

December 22, 2011

### *NLRB Amends Union Election Rules*

On December 21, 2011, the National Labor Relations Board adopted a final rule that amends the process for union representation elections. Employers had criticized the proposed rule as permitting labor unions to engage in “ambush elections.”

The amendments were initially proposed in June with the intent “to reduce unnecessary litigation, streamline pre- and post-election procedures, and facilitate the use of electronic communications and document filing.” However, given employer and political opposition, the Board limited the final rule to “less controversial” provisions “designed to streamline Board procedures in order to eliminate wholly unnecessary barriers to the expeditious resolution of questions concerning representation.” The new rule is scheduled to take effect on April 30, 2012.

The final rule was approved by a vote of only two NLRB members. Member Hayes, who opposed both the amendments and the process used by the Board majority to implement the rule, abstained from voting on the final rule.

According to a press release issued by the NLRB announcing the final rule, the amendments are “primarily focused on procedures followed by the NLRB in the minority of cases in which parties can’t agree on issues such as whether the employees covered by the election petition are an appropriate voting group.” Among the changes, the final rule will:

- Eliminate the right to file a pre-election request to seek review by the Board. In an effort “to avoid piecemeal litigation”, requests for Board review will now be deferred until after the election, where they can be combined with any requests for review of post-election rulings. However, special permission to appeal to the Board may be granted if there are “extraordinary circumstances where it appears that the issue will otherwise evade review.”
- Make Board review of all Regional Directors’ decisions discretionary.
- Explicitly state that the statutory purpose of a pre-election hearing is to determine if a question of representation exists.
- Provide hearing officers with the authority to limit the presentation of evidence at a pre-election hearing and the discretion whether to permit the filing of post-hearing briefs or only to accept oral arguments.
- Eliminate a practice that an election would not be held until at least 25 days after an NLRB Regional Director’s direction of an election.

Notably, the Board did not adopt the more controversial measures that were contained in the initial proposal, including requirements that employers disclose available telephone numbers and email addresses, work location, shift, and classification of each eligible voter and that employers prepare position statements prior to the pre-election hearing. The final rule thus does not contain the most controversial “ambush election” provisions.

Although the final rule does not establish firm timelines or election deadlines, its effect will likely be to reduce the time from petition to election. As a result, employers will have less time to conduct a campaign against union representation after a petition has been filed.

A lawsuit alleging that this “ambush election” rule violates various federal statutes and the United States Constitution has been filed by U.S. Chamber of Commerce and the Coalition for a Democratic Workplace.

We will continue to monitor the developments surrounding the new rule and provide updates as the need arises.

If you have any questions or would like further information regarding the effect of the new rule, please contact your Butzel Long attorney or the authors of this Client Alert.

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