

**ALERTS****Labor & Employment Law Alert - NLRB Approves Quickie Election Rule**

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Just one day after limiting the ability of employers to restrict employee use of email systems, the NLRB today handed another victory to organized labor when it approved a new rule for the conduct of union representation elections – commonly referred to as the “quickie” or “ambush” election rule. The new rule will clearly speed up the union representation election process and restrict the ability of employers to communicate with their employees over the significance of that election.

The Board’s announcement today on the 3-2 vote called the new rules an effort “to modernize and streamline the process.” However, the two Republican Board members dissenting from the rule change called it unnecessary, violative of worker privacy and an obstacle to workers making informed choices regarding unionization. Members Philip Miscimarra and Harry Johnson wrote in dissent that “[t]he final rule has become the Mount Everest of regulations: massive in scale and unforgiving in its effect.”

The rule will be published in the Federal Register on Dec. 15, and will take effect on April 14, 2015.

Among others things, the new rule:

- Limits the subject matters to be considered in pre-election hearings, pushing to post-election hearings most objections concerning the election and the proposed unit;
- Requires employers to submit a Position Statement on all issues raised by the proposed bargaining unit seven days after receipt of the petition, risking waiver on issues not raised then;
- Eliminates a previously-required 25-day period between the time an election is ordered and the election itself;
- Requires employers to furnish union organizers with all available personal email addresses and phone numbers of workers eligible to vote in a union election; and
- Provides for electronic filing and transmission of election petitions and other documents.

The Board published the following chart showing the differences between the old and new rule:

**Current procedures****New procedures****RELATED PRACTICE AREAS**

Labor and Employment

Parties cannot electronically file election petitions. Parties and NLRB regional offices do not electronically transmit certain representation case documents.

Election petitions, election notices and voter lists can be transmitted electronically. NLRB regional offices can deliver notices and documents electronically, rather than by mail.

The parties and prospective voters receive limited information.

Parties will receive a more detailed description of the Agency's representation case procedures, as well as a Statement of Position form, when served with the petition. The Statement of Position will help parties identify the issues they may want to raise at the pre-election hearing. A Notice of Petition for Election, which will be served with the Notice of Hearing, will provide employees and the employer with information about the petition and their rights and obligations. The Notice of Election will provide prospective voters with more detailed information about the voting process.

The parties cannot predict when a pre- or post-election hearing will be held because practices vary by Region.

The Regional Director will generally set a pre-election hearing to begin 8 days after a hearing notice is served and a post-election hearing 14 days after the filing of objections.

There is no mechanism for requiring parties to identify issues in dispute.

Non petitioning parties are required to identify any issues they have with the petition, in their Statements of Positions, generally one business day before the pre-election hearing opens. The petitioner will be required to respond to any issue raised by the non petitioning parties in their Statements of Positions at the beginning of the hearing. Litigation inconsistent with these positions will generally not be allowed.

The employer is not required to share a list of prospective voters with the NLRB's regional office or the other parties until after the regional director directs an election or approves an election agreement.

As part of its Statement of Position, the employer must provide a list of prospective voters with their job classifications, shifts and work locations, to the NLRB's regional office and the other parties, generally one business day before the pre-election hearing opens. This will help the parties narrow the issues in dispute at the hearing or enter into an election agreement.

Parties may insist on litigating voter eligibility and

The purpose of the pre-election hearing is clearly defined and parties will generally

inclusion issues that do not have to be resolved in order to determine whether an election should be held.

litigate only those issues that are necessary to determine whether it is appropriate to conduct an election. Litigation of a small number of eligibility and inclusion issues that do not have to be decided before the election may be deferred to the post-election stage. Those issues will often be mooted by the election results.

Parties may file a brief within 7 days of the closing of the pre-election hearing, with permissive extensions of 14 days or more.

Parties will be provided with an opportunity to argue orally before the close of the hearing and written briefs will be allowed only if the regional director determines they are necessary.

Parties waive their right to challenge the regional director's pre-election decision if they do not file a request for review before the election. This requires parties to appeal issues that may be rendered moot by the election results.

Parties may wait to see whether the election results have made the need to file a request for review of the regional director's pre-election decision unnecessary and they do not waive their right to seek review of that decision if they decide to file their request after the election.

Elections are delayed 25-30 days to allow the Board to consider any request for review of the regional director's decision that may be filed. This is so even though such requests are rarely filed, even more rarely granted and almost never result in a stay of the election.

There will be no automatic stay of an election.

The Board is required to review every aspect of most post-election disputes, regardless of whether any party has objected to it.

The Board is not required to review aspects of post-election regional decisions as to which no party has raised an issue, and may deny review consistent with the discretion it has long exercised in reviewing pre-election rulings.

The voter list provided to non-employer parties to enable them to communicate with voters about the election includes only names and home addresses. The employer must submit the list within 7 days of the approval of an election agreement or the

The voter list will also include personal phone numbers and email addresses (if available to the employer). The employer must submit the list within 2 business days of the regional director's approval of an election agreement or decision directing an election.

regional director's decision directing an election.

This rule makes every private, non-union company much more vulnerable to unionization. Indeed, employers currently have time prior to the secret ballot election to present the opposing viewpoint on whether unionization is a good idea, which allows employees to hear both sides of the story and make an informed decision. But, after this rule is implemented, employers will no longer be able to wait to mount a campaign prior to an election. Moreover, this rule and yesterday's NLRB decision gives unions unprecedented access to communicate with employees via an employer's e-mail system. As a result, employees might be pressured or intimidated into signing authorization cards when, in actuality, they would prefer not to be in a union.;

Recognizing this, prudent employers will develop a pro-active plan to oppose unionization. The basic elements of this plan should include:

- Conducting a vulnerability assessment to ensure that you have the necessary policies in place, such as non-solicitation/non-distribution policies as well as problem-solving policies, and that you consistently enforce those policies;
- Training your supervisors regarding how to identify and respond to union organizing activity as well as how to foster positive employee relations;
- Increasing communication with your employees to gain feedback on working conditions, wages and benefits, to explain the consequences of signing a union authorization card, and to educate them on your position about unions; and
- Developing a campaign "in the box" now—before union organizing begins.

To obtain more information on developing a plan to avoid unionization, please contact the Barnes & Thornburg Labor and Employment attorney with whom you work, or a leader of the firm's Labor and Employment Law Department in the following offices:

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