi-location or single location) and composition (which job classifications are covered) of the unit. Failure to raise an issue in the Statement of Position Form would bar a party from later litigating that issue. These proposals severely restrict an employer's ability, in the short seven-day window before a pre-election hearing, to assess the appropriateness of the petitioned-for unit, obtain legal counsel, make an informed decision, and prepare, if necessary, to litigate any issues at a hearing.
- **Employers are required to provide a preliminary voter list to the union before the pre-election hearing**. The proposal mandates that the non-petitioning party (*i.e.*, employer) produce a preliminary voter list including the names, work locations, shifts and classifications of unit members by the opening of the pre-election conference. This mandate provides a union with a roadmap to facilitate its further organizing of the employer's workforce. For example, assuming there are 100 employees in a warehouse, a union can obtain 30% support on authorization cards (which are not checked for authenticity under current Board processes), file a petition, obtain the preliminary voter list with information for all 100 employees, and then withdraw its petition at the hearing. The petition then could be re-filed after the union had the data it wanted to better organize the unit.
- **Employers are required to provide a final voter list within two days after the election is scheduled**. This proposal requires the list of voters produced by the employer to include names, addresses, phone numbers and email addresses. The transparent purpose of accelerating the employer's submission of the voting list (referred to as the *Excelsior* list) from seven days to only two days is to facilitate organizing. Requiring an employer to provide phone numbers and email addresses, which is not currently required by law, potentially raises employee privacy issues. This proposal also calls into question whether an employer must turn over employees' company-issued email addresses.
- **Parties are required to wait until after the election to appeal a Regional Director's ruling in directing an election**. In denying a party the right to appeal an adverse pre-hearing decision, the proposal seeks to expedite when elections are held. This new approach could result in the parties wasting time and resources directing campaign-related information to employees who may ultimately be found not to have been eligible to vote. One example is a Regional Director directing a multi-location election in a unit of multiple stores, with hundreds of employees, only to have the Board at the post-election stage determine the unit should have been a single store with a fraction of the employees.

- **Post-election disputes are to be heard within 14 days of the election and appeal rights to the Board are discretionary**. By mandating a hearing within 14 days of the election, the proposal eliminates any meaningful investigation into the veracity of a party's objections. This would result in more post-election hearings and delay the certification of the election results. The proposal also eliminates mandatory review of post-election disputes by the Board and empowers the Board with the discretion to hear a post-election dispute or defer to the Regional Director for a final decision.

After receiving over 65,000 comments in response to the June 2011 proposed rule and holding two days of hearing in July 2011, the NLRB issued its final rule on December 22, 2011. The final rule, which included a subset of the proposed rule, was in effect for less than one month before it was struck down by the U.S. District Court for the District of Columbia on a procedural issue regarding then Board Member Brian Hayes' status. The final rule was caught up in litigation for the next two years. Instead of further litigating, in December 2013, the NLRB agreed to drop its appeal of the district court's ruling.

## The NLRB's February 6, 2014 Notice of Proposed Rulemaking

In the preamble to the 2014 notice of proposed rulemaking, the NLRB makes it clear that it is merely re-issuing the 2011 proposed rule. "The present proposal is, in essence, a reissuance of the proposed rule of June 22, 2011. 76 FR 36812. The Board is again proposing the same changes which [sic] were proposed in 2011, and asking for any comments the public may have on whether or how the Board should act on these proposals." The NLRB also made it clear that the newly proposed rulemaking incorporates by reference the comments and testimony received in response to the 2011 proposed rule, and all such information will be considered (again) in determining whether to issue a final rule. In other words, all of the changes contained in the 2011 proposed rule, even those the Board rejected after expending significant resources to receive comments and hear testimony, have been revived for re-consideration in 2014.

As expected given its controversial nature, the 2014 notice of proposed rulemaking was adopted according to party lines, with the three Democratic members (Mark Gaston Pearce, Kent Hirozawa and Nancy Schiffer) voting in favor of and the two Republican members (Phillip Miscimarra and Harry Johnson) voting against the proposed rule.

In dissenting, Board Members Miscimarra and Johnson opine for over 50 pages on the faults of the proposed rulemaking. They take aim at the majority's rationale behind the proposed changes and the practical application of the proposed changes. In essence, the dissent states that delaying the hearing until after the election creates an "election now, hearing later" process that deprives parties and voters of knowing who is actually eligible to vote. "To state the obvious, when people participate in an election, it is significant whether they actually have a right to vote, whether their vote will be counted, and whether the election's outcome will even affect them." The "election now, hearing later" approach would remove fundamental questions such as:

> (i) who can actually vote, (ii) which employees who cast votes would, in the end, be excluded from the bargaining unit and would not even have their votes counted, (iii) whether people who represent themselves as employee-voters during the campaign may actually be supervisors (*i.e.*, representatives of one of the campaigning parties), (iv) whether other people who appear to be supervisors may actually be employee-voters, and (v) whether the union-represented workforce, if the union prevails, will ultimately exclude important employee groups whose absence would adversely affect the outcome of resulting negotiations.

By shortening the time before an election, the dissent points out, voters will be compelled to "vote now, understand later." The shortened time period from the filing of a petition to the election—which Littler estimates can occur in just 18 days—would restrain employers, unions and employees from engaging in protected speech on the important topic of whether or not to unionize.

The dissent does not merely counter the majority's analysis; it also offers an alternative path for consideration. They suggest that the Board should set a minimum amount of time from the filing of a petition before an election can be held. Doing so would provide all parties with an opportunity to consider election-related proposals and give employees the fullest freedom of choice in the election. The dissent further suggests that elections in general have not been unduly delayed under current Board procedures, and the focus should be on the real cause of the delays (*e.g.*, the filing of blocking charges) in the limited situations where the election process has been delayed. Also, the dissent suggests that the

Board take a hard look at its internal processing of elections to expedite resolution of representation cases, as opposed to taking away rights to a pre-election hearing. Two additional recommendations of the dissent are to more aggressively and efficiently litigate incidents of unlawful election misconduct and identify ways to safeguard employee privacy as election procedures adapt to the changes in technology.

The public has until April 7, 2014 to submit comments on the February 6, 2014 notice of proposed rulemaking. Littler's Workplace Policy Institute™ expects to file comments in opposition to the new proposed rule on behalf of a number of organizations.

## Steps Employers Should Take to Prepare for the Future

Employer organizations are expected to challenge any final rule that comes from this new round of rulemaking. The challenges, however, are more likely to be focused on the substance of the rule, as the procedural debate over whether the Board has a properly constituted quorum no longer exists. (All five members of the Board received Senate confirmation effective July 30, 2013.)

Regardless of successes or failures in the anticipated court battle over the rule, there will be changes to the way the NLRB processes election petitions in some form or another. The following are a few pro-active steps employers should consider taking to prepare for this eventuality.

First, employers should refocus on creating positive employee relations. There are obvious benefits to improving employee satisfaction, increasing productivity and efficiency, and reducing turnover. A side benefit is fostering open, direct communications among all levels of management, supervisors and employees, which may help limit employees' thoughts about union representation. Conducting a vulnerability assessment is one tool to guide your positive employee relations program.

Second, in advance of an organizing threat at a facility, employers should review their operations for issues relating to the scope and composition of a potential bargaining unit. As to scope (*i.e.*, locations), this entails looking into whether there are certain locations that are so integrated that they should be included in the same petitioned-for unit. As to composition (*i.e.*, job classifications), this entails looking into job classifications and determining which classifications share a community of interest. If the company wants to include or exclude certain locations and/or job classifications during an organizing effort, it can restructure the operations and/or jobs now to bolster its position in the future. This is important in light of the NLRB's 2011 *Specialty Healthcare* decision permitting micro-unit organizing.[2] It is also important given the proposed rule change that would require an employer to state its position as to the appropriateness of a petitioned-for unit and address eligibility issues within seven days of a petition's being filed.

Third, employers should review their policies and rules to ensure compliance with the Act. The NLRB continues to hold that the mere maintenance of a policy or rule that it construes as interfering with employee rights under the Act—even without enforcement—can be used to set aside an election victory won by an employer. Also, during an organizing drive, certain policies are often brought to the forefront, including those relating to solicitation and distribution, off-duty access, and wearing of union buttons.

Fourth, employers should provide adequate training to their management team to ensure the members of the team understand the importance of fostering positive employee relations and how to effectively communicate with employees.

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2 *See* Jack Lambremont and Kyllan Kershaw, *Labor Board Likely Emboldened Following Sixth Circuit Decision Paving the Way for Micro-Units*, Littler ASAP (Aug. 22, 2013), *available at* http://www.littler.com/publication-press/publication/labor-board-likely-emboldened-following-sixth-circuit-decision-paving-.